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Twombly Affects All Elements Of Antitrust Claims


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Law360, New York (February 14, 2014, 12:44 PM ET) -- Seven years ago in Bell Atlantic Co. v. Twombly, the U.S. Supreme Court injected a "plausibility" standard into Rule 12(b)(6) practice and held that a plausible antitrust conspiracy claim must be based on more than just parallel conduct by the alleged conspirators.[1]

Since then, volumes have been written by the lower courts, scholars and practitioners attempting to clarify what "plausible" means, the types of additional allegations are required to raise "plausible grounds to infer an agreement,"[2] whether a plaintiff alleging parallel conduct is also required to plead the existence of "plus factors," and the extent to which conspiracy allegations must negate "obvious alternative explanations"[3] for a defendant's behavior.

In fact, notable appellate decisions in the conspiracy context, like In re Text Messaging Antitrust Litigation[4] and Evergreen Partnering v. Pactiv Corp.,[5] have drawn much attention for grappling with these questions in their efforts "to clarify the proper pleading requirements for sufficiently alleging agreement in § 1 complaints."[6]

What has drawn less attention in this brave, new post-Twombly world,[7] however, is the way in which "plausibility" has started to reshape the standard for pleading nonconspiracy elements of antitrust claims. After all, as the Supreme Court clarified in Ashcroft v. Iqbal that Twombly was not just a conspiracy pleading standard: the plausibility standard applies to "all civil actions," meaning that "[t]hreadbare recitals" of any "element[] of a cause of action … [will] not suffice."[8]

Indeed, Twombly is being wielded regularly to challenge all aspects of an antitrust claim — from the plaintiff's allegations of injury to market definition to market power, even the failure to negate affirmative defenses. "Plausibility," and all that is entailed in nudging a claim over the line from conceivable to plausible, has thus become a major concern that plaintiffs and defendants alike must engage with respect to every element of an federal antitrust claim. Fortunately, several recent federal cases have begun to define what it means to plausibly allege the nonconspiracy elements of a federal antitrust claim.

Plausible Overcharges and Antitrust Injury

No private antitrust claim can proceed in federal court without a showing of "antitrust injury" — that is, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[9] In a purchaser action to recover overcharges, this element is usually satisfied by the plaintiff alleging and then proving that it paid inflated prices as a result of the

defendant's anti-competitive conduct.[10]

But a recent Ninth Circuit decision suggests that Twombly may have significantly raised the bar for pleading the existence of an overcharge and antitrust injury. In Somers v. Apple Inc., the Ninth Circuit affirmed the dismissal of class action antitrust claims brought by an iPod purchaser claiming she paid Apple "inflated music prices" because Apple allegedly monopolized the music download market by restricting the transfer of songs purchased on iTunes.[11] The plaintiff further claimed that during the alleged five-year period of Apple's monopoly, Apple was able to charge higher prices for its music "than it could have in a competitive market."[12]

The Ninth Circuit, however, found that this overcharge claim was not plausible under Twombly because Apple's price for music downloads — 99 cents — remained the same before and after the monopoly began, and there was no allegation that prices declined after the monopoly ended.[13] As the Ninth Circuit ultimately explained: "The fact that Apple continuously charged the same price for its music irrespective of the absence or presence of a competitor renders implausible [plaintiff's] conclusory assertion that Apple's software updates affected music prices."[14]

The court acknowledged that other factors could conceivably have resulted in Apple's price consistency, despite the alleged anti-competitive conduct.[15] Still, the court held that such possibilities alone were not enough to save plaintiff's claim under Twombly and Iqbal: "[T]o state a plausible antitrust injury, [plaintiff] must allege facts that rise beyond mere conceivability or possibility."[16] Relying on Twombly, the court also found that the plaintiff's allegations failed to negate "other 'obvious alternative explanations' for the music pricing," including the possibility that Apple "kept the music prices low to incentivize customers to purchase the iPod" or used low pricing to undercut its rivals.[17]

Accordingly, a core lesson that may be taken from the Ninth Circuit's analysis in Somers is that when it comes to alleging overcharges and antitrust injury, plausibility is as much a test of economic logic as it is of factual detail. Under the Ninth Circuit's approach, not only must a plaintiff's overcharge theory rise above mere conclusion (i.e., describe the overcharge in sufficient factual detail), but it also must make economic sense in light of the market facts.

Plausible Market Definition

In many antitrust cases, defining the relevant product and geographic market is a critical, if not dispositive, issue. The relevant product market "includes all reasonably interchangeable products," and the relevant geographic market identifies the "area in which consumers can practically seek alternative sources of the product."[18]

As such, even in the pre-Twombly era, federal courts required more than mere conclusory allegations regarding the relevant market, dismissing complaints that failed to define the relevant market "with reference to the rule of reasonable interchangeability and cross-elasticity of demand" or those that alleging a relevant market "that clearly does not encompass all interchangeable substitute products."[19] The advent of Twombly and Iqbal has only tightened these requirements, with courts increasingly requiring concrete factual allegations that plausibly support the proposed market definition.

