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Implications Of Starr V. BMG Music

Law360, New York (February 18, 2010) -- Last month, the Second Circuit reversed the Southern District of New York's dismissal of a complaint on Twombly grounds, finding that a variety of allegations, when combined, supported the inference of a conspiracy. Starr v. Sony BMG Music Entm't, No. 08-5637-cv, 2010 WL 99346 (2d Cir. Jan. 13, 2010).

The Starr case involved a purported conspiracy among competitors selling music online ("digital music") to fix prices via joint ventures and a trade association.

The court found that a grand total of seven plus factors were alleged and that combined they were sufficient to make the conspiracy plausible enough to withstand a Twombly challenge.

One of the seven alleged plus factors blessed by the Starr court was the assertion that the defendants' conduct was the subject of a pending investigation by the New York attorney general and two separate investigations by the U.S. Department of Justice.

The Second Circuit's reversal and its use of this plus factor puts the Second Circuit in the new position of being one of the toughest in which to get a case dismissed pursuant to Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

What remains unclear is the extent to which permutations of fewer than the seven plus factors cited by the Second Circuit would be sufficient to support an inference of conspiracy, and whether any of the cited plus factors alone would be sufficient.

The most troubling plus factor endorsed by the Second Circuit is the pendency of an antitrust investigation by state or federal enforcers.

While the court below followed the lead of numerous other district courts in reasoning that government investigations cannot show an "antitrust record" that would carry weight in pleading an antitrust conspiracy — see In re Digital Music Antitrust Litigation, 592 F. Supp. 2d 435, 444 (S.D.N.Y. 2008) — the Second Circuit reversed, finding that the existence of DOJ and New York attorney general investigations was one factor that helped to "place the parallel conduct 'in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.'"

At the same time, the Second Circuit brushed aside the fact that an earlier DOJ investigation into digital music had been closed and that DOJ had publicly announced that it found no wrongdoing.

The court said that "defendants cite[d] to no case to support the proposition that a civil antitrust complaint must be dismissed because a criminal investigation undertaken by the Department of Justice found no evidence of a conspiracy."

This approach is at odds with the prevailing view in other circuits that the mere existence of an investigation, including an investigation that was closed with no findings of wrongdoing, should be neither a "plus factor" leading to an inference of a conspiracy nor reason for mandatory dismissal of a complaint.

See In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007); In re Travel Agent Comm'n Antitrust Litig., No. 1:03 CV 30000, 2007 WL 3171675, at *12 (N.D. Ohio Oct. 29, 2007); Hall v. United Air Lines, Inc., 296 F. Supp. 2d 652, 662 (E.D.N.C. 2003).

There are many good reasons why government investigations that have not borne fruit should be disregarded when deciding a motion to dismiss. We recognize that an enforcer may have better information than the plaintiffs can put in the complaint, but it also may have worse information.

Enforcers rarely, if ever, disclose the reasons why they chose to launch an investigation. The basis could be a preliminary, possibly erroneous, industry analysis, unsubstantiated rumors, or even a deliberate campaign by a company's competitor to discredit its rival, a customer attempting to pressure its suppliers, or plaintiffs' counsel in an effort to support its ongoing cases.

Upon receiving allegations of anti-competitive conduct, it should come as no surprise that a responsible antitrust enforcer would open an investigation to determine whether the allegations have merit.

But an antitrust enforcer's decision to open an investigation to learn the real facts after receiving a complaint should not automatically mean that a private action asserting such a claim is plausible enough to go to discovery, because sometimes the complaints made to antitrust enforcers are baseless.

The Starr holding is questionable for a second reason as well: It is not unusual for antitrust investigations to peter out and lie dormant, rather than being formally closed, even though the investigation has run its course and the government has identified no wrongdoing.

Government cases often open with a very public bang (search warrants or company press releases) but die with a whimper. Thus, attributing more than token significance to a government investigation that has gone nowhere is a mistake, particularly given the difficulty of segregating those cases that will eventually reveal wrongdoing from those that are baseless.

Recognizing the costs and burdens of discovery in antitrust cases, the Supreme Court has cautioned that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." Associated Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983).

The existence of a government investigation is no substitute for the court's independent review. The take-away for trial courts applying the Starr case should be that no one of the plus factors cited by the Second Circuit is alone sufficient to move a complaint's allegations into the realm of plausibility under Twombly.

There must be a holistic assessment of the allegations, followed by a hard look at not only the sheer number of plus factors, but also whether they add up to anything at all.

And, we suggest, it is up to the court to decide if the plus factors add up to a well-pled case. That one of 53 enforcers has opened a file should not relieve the court of that duty.

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