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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

No Heightened Pleading Standard For Antitrust Plaintiffs

Emily Jarvis

Law360, New York (August 16, 2013, 11:57 AM ET) -- In Bell Atlantic Corporation v. Twombly, the U.S. Supreme Court held that factual allegations in a complaint must suggest that the plaintiff has a plausible — as opposed to merely a conceivable — claim for relief. The court also cautioned that requiring plausible grounds to infer an antitrust agreement does not impose a probability requirement at the pleading stage.

After Twombly, some lower courts relied on high standards developed at the summary judgment and trial stage when interpreting what constitutes plausible allegations of anti-competitive conduct. But a sufficient number of cases have now clarified that antitrust cases do not have a heightened antitrust pleading standard.

For example, the First Circuit recently held it is improper to weigh competing plausible explanations for a defendant's conduct at the motion-to-dismiss stage. A defendant's legitimate plausible justification of its conduct does not render a plaintiff's otherwise-plausible allegations of anti-competitive conduct implausible. In other words, a plaintiff's antitrust allegations need not exclude the plausibility of independent conduct at the pleadings stage.

Evergreen Partnering Group v. Pactiv Corporation[1]

Evergreen Partnering Group involved allegations by a company that developed a method of recycling polystyrene disposable plastics into "food grade" products. Despite the polystyrene industry facing significant criticism from environmental-advocacy groups and local governments, efforts to make polystyrene production more environmentally friendly previously failed. But Evergreen alleged its new closed-loop-production model was successful. Evergreen's method would (1) physically collect used certified food-grade polystyrene products from large school systems; (2) process them into a recycled resin (PC-PSR); and (3) use the PC-PSR to manufacture new single-use products for the same school systems.

Evergreen did not have the capacity to manufacture and meet large school districts' single-use polystyrene product needs. So it sought to partner with large polystyrene-producer defendants, which

were alleged to control 90 percent of the single-serve polystyrene food service packaging and tableware market.

Despite Evergreen's success in smaller markets, and an initial agreement to partner with a defendant, Evergreen alleged that the defendants ultimately concertedly refused to deal with Evergreen in order to preserve their existing market share and to promote higher-priced environmentally friendly products made from materials such as paper and bamboo.

Evergreen alleged facts indicating that a trade association — where each defendant was a member — facilitated the conspiracy. Evergreen specifically alleged that an agreement occurred at a specific trade-association meeting along with subsequent parallel conduct by defendants, despite an initial interest in Evergreen's model. Evergreen also alleged that the polystyrene-food-services industry was highly concentrated and the success of Evergreen's model depended on the participation of at least one of the producer defendants. Additionally, the complaint alleged that the defendants were acting against their own interests because the closed-loop program was cost neutral and would have produced consumer savings and higher customer sales due to the attractiveness of potential savings and environmental benefits.

Defendants argued that Evergreen's system would increase costs for both the producer defendants and consumers and required producer defendants to expand beyond their established market niches disrupting a profitable status quo. Defendants also argued that it would undermine their more profitable environmentally conscious products.

The district court granted defendants' motion to dismiss with prejudice reasoning that Twombly required it to evaluate the defendants' proffered business judgment reasons for boycotting Evergreen. The court found that "there are legitimate business reasons that can easily explain defendants' refusal to deal with Evergreen or to compete with one another for market share." Thus, defendants' reasons for resisting Evergreen's closed-loop system rendered the conspiracy claim implausible.

The First Circuit reversed the lower court's decision, explaining that Twombly does not require a plaintiff to plead facts ruling out the possibility of independent action at the motion to dismiss stage. The First Circuit cited to the Second Circuit's decision in Anderson News v. American Media[2], that circuit's leading case on the proper application of Twombly's plausibility requirement.

Anderson News explained that on a Rule 12(b)(6) motion it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives. And although an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that the conduct was culpable is not also plausible.

Thus, the First Circuit in Evergreen found that the lower court "improperly applied a heightened pleading standard in reviewing Evergreen's complaint, and it improperly occupied a factfinder role when it both chose among plausible alternative theories interpreting defendants' conduct and adopted as true allegations made by defendants in weighing the plausibility of the theories put forward by the parties."

The court further explained that it was "wary" of placing too much significance on the presence or absence of "plus factors" at the pleadings stage. If no direct evidence of an anti-competitive agreement is alleged, Twombly requires only that a complaint allege the contours of when an agreement was made, supporting those allegations with context tending to make the agreement plausible. While the plus factors are certainly helpful in guiding a court in its assessment of plausibility, more general allegations informing the context of an agreement may be sufficient. Evergreen's allegations met this standard.

Conclusion

The First Circuit's analysis in Evergreen sought to correct and clarify any confusion regarding the proper pleading requirements for sufficiently alleging an agreement in § 1 complaints. This confusion arguably stemmed from the application of caselaw evaluating antitrust claims at the summary-judgment and post-trial stages after Twombly. But a sufficient body of caselaw has now established that there is no heightened pleading standard for antitrust plaintiffs. And antitrust practitioners should consider the following when drafting or evaluating a complaint after Evergreen:

- Twombly's plausibility standard does not require an antitrust plaintiff to allege facts that rule out the possibility of independent action and it is improper to weigh competing plausible explanations for a defendant's conduct at the motion-to-dismiss stage.

- While "plus factors" enhance the factual plausibility of a complaint, alleging "plus factors" may not be necessary at the pleading stage.

- Evergreen and other recent decisions review allegations to contextualize the defendant's conduct, rather than compartmentalizing allegations as some early post-Twombly decisions had done.

- Assessing plausibility at the motion-to-dismiss stage is a fact-intensive inquiry. But there is at least some authority that general allegations informing the context of an agreement may be sufficient without strict adherence to the plus factors. Plausibility ultimately calls for enough facts to raise reasonable expectations that discovery will reveal evidence of an illegal agreement.

--By Emily A. Jarvis, Robins Kaplan Miller & Ciresi LLP

Emily Jarvis is an associate at Robins Kaplan's Los Angeles office. Her practice is focused on antitrust and trade regulation, entertainment and media litigation, and complex business litigation.

[1] Evergreen Partnering Group Inc. v. Pactiv Corp., No. 12-1730, 2013 U.S. App. LEXIS 12505 (1st Cir. June 19, 2013).

[2] Anderson News LLC v. Am. Media Inc., 680 F.3d 162, 185 (2d Cir. 2012).