A recent decision by a California federal district court, Sidibe v. Sutter Health, exemplifies the importance of plausibility when it comes to pleading the existence of a "relevant market" on an antitrust claim. [20] There, a putative class of health-plan enrollees asserted several antitrust claims against hospital-chain defendant Sutter Health, alleging that Sutter was imposing "tying arrangements that require[d] [plaintiffs'] health plans to include all Sutter providers in their networks in order to have reduced rate access at Sutter's hospitals, and was using "its market power to maintain and enhance its monopolies over Inpatient Hospital Services in Northern California."[21]

The named class plaintiffs specifically alleged that the relevant geographic markets for "acute-care in-patient hospital services" were "local in nature, consisting of the area in which the seller operates and in which the purchaser can practicably turn for supplies or services."[22] At the same time, class plaintiffs alleged "'the six local geographic markets implicated by Sutter's conduct include' San Francisco, Alameda, Contra Costa, Sacramento, Placer, and Amador counties."[23]

Granting a motion to dismiss rooted in Twombly, the district court found these definitions implausible, despite the complaint's use of allegations that tracked the relevant standard. In this regard, the court observed that the first major problem with plaintiff's market definitions was their lack of clarity, leaving the court unsure "whether Plaintiffs' claims are based on a single local market, the six county-wide markets, or an indeterminate number of markets bounded by the areas in which Sutter hospitals operate."[24]

The court next rejected plaintiffs attempt to define "six county-wide markets" since the plaintiffs "provide[d] no factual allegations to support drawing lines at these county borders."[25] Finally, the court observed that if the plaintiffs' claims were "based on … the local markets in which Sutter hospitals operate, [plaintiffs'] need to identify those markets (in reasonably concrete geographic terms), rather than just describing methodologies for drawing market boundaries."[26]

Sidibe serves as an important reminder of the level of precision that federal courts may now demand in antitrust litigation under the Twombly plausibility standard when it comes to pleading the existence of a relevant market. Market definitions that are muddled or unstated — be it through presentation of multiple possible definitions or a mere methodology for arriving at a definition — may be all the "implausibility" that a court needs to dismiss an antitrust claim. And the same goes for market definitions that lack a sufficiently comprehensible foundation of facts to back them up.

Plausible Market Power

Another often critical element of an antitrust claim is an allegation that the given defendant (or defendant(s)) exercised monopoly power in the geographic and product markets alleged by plaintiff.[27] While the importance of alleging this element might seem a no-brainer in the antitrust context, "plausibility" now requires antitrust litigants to devote much more thought to how this element is pleaded. For example, in Intellectual Ventures LLC v. Capital One, a Virginia federal district court recently dismissed antitrust counterclaims based partly on the defendant's failure to plausibly allege that the plaintiff held monopoly power in the "relevant markets" at issue.[28]

The plaintiff in the case — Intellectual Ventures, a patent assertion entity holding "a portfolio of approximately 80,000 patents and patent applications" — originally sued defendant-bank Capital One for patent infringement.[29] Capitol One, in turn, counter-claimed that IV was using its portfolio (and concomitant threat of patent infringement suits) to "monopolize[] the 'ex post market for technology used to provide commercial banking services in the United States.'"[30] But the court found that "Capital One has failed to allege facts that make plausible its claim that IV wields unlawful monopoly power within that market."[31]

The court reached this conclusion for three reasons. First, "Capital One d[id] not allege IV's share" of the relevant market — instead, Capital One alleged that IV exercised monopoly power because "IV ha[d] demanded and received 'supracompetitive prices'" in licensing its financial patents.[32] Second, even taking this claim of "supracompetitive prices" at face value, "Capital One [did] not allege[] any specific license fees or royalties that IV has demanded from any commercial banks or that those banks have paid" — thus leaving the court without the ability to understand how such fees could be "unlawfully 'supracompetitive.'" [33] Third and finally, Capital One provided "no facts or allegations that explain why IV's alleged 'supracompetitive prices' reflect[ed] unlawful monopoly power within the context of IV's right to license its patents."[34]

Intellectual Ventures reveals how closely federal courts are willing to examine the plausibility of an allegation of "monopoly power." In this regard, such courts may be prepared to find monopoly-power allegations implausible based on a lack of supporting allegations, such as a failure to plead how much market share a defendant possesses.

Or they may fault these allegations on more complex economic grounds that intertwine with the other elements of the claims, demanding that a complaint provide allegations that explain why a defendant's conduct in a given market is unlawful or why supracompetitive prices result from unlawful monopoly power when a lawful explanation for the higher prices may exist. Such reasoning certainly tracks the Supreme Court's ultimate conclusion in Twombly that while "parallel conduct was consistent with an unlawful agreement [in restraint of trade] ... it [still] did not plausibly suggest an illicit accord because [this parallel conduct] ... was more likely explained by lawful, unchoreographed free-market behavior."[35]

Plausible Affirmative Defenses to Antitrust Claims

As Twombly and Iqbal continue to reshape the antitrust pleading landscape, one of the relatively uncharted frontiers is their potential application to affirmative defenses. Lower courts are currently divided on whether Twombly and Iqbal apply to the pleading of affirmative defenses.[36] It therefore remains to be seen how defendants pleading affirmative defenses in antitrust cases stand to fare against plaintiffs demanding these defenses be struck under the Twombly plausibility standard.

