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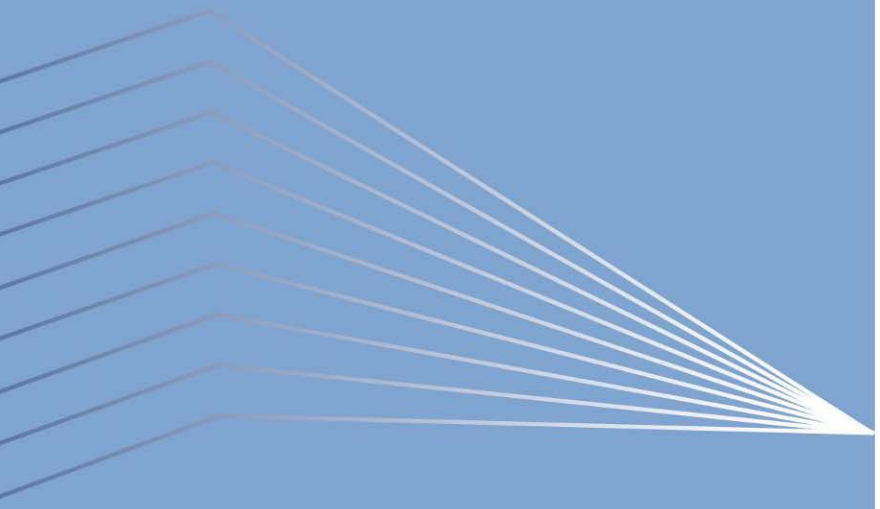

Antitrust Digest

Developing Trends and Patterns in Federal Antitrust Cases After *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*

APRIL 2010

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This digest is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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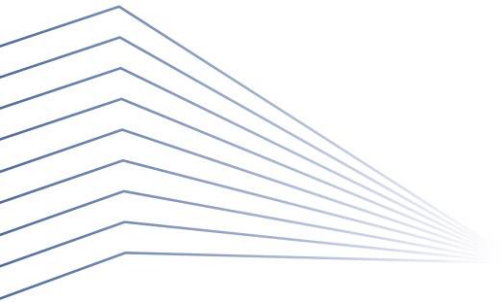

Digest Overview

This digest examines how federal courts have been interpreting pleading requirements for antitrust claims alleging violations of either Section 1[1] or Section 2[2] of the Sherman Act after the Supreme Court's pronouncement in *Bell Atlantic Corp. v. Twombly*.[3]

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1 Section 1 of the Sherman Act states in pertinent part that: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (2009).

2 Section 2 of the Sherman Act states in pertinent part that: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony, and, on conviction thereof shall be punished by fine not exceeding $100,000,000 if a corporation. . ." 15 U.S.C. § 2 (2009).

3 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

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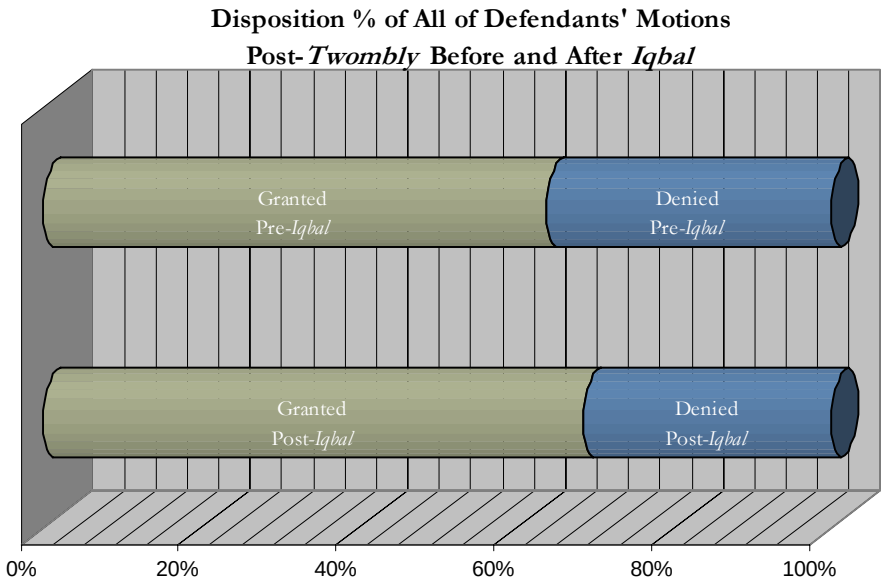
Like all federal civil actions, Rule 8(a) of the Federal Rules of Civil Procedure ("FRCP") governs the pleading requirements for antitrust claims. Rule 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief."[4] This rule as interpreted by the Court in *Conley v. Gibson* meant that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[5] *Conley*'s decree of Rule 8's meaning commonly referred to as "notice pleading" had harsh ramifications for antitrust defendants. Under a strict reading of the rule, complaints filed pursuant to the FRCP alleging nothing more than general unlawful restraint of trade were sufficient to move beyond the pleading stage and into the liberal discovery phase of a proceeding.[6] The desire to avoid burdensome discovery and litigation costs resulted in many antitrust defendants settling feeble or spurious claims at the outset of an action.[7]



But in *Twombly*, the Supreme Court explicitly rejected *Conley*'s prior interpretation of Rule 8. The Court stated that "after puzzling the profession for 50 years, this famous observation has earned its retirement" because *Conley*'s "[no set of facts] phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard."[8] Under the plausibility

[4] Fed. R. Civ. P. 8(a)(2) (2009).

