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Twombly And Iqbal Should Not Be Overstated

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Law360, New York (February 05, 2013, 12:01 PM ET) -- There can be no dispute: The United States Supreme Court decisions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), have significantly transformed federal litigation. This transformation of the federal pleading standard, however, has not resulted in uniformity. Put simply, not every federal district gives Twombly and Iqbal equal force. Some federal courts apply those decisions in a manner that arguably creates an unfair burden on plaintiffs, especially antitrust plaintiffs seeking to adequately allege antitrust conspiracy and to proceed to discovery.

At the same time, the overstatement or misapplication of the higher pleading standard set forth in Twombly and Iqbal has stirred a backlash in the form of a string of circuit court decisions putting Twombly and Iqbal into perspective. Of those federal circuit-court decisions assessing the standard for pleading antitrust conspiracy, a few are noteworthy.

Starr v. Sony BMG Music Entertainment

In Starr v. Sony BMG Music Entertainment, 592 F.3d 314 (2d Cir. 2010), a group of consumers alleged an antitrust conspiracy between major record labels to fix the prices and terms under which their music would be sold as digital files over the Internet. The district court dismissed the complaint for failure to state a Section 1 claim, and the consumers appealed to the Second Circuit. On appeal, Judge Robert Katzmann's comprehensive opinion analyzed the language and reasoning of Twombly.

The court found that the plaintiffs' factual allegations, taken together, placed the major record labels' 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." The court disagreed with the major record labels' argument that an antitrust plaintiff must allege facts that tend to exclude independent self-interested conduct as an explanation for parallel behavior. The court likewise rejected the defendants' argument that Twombly requires that a plaintiff identify the specific time, place or person related to each conspiracy allegation. Declining these invitations to overstate Twombly, the Second Circuit held that the district court erred in dismissing the consumers' antitrust complaint.

In re Text Messaging Antitrust Litigation

In In re Text Messaging Antitrust Litigation, 630 F.3d 622 (7th Cir. 2010), the plaintiffs filed a class action against sellers of text-messaging services, alleging an antirust conspiracy to fix the prices of such services. The district court certified for interlocutory appeal the question of whether the plaintiffs' amended complaint stated a claim under the Twombly standard. On interlocutory appeal to the Seventh Circuit, Judge Richard Posner remarked that the scope of Twombly is "unsettled" and that "[p]leading standards in federal litigation are in ferment after Twombly and Iqbal."

After analyzing the complaint in Twombly, the court turned to the complaint at hand and recognized that it alleged a mixture of parallel behaviors, details of industry structure, and industry practices that would facilitate collusion. Acknowledging the absence of a "smoking gun," the court emphasized that circumstantial evidence can be enough to establish an antitrust conspiracy. The court ultimately held that the amended complaint provided a sufficiently plausible case of price fixing to warrant allowing the case to proceed to discovery. In concluding, Judge Posner observed that, although the complaint must establish a "nonnegligible probability" that the claim is valid, the probability need not be as great as such terms as "preponderance of the evidence" connote.

Anderson News v. American Media

One of the latest circuit court decisions to put Twombly and Iqbal into perspective is the Second Circuit's decision in Anderson News LLC v. American Media Inc., 680 F.3d 162 (2d Cir. 2012). In the underlying case, magazine wholesaler Anderson News LLC and Anderson Services LLC (collectively, "Anderson") claimed that a group of national magazine publishers (including Time Inc. and Rodale Inc.) and their distributors (including Curtis Circulation Co.) violated Section 1 by conspiring to drive Anderson out of business after it sought to impose new surcharges on publishers.

The publishers and distributors eventually moved to dismiss Anderson's complaint, arguing that the complaint failed to set forth a plausible basis for finding a conspiracy under Twombly and Iqbal.The district court ultimately granted the motion and dismissed the complaint, holding that Anderson's antitrust allegations did not meet Twombly's plausibility standard. In its ruling, the district court concluded that the complaint's allegations presented only an "economically implausible antitrust conspiracy" theory based on "sparse parallel conduct allegations."

On appeal to the Second Circuit, Judge Amalya Kearse, writing for a unanimous panel, held that the district court erred in ruling that the alleged conspiracy was facially implausible under the standards set forth in Twombly and Iqbal. The Second Circuit addressed the proper application of the plausibility requirement: "At the pleading stage, a complaint claiming conspiracy, to be plausible, must plead 'enough factual matter (taken as true) to suggest that an agreement was made.'" But allegations of conspiracy need not "rule out" the possibility of independent action, Judge Kearse noted, as would be required at later litigation stages such as the summary-judgment stage. By the same token, the court explained that "[t]he question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible."

Further, because "the plausibility standard is lower than a probability standard," there may be "more than one plausible interpretation of a defendant's words, gestures, or conduct." And "it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives." In this regard, the Second Circuit held that the district court was incorrect in ruling that Anderson did not state a plausible Section 1 claim because unilateral parallel conduct by the defendants was "completely plausible." The Second Circuit emphasized that the choice between two plausible inferences drawn from a complaint's factual allegations is not a choice to be made by the court at the pleading stage.

Most recently, certain defendants in Anderson News petitioned the U.S. Supreme Court for a writ of certiorari, urging the high court to review the Second Circuit's Twombly analysis. But the high court denied the same in a one-line order on Jan. 7, 2013. While the Supreme Court's reasons for denying the petition are not known, it is safe to say that the Second Circuit's decision has the potential to become a seminal decision on pleading antitrust conspiracy.

The circuit court decisions in Starr v. Sony BMG, In re Text Messaging, and Anderson News demonstrate that although Twombly was meant to protect litigants from the burden of defending against meritless antitrust suits, the district courts should still give antitrust plaintiffs the benefit of the doubt at the pleading stage.

These decisions further demonstrate that a plaintiff may be able to survive a Twombly motion, even in the absence of direct evidence of an agreement, and despite the existence of a plausible alternative to a plaintiff's theory. More fundamentally, these circuit court decisions serve as a reminder to bench and bar alike that Twombly and Iqbal must be put into perspective and should not be overstated, as can be easily done in light of the still-unsettled scope of those transformational decisions.

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