For example, this might play out in a price-discrimination claim under the Robinson-Patman Act (i.e., a claim that a seller has lessened competition by selling the same product at different prices to similar buyers), with a plaintiff moving to strike the defendant's cost-justification, meeting-competition, or functional-discount defenses because they were not supported by factual allegations concerning differences in the manufacturing costs, prices offered by competitors, or marketing or other services provided by a purchaser that allegedly created functional discount. If Twombly and Iqbal apply with equal force to the pleading of affirmative defenses, Twombly/Iqbal could develop into a significant tool for antitrust plaintiffs.

On the other hand, some courts have suggested that Twombly and Iqbal require plaintiffs to plead facts showing that certain defenses and immunities do not apply. Consider the case of Coalition for a Level Playing Field LLC, v. AutoZone, in which a New York federal district court dismissed a price-discrimination action against auto-part manufacturers and "big box" retailers under Twombly because the complaint did not negate a functional-discount defense to a price-discrimination claim, as the auto-part-store plaintiffs "offered no factual material to support a plausible inference that any discounts taken by the retailer defendants do not reflect bona fide functional discounts."[37]

In this regard, the court refused to credit as plausible the plaintiffs' allegation that: "Defendant Retailers are aware that they are not 'efficient' in comparison to the Plaintiffs and that the only thing that keeps the Defendant Retailer in business is buying goods at illegally low prices that do not have any legitimate cost-justification, meeting-competition, or functional discount defense."[38]

Conclusion

To be sure, Twombly has, and will continue to have, its greatest impact on the conspiracy-related elements of an antitrust claim. But recent decisions in cases like Somers, Sidibe, Intellectual Ventures, and AutoZone show that Twombly and Iqbal are having a profound influence on all aspects of antitrust pleading.

As these cases illustrate, "plausibility" scrutiny is being extended to the entirety of an antitrust complaint (and may even be applied to affirmative defenses). As Seventh Circuit Judge Richard Posner cautioned in Text Messaging, this does not mean that that an antitrust complaint will have to establish each element by a "preponderance of the evidence."[39] But it will require that each theory alleged square with economic logic and market facts.

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[1] 550 U.S. 544, 557 (2007).

[2] Id. at 556.

[3] Id. at 568; cf. In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 322 (3d Cir. 2010)

[4] 630 F.3d 622 (7th Cir. 2010).

[5] 720 F.3d 33 (1st Cir. 2013).

[6] Id. at 44.

[7] Apologies to Aldous Huxley and William Shakespeare. See Aldous Huxley, Brave New World (1932); William Shakespeare, The Tempest act 5, sc. 1.

[8] 556 U.S. 662, 678, 684 (2011).

[9] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[10] See, e.g., Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968) ("[W]hen a buyer shows that the price paid by him . . . is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4 [of the Clayton Act].").

[11] 729 F.3d 953, 962-966 (9th Cir. 2013).

[12] Id. at 964.

[13] See id.

[14] Id.

[15] See id. at 965 (noting that it was "certainly possible" that Apple's price consistency could be the result of "some other factor, such as superior product or greater efficiency").

[16] Id.

[17] Id.

[18] Craftsmen Limousine Inc. v. Ford Motor Co., 491 F.3d 380, 388 (8th Cir. 2007).

[19] Queen City Pizza Inc. v. Domino's Pizza Inc., 124 F. 3d 430, 436 (3d Cir. 1997) (collecting cases).

[20] No. C 12-04854 LB, 2013 U.S. Dist. LEXIS 160512, at *31-39 (N.D. Cal. Nov. 7, 2013).

[21] Id. at *2.

[22] Id. at *15.

[23] Id. at *33.

[24] Id. at *34.

[25] Id.

[26] Id.

[27] See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966) (explaining that one of the elements of "[t]he offense of monopolization under § 2 of the Sherman Act" is "the possession of monopoly power in the relevant market").

[28] No. 1:13-cv-00740 (AJT/TRJ), 2013 U.S. Dist. LEXIS 177836, at *19-21 (E.D. Va. Dec. 18, 2013).

[29] Id. at *3, *5.

[30] Id. at *14.

[31] Id. at *19.

[32] Id. at *19-20.

[33] Id. at *20.

[34] Id.

[35] Iqbal, 556 U.S. at 680 (explaining the Court's ruling in Twombly).

[36] Compare, e.g., Hayne v. Green Ford Sales Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) ("[T]he Court agrees with ... applying the heightened [Twombly] pleading standard to affirmative defenses."), with, e.g., Wells Fargo & Co. v. United States, 750 F. Supp. 2d 1049, 1051 (D. Minn. Oct. 27, 2010) ("The Court strongly agrees with those judges who have found that Iqbal and Twombly do not apply to the pleading of affirmative defenses.").

[37] 737 F. Supp. 2d 194, 216 (S.D.N.Y. 2010).

[38] Id.

[39] Text Messaging, 630 F.3d at 629.