[5] *Conley*, 355 U.S. 41, 45-46 (1957).

[6] Rule 26 of the Federals Rule of Civil Procedure grants a party discovery on "any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26 (2009)

[7] *See Twombly*, 550 U.S. at 558-559. Underlying the decision in *Twombly* was an acknowledgement of the ubiquitous tension in antitrust law between plaintiffs' need to gain access to and obtain discovery in federal court and defendants' need to avoid unnecessarily lengthy and expensive litigation.

[8] *Twombly* at 563 ("*Conley* then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.").

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standard, the Court stated that for a § 1 conspiracy complaint to survive a motion to dismiss it must contain "enough factual matter (taken as true) to suggest that an agreement was made," for only then is such a complaint "plausible on its face," thereby raising "a reasonable expectation that discovery will reveal evidence of an illegal agreement."[9] The Court's failure to give specific guidance on the application of this plausibility standard, however, resulted in far ranging applications as federal judges grappled with the proper legal analysis that *Twombly* required.[10] At last, on May 18, 2009, the Supreme Court in *Ashcroft v. Iqbal* clarified that not only did *Twombly*'s plausibility standard apply to *all* federal pleadings brought under Rule 8 of the FRCP, but also detailed the appropriate analysis that a federal court should employ when applying this standard to a defendant's motion to dismiss.

Because the parameters of the plausibility standard are still being defined, the purpose of this digest is to examine almost 170 post-*Twombly* federal antitrust cases to reveal how federal courts have been applying the plausibility standard to motions to dismiss for failure to state a claim under § 1 or § 2 of the Sherman Act. With this specific purpose serving as a guidepost, this digest only examines cases that meet the following criteria (1) the case must have been decided by a federal court; (2) the complaint must have contained at least one federal antitrust claim or counterclaim brought under §§ 1 or 2 of the Sherman Act; (3) the decision must have been issued after *Bell Atlantic v. Twombly*; (4) the defendant or counterclaim defendant must have moved for the court to dismiss the claim prior to full discovery based on plaintiff's failure to sufficiently plead a federal antitrust violation; and (5) the court must cite to at least *Twombly*[11] when determining the applicable legal standard to adjudge defendant's motion to dismiss. Since the digest focuses on sufficiently pleading a federal antitrust violation, it also excludes all cases and claims (1) where the antitrust violation arises out of fraud[12]; (2) where the motion to dismiss was granted based on a claim of privilege or immunity; and (3) where a party invoked the *Noerr-Pennington* doctrine.[13]

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[9] *Id.* at 557.

[10] *See, e.g.*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), overruled by *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (Cabranes, J., concurring) ("[I]t is worth underscoring that some of [the Court's] precedents are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity; to say the least, the guidance they provide is not readily harmonized.") (internal quotation marks omitted).

[11] Cases decided after May 18, 2009 may also cite to *Ashcroft v. Iqbal*, the Supreme Court decision that clarified *Twombly*'s plausibility standard, but a case is not required to cite to both *Iqbal* and *Twombly* for inclusion in the digest.

[12] Rule 9(b) of the Federal Rules of Civil Procedure governs the pleading of actions sounding in fraud or mistake and states in full: "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b) (2009).

[13] The *Noerr-Pennington* doctrine protects parties from antitrust liability when they institute their own claims for relief. Under *Noerr-Pennington*, when a Plaintiff institutes its own suit for patent infringement, it cannot be sued for violating an antitrust provision by virtue of the lawsuit. This immunity, however, does not apply to plaintiffs who institute litigation that falls within the category of being a "sham." *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993).

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In sum, the information gathered from the relevant cases in this digest[14] confirms that the plausibility standard has altered the landscape for sufficiently pleading a violation of the Sherman Act. In particular it shows that (1) the dismissal rate for plaintiffs' complaints still equates to almost a 2:1 ratio (65%); (2) federal courts clearly have differing views as to what must be alleged to survive a motion; (3) circuit courts collectively affirmed lower courts' granting of defendants' motion to dismiss 86% of the time; (4) congressional action is being proposed to stem the general rising tide of dismissal rates in federal courts; and (5) the antitrust cases most likely at risk of dismissal are those filed with nothing more than bare allegations, including especially those cases filed on the heels of government investigations with little factual information.

Twombly and *Iqbal*: The Genesis of the Plausibility Standard

Summary of *Twombly*

In *Twombly*, the Court held that stating a § 1 "claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made . . . [and] simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[15]

The 1984 divestiture of the American Telephone & Telegraph Company's local telephone business created a system of regional service monopolies, known as "Baby Bells" or Incumbent Local Exchange Carriers.[16] The Baby Bells were excluded from the separate market for long-distance service providers.[17] A decade later Congress withdrew approval of the Baby Bell monopolies and subjected them to a host of regulations intended to facilitate market entry for competitors.[18] Subscribers of local telephone and high speed Internet services brought a federal antitrust class action alleging that the Baby Bells were conspiring to restrain competition in the local telephone and high-speed Internet market.[19] Plaintiffs supported their claim with allegations of parallel conduct: that the Baby Bells remained in *their own geographic areas* despite being able to conveniently and cost effectively enter each other's.[20] The Second Circuit found the complaint sufficient under the *Conley* interpretation of Rule 8.[21] The Supreme Court reversed.[22]

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[14] The digest only includes cases issued prior to January 14, 2010 retrievable from Westlaw, an online proprietary legal research database server. This digest also assumes the reader has some familiarity with the cases cited; further the summaries included should only be used to provide a brief recap of the federal antitrust issues involved.

[15] *Id.* at 556.

[16] *Id.* at 548.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 550.

[20] *See Id.* at 564-68.

[21] *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005).

[22] *Twombly*, 550 U.S. at 570.

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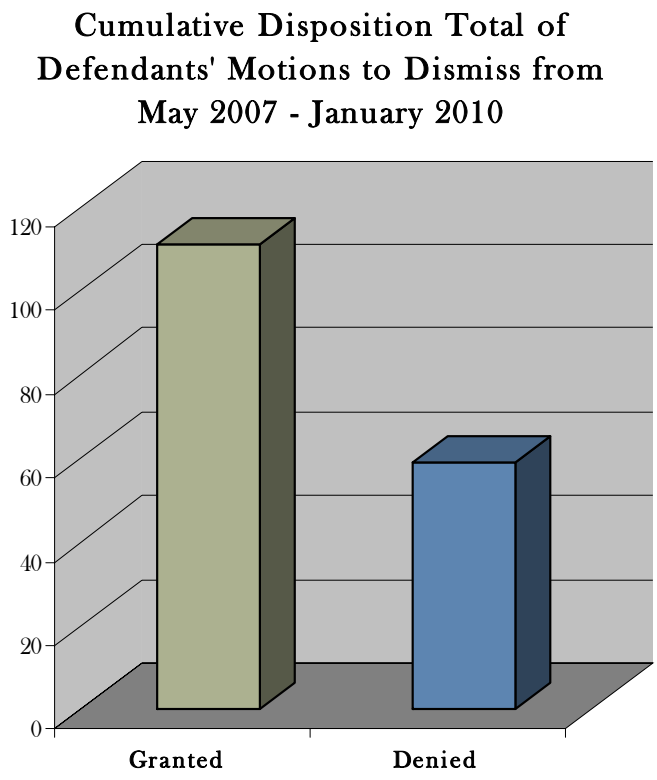
In doing so, the Court gave substantial weight to the fact that defendants' actions could be justified based on their prior existence as regulated monopolies after AT&T's divestiture. Specifically, the Court noted that a "natural explanation for the noncompetition alleged [was] that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."[23] Finally, the Court held that survival of a motion to dismiss "d[id] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that [wa]s plausible on its face . . . [but where] the plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."[24]

The Court did not, however, explicitly state what additional facts plaintiffs needed to plead to avoid early dismissal, nor did the Court explain which facts were dispositive of whether plaintiffs had sufficiently pled a cognizable action pursuant to the Sherman Act. Thus following *Twombly*, district courts varied widely in their application of this new plausibility standard.

Summary of *Iqbal*

Consequently, in *Ashcroft v. Iqbal*,[25] the Court took the opportunity to elaborate on how federal courts should be applying the plausibility standard. Although not an antitrust action, *Iqbal* is apposite because it explicitly articulates the desired analytical approach to assessing whether a complaint contains enough factual heft to survive a motion to dismiss.



In *Iqbal*, Javaid Iqbal, a Muslim Pakistani filed a *Bivens* action against numerous federal officials, including the Attorney General, John Ashcroft, and the Director of the FBI, Robert Mueller, for various alleged constitutional deprivations following his arrest and detention in a New York maximum security prison following the September 11, 2001 terrorists attacks.[26] Specifically, Iqbal alleged that Ashcroft was the "principal architect" of and Mueller was "instrumental in [the] adoption, promulgation, and implementation" of an unconstitutional policy that subjected him to harsh conditions of confinement on account of his race, religion, or

national origin.[27] Ashcroft and Mueller moved to dismiss for failure to state a claim arguing that Iqbal's complaint failed to sufficiently allege that they had a discriminatory purpose in adopting the policies at issue.[28] The district court denied their motion, but while their appeal to the Second Circuit was pending, the Supreme Court issued *Twombly*.[29] Nevertheless, the Second Circuit held that *Twombly* did not apply to this context and affirmed the lower court's decision.[30] Defendants sought and the Court granted certiorari to address the narrow question of whether the respondent pled enough factual matter that, if taken as, true stated a claim to relief.[31] The Court reversed the Second Circuit in a 5-4 decision holding that Iqbal's complaint failed to state a claim against Ashcroft and Mueller.[32]

The Court held that under the plausibility standard "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relieve that is plausible on its face."[33] Moreover, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[34]

Working Through *Twombly*'s Two Working Principles

In *Iqbal*, faced with a similar scenario, factually and procedurally, as in *Twombly*, where the complaint relied on inferences to connect defendants conduct to plaintiff's alleged injuries and the defendants moved to dismiss, the Court seized this opportunity to enunciate the following guidance for applying the plausibility standard. The Court declared that two working principles underlie its decision in *Twombly*: (1) "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions [because] [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and (2) "only a complaint that states a plausible claim for relief survives a motion to dismiss [and] [d]etermining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[35]

A parsing of the Court's analyses in both *Twombly* and *Iqbal* reveals six key pillars underlying a proper application of the plausibility standard: (1) legal conclusions are not entitled to be taken as true; (2) only factual allegations are entitled to that tenet; (3) plaintiffs are required to provide factual allegations to

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[27] *Id.* at 1944.
[28] *Id.*
[29] *Id.* at 1944-45.
[30] *Id.* at 1944.
[31] *Id.* at 1945.
[32] *Id.*
[33] *Id.* at 1949 (citing *Twombly*, 550 U.S. at 570).
[34] *Id.*
[35] *Id.* at 1949-50 (internal citations and quotation marks omitted).

support each element of their claim; (4) legal conclusions are only acceptable to provide the legal framework for the claim; (5) judges should draw on their experience and common sense when determining whether plaintiffs have alleged sufficient facts that plausibly show plaintiffs are entitled to relief; and (6) plaintiffs are not entitled to discovery based on a deficient complaint because "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusion."[36]

A Statistical Snapshot of the Plausibility Standard by Circuit

In *Iqbal*, like *Twombly*, the plaintiff lacked factual allegations in support of an essential element of his claim. In *Twombly*, the plaintiff failed to allege factual allegations in support of the existence of an agreement; in *Iqbal*, the plaintiff failed to provide factual allegations to support an inference that two high ranking government officers had knowingly and willingly engaged in the alleged unconstitutional policies. These failures proved to be fatal.

[36] *Id.*

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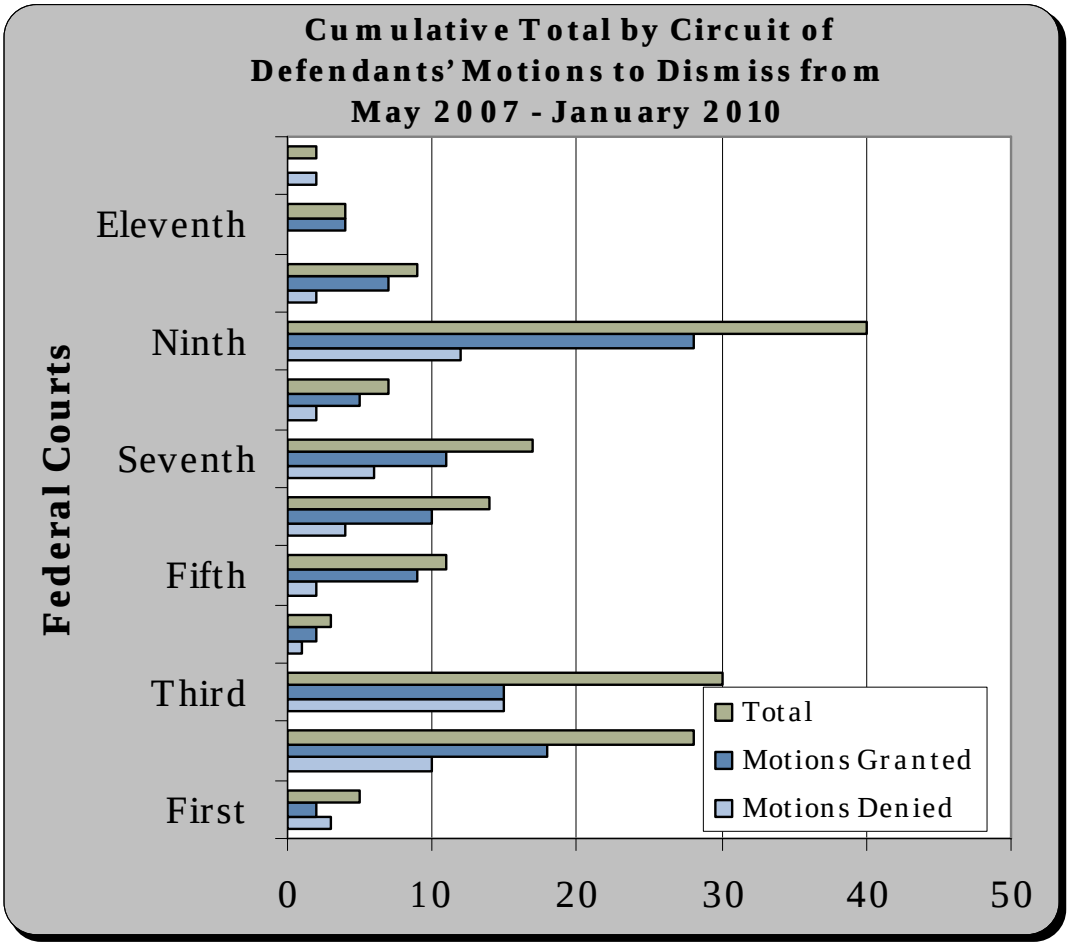
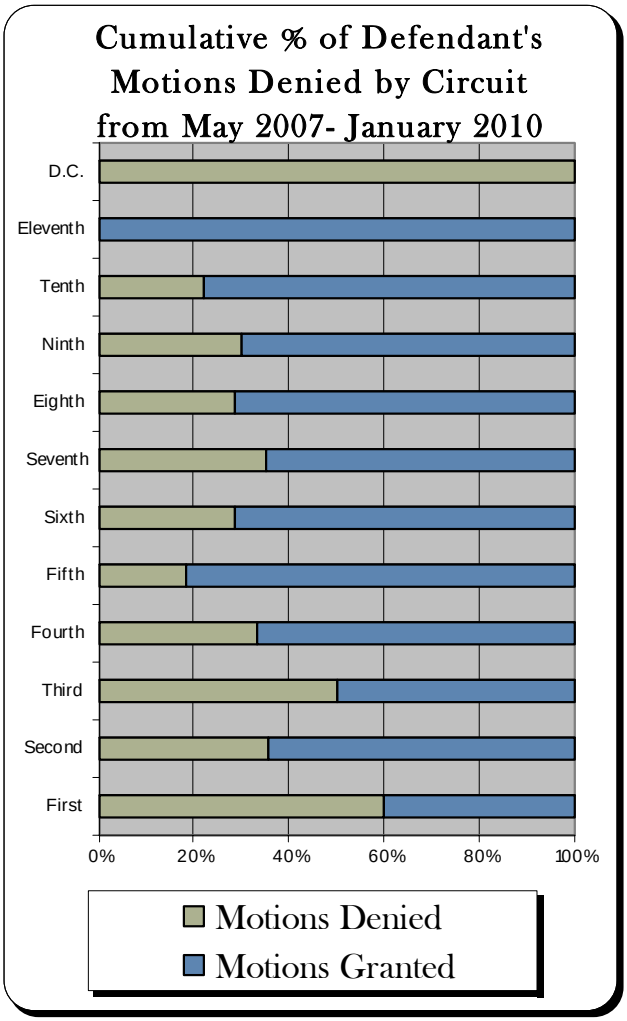


Continued analysis of how *Twombly*'s plausibility standard has been applied in federal antitrust actions details the substantial impact this standard has had on the viability of plaintiffs' antitrust claims. For example, of the 170[37] substantive cases investigated in this digest, 111 of defendants' motions to dismiss were granted. This dismissal rate still equates to almost a 2:1 ratio (65.3%) for granting defendants' motion to dismiss. As more district courts began to issue rulings and the number of cases discussed in the digest reached a critical mass, it became evident that the plausibility standard had altered the landscape for sufficiently pleading a federal antitrust claim. But, as circuit courts slowly begin to analyze and decide what factual enhancements are sufficient to allege a Sherman Act violation, it is clear that the circuits have varying views as to what must be alleged to survive a motion to dismiss. Depending on a party's interests

[37] The digest actually includes 166 cases but 4 cases were dismissed in part and granted in part. Thus, for statistically counting purposes those cases were included in both the granted and dismissed totals.

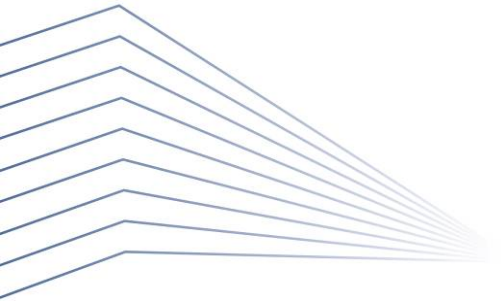
and its desired results, knowing which circuit is more favorable or less favorable to a particular argument, position, or theory could be the difference between a motion to dismiss being granted or denied.

A review of just the statistical information reveals, as depicted in the bar graph above, that the Ninth, Third, and Second Circuits, respectively still heard and decided a majority of the motions to dismiss (57.6%). Not only does the Ninth Circuit continue to have the highest volume of antitrust cases amongst these three circuits, but also as it relates to these three circuits, it still has the highest likelihood of granting defendants' motion to dismiss. The Ninth Circuit granted defendants' motion to dismiss 70% of the time. Whereas, the Second Circuit and the Third Circuit only granted 64% and 50% of defendants' motions to dismiss, respectively.



As apparent from bar graphs above and to the left, the Fifth, Sixth, and Seventh Circuits compose the second tier of circuits as it relates to the number of cases filed with this circuit grouping accounting for the only other circuits to have each heard at least 10 motions to dismiss. This second tier has granted defendants' motions to dismiss at 82%, 71%, and 55% respectively.

As it relates to alleged Sherman Act violations, since *Twombly* has been decided at least 22 of Defendants' motions to dismiss Plaintiffs' complaint for failure to state a claim have gone up on appeal. This equates to about 13% of the cases heard at the district court level even reaching the appellate level for review. Of those 22 cases, the circuit courts affirmed 19 (86%) of those cases where the district courts had granted defendants' motion to dismiss. Thus, less than 2% of the applicable antitrust cases brought in federal court have been reversed since *Twombly*. Notably, amongst the reversing circuit courts, the Second Circuit has heard four appeals and reversed the lower court's decision on two separate occasions. The Eighth Circuit is the only other circuit to actually reverse the ruling of a district court and find a plaintiffs' complaint sufficient to state a violation of § 1 or § 2 of the Sherman Act.



Recent Trends and Patterns

The cases included in last year's digest indicated four possible emerging trends with the sum effect of those trends equating to federal courts granting, at almost a 2:1 ratio, defendants' motions to dismiss post-*Twombly*. A cumulative assessment of the cases since the Court's pronouncement of the plausibility standard in *Twombly* continues to substantiate this rate of dismissal. In fact, in the 51 cases reviewed post-*Iqbal*, the rate of dismissal is actually higher than 2:1 (68%).

The four previously identifiable trends include, that federal courts are: (1) applying *Twombly*'s plausibility standard to all elements of an antitrust complaint; (2) relying on certain key "plus factors" when determining the adequacy of a plaintiff's allegations of an agreement; (3) willing to grant defendants' motion to dismiss even when the complaint contained various plus factors, if the court attributed defendants' parallel conduct to some legitimate business action, market factor, or industry custom; and (4) not restricting the leniency with which they allowed amendment of complaints. This latest installment of the digest, not only revisits these four trends, but also discusses three new developments in pleading a federal antitrust violation.

First, historically, the mere press release of a Department of Justice investigation has been sufficient to trigger the inundation of federal courts with a myriad of antitrust complaints mimicking the governments investigation, but some federal courts are rejecting such hastily pled conclusory complaints as insufficient to survive a motion to dismiss.

Second, a potential circuit split concerning the extent to which a plaintiff must allege specific facts as to time, place, and defendants. As various circuit courts begin to weigh in on their circuit's proper application of the plausibility standard, some courts, the Sixth and Ninth Circuits in particular, appear to be requiring a heightened pleading of specific factual allegations as to time, place, and persons involved in the alleged conspiracy before permitting an inference of an agreement between the defendants.

Third, as it has become cogent that the plausibility standard has generally raised the bar for plaintiffs to pleading a civil action in federal court, several lawmakers have proposed enacting federal legislation that would specifically overrule *Twombly* and *Iqbal*; and expressly restore *Conley's* no set of facts as the appropriate standard for judging the sufficiency of plaintiff's complaint.

Trend No. 1: Courts Are Still Applying *Twombly* to All Elements of a Complaint

As likely fortified by the Court's ruling in *Iqbal*, the most noticeable effect of *Twombly*'s plausibility standard is the stricter inquiry into threshold issues confronting any federal antitrust action. Although the exact elements of each of these threshold issues may vary across jurisdictions, the courts are readily applying *Twombly*'s plausibility standard to all essential elements of an antitrust claim. For example, one district court even granted defendants' dismissal because the complaint failed to allege a factual nexus between the defendants' conduct and interstate commerce.[38] That court noted that Third Circuit precedent "suggest[s] that **some** allegation regarding a defendant hospital's interstate dealings [wa]s required" to please a Sherman Act violation.[39] Similarly, courts are still enforcing the tenet that it is possible to plead oneself out of court if on the face of the complaint, plaintiff establishes that a threshold

[38] *See Villare v. Beebe Med. Ctr., Inc.*, 630 F. Supp. 2d 418 (D. Del. 2009) (granting defendants' motion because "[d]espite th[e] very low threshold plaintiffs d[id] not point to, and the complaint at bar d[id] not appear to contain . . . such factual allegations").
[39] *Id.* at 425 (emphasis in original).

element (such as relevant market or market power) cannot be proven.[40] In short, *Twombly*'s plausibility standard continues to provide defendants with multiple fronts on which they can attack the sufficiency of a plaintiff's complaint.

Trend No. 2: The Emergence of Key Plus Factors

Although plaintiffs continue to assert a multitude of plus factors, the courts appear to be giving more weight to certain key plus factors. Plus factors can generally be any circumstance accompanying defendants' parallel conduct that gives rise to an inference of concerted action by excluding the possibility that defendants' behavior was engaged independently; thereby plus factors amplify the context of when an inference of an agreement would be plausible.

Even though *Twombly* did not expressly set forth a list of permissible plus factors, the Court, *in dicta*, pointed to a few factual allegations that if pled in conjunction with defendants' conscious parallelism would be, arguably in themselves, suggestive of an agreement between defendants. The factors referenced in *Twombly* include: (1) parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties; (2) conduct that indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement; (3) complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason; and (4) the referencing of a specific time, place, and person involved in the alleged conspiracies.

COMMONLY CITED PLUS FACTORS
PRE-*TWOMBLY* AND POST-*TWOMBLY* BY THE CIRCUIT COURTS

Pre-*Twombly*:
- Motive to conspire
- Opportunity to conspire/Sharing pricing information
- Specifics as to time period over which alleged unlawful agreement took place
- Acting against self-interest
- Market concentration
- Specific harm to consumers, such as increase in cost, decrease in quality, or decrease in availability
- Simultaneous price changes
- Simultaneous uniform changes in production

Post-*Twombly*:
- Acting against self-interest
- Simultaneous actions for no discernible reason
- Admissions or guilty pleas by defendants
- Specific factual allegations that demonstrate the existence of an agreement or explicit understanding

[40] *See Hon Hai Precision Indus. Co. v. Molex, Inc.*, No. 08-5582, 2009 WL 310890, at *3 (N.D. Ill. Feb. 9, 2009) (complaint on its face conceded competition in the relevant market); *Echostar Satellite v. Viewtech, Inc.*, No. 07-cv-1273, 2009 WL 1668712, at *5 (S.D. Cal. May 27, 2009) (complaint alleged on its face that DirectTV, a major competitor of EchoStar, held individually in excess of 40% of the market thus the complaint's monopoly-related causes of action were dismissed).

Because the Court elected not to expressly provide a working list of acceptable plus factors, some federal courts continue to rely on their circuit's established plus factors pre-*Twombly*, while others appear to look to *Twombly* for guidance. The result is that some circuits appear to require heightened pleadings of direct evidence. Still, regardless of the circuit, a few plus factors are widely accepted as being almost dispositive of an unlawful agreement. The strongest plus factor is any factual allegations that point to the actions taken by defendants as being against the defendants' independent self-interest with no reasonable explanation, such as the idling or imposing downtime in manufacturing mills,[41] implementing massive and unprecedented production cuts,[42] engaging in highly restrictive unappealing joint ventures to facilitate communication with competitors,[43] or breaking a contract and refusing to fill potential customers purchase orders that would expose the defendant to potential litigation.[44]

Two other strong plus factors used to plausibly infer agreement are when the complaint contains factual allegations that detail plaintiffs almost simultaneous action for no discernible reason[45] and complaints that contain admissions or guilty pleas by defendants to involvement in other conspiracies, in the right context and in the right jurisdiction.[46] The vast majority of the other alleged plus factors asserted by plaintiffs appear to be analyzed on a case-specific basis depending on the context of the alleged unlawful conduct.

Trend No. 3: Defendants' Reliance on Unchoreographed Free-market Behavior

In *Twombly*, the Court noted that the Baby Bells emerged at a time of traditional public monopolies, which made them keenly aware of the benefits of a "sit tight" and expect your "neighbors to do the same"[47] policy. Relying upon the history of the telecommunications industry and the impact of the Telecommunications Act of 1996, the Court concluded that defendants' actions could easily have been non-conspiratorial reactions to dominant market influences.

Based on *Twombly*, several courts have cited a potential independent business justification as the grounds for dismissing a plaintiff's complaint. A closer look at the cases where courts have accepted this proposition reveals that this argument depending on the context may be permissible or sufficient to defeat

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[41] *See In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38 (E.D. Pa. 2007).

[42] *See Standard Iron Works v. Arcelormittal*, 639 F. Supp. 2d 877 (N.D. Ill. 2009).

[43] *See Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010).

[44] *See Champagne Metals v. Ken-Mac Metals, Inc.*, No. 02-0528, 2008 WL 5205204 (W.D. Okla. Dec. 11, 2008).

[45] *See, e.g*, *In re Potash Antitrust Litig.*, MDL No. 1996, 2009 WL 3583107 (N.D. Ill. Nov. 3, 2009) (allegations that certain suspensions in production all took place over the same 12-day period and the announcement of one Defendant's suspension of production made by a purported competitor plausibly suggested an agreement); *Home Quarters Real Estate Group, LLC v. Mich. Data Ex., Inc.*, No. 07-12090, 2009 WL 276796 (E.D. Mich. Feb. 5, 2009) (Plaintiff alleged that Defendants took action within 24 hours of one another to close off Plaintiff's access to Defendants' services); *cf In re Text Messaging Antitrust Litig.*, No. 08-7082, 2009 WL 5066652 (N.D. Ill. Dec. 10, 2009) ("It would be difficult to characterize changes occurring over an 11-month period as occurring at the same time").

[46] See Trend No. 5 for a more thorough examination of this potential plus factor.

[47] *Twombly*, 550 U.S. at 568.

a complaint lacking direct allegations of an agreement,[48] but where the complaint contains either direct allegations of an agreement, an agreement or specific evidence pertaining to the nature of the agreement, an assertion that defendants' conduct was due to "lawful, unchoreographed free-market behavior" will likely be insufficient.[49]

There is some tension between the courts as to whether *Twombly* requires a plaintiff to allege sufficient facts to exclude defendants' lawful justifications with some clearly stating that *Twombly* explicitly only requires for plaintiffs to allege "enough factual matter (taken as true) to suggest that an agreement was made" and did not require plaintiffs to exclude defendant's independent business justifications.[50] In *Starr v. Sony BMG*, the Second Circuit expressly rejected defendants arguments that a plaintiff seeking damages under § 1 of the Sherman Act must allege facts that tend to exclude independent self-interested conduct as an explanation for defendant's parallel behavior.[51]

However, as for the factual allegations of parallel conduct, the Supreme Court has "[a]cknowledg[ed] that parallel conduct . . . consistent with an unlawful agreement, . . . d[oes] not plausibly suggest an illicit accord [when] it [i]s not only compatible with, but indeed . . . more likely explained by, lawful, unchoreographed free-market behavior."[52] Along these lines, at least one federal court has held that under *Twombly*, proof of a conspiracy "must include evidence tending to exclude the possibility of independent action" and "to rule out the possibility that the Defendants were acting independently."[53] Similarly, another federal court held that likely lawful independent justifications could be pulled from the face of the complaint itself. In *In re Text Messaging*, the court stated that "[p]laintiffs themselves identify [the] reason[] why defendants' conduct was not only compatible with but indeed more likely explained by,

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[48] *See, e.g.*, *Burtch v. Milberg Factors, Inc.*, No. 07-556, 2009 WL 840589, at *14 (D. Del. Mar. 30, 2009) (noting that it could be just as likely that Defendants' parallel conduct was the result of independent, rational, and wholly lawful decisions by each Defendant to limit its exposure to Factory's 2-U's deteriorating financial condition); *Mornay v. Travelers Ins.*, No. 07-5274, 2008 WL 2439941, at *3 (E.D. La. June 13, 2008) (several insurers' price lists were identical suggested that they commonly used Xactware, which the Louisiana Insurance Department specifically suggested they do provided an independent basis for defendant's parallel pricing structure); *Am. Channel, LLC v. Time Warner Cable, Inc.*, No. 06-2175, 2007 WL 1892227 (D. Minn. June 28, 2007) (court found that the allegations did not exclude the possibility of independent action because it was in both Defendants' economic interest to promote their own affiliated networks).

[49] *See, e.g.*, *In re S.E. Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008) (defendants conceded an actual agreement existed in the form of the vertical full supply and outsourcing agreements); *Macquarie Group Limited v. Pacific Corporate Group*, LLC, No. 08-cv-2113, 2009 WL 539928, at *5 (S.D. Cal. Mar. 2, 2009) (plaintiffs alleged an explicit agreement, evidenced by an admission by one of the co-conspirators and supported by circumstantial proof); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M-07-1827, 2008 WL 3916309, at *3 (N.D. Cal. Aug. 25, 2008) (complaint alleged specific instances of invitations to agree and subsequent agreements by high-ranking executives);

[50] *See, e.g.*, *Am. Med. Ass'n v. United Healthcare Corp.*, No. 00 Civ. 2800, 2008 WL 3914868, at *447 (S.D.N.Y. Aug. 22, 2008) (plaintiffs did not need to provide evidence that Defendants were acting contrary to their independent business interests).

[51] *Id.*, No. 08-5637, 2010 WL 99346, at *7; see also *In re Potash Antitrust Litig.*, MDL No. 1996, 2009 WL 3583107, at * 22 (N.D. Ill. Nov. 3, 2009) ("Plaintiffs are not required to exclude every plausible interpretation of the facts that does not support their theory of liability.") quoting *Hackman v. Dickerson Realtors, Inc.*, 595 F. Supp. 2d 875, 879 (N.D. Ill. 2009).

[52] *Iqbal* at 1950 (citing *Twombly*, 550, U.S. at 567).

[53] *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, No. 3:09-CV-487, 2009 WL 2767055 (M.D. Tenn. Aug. 27, 2009).

lawful, unchoreographed free-market behavior . . . defendants charge[d] high prices for single-message texts to encourage users to purchase these bulk plans."[54] In the future it will be interesting to see which, if any, circuits expressly address the issue.

Trend No. 4: Allowing Amendment

In light of the liberal provisions of Rule 15(a) for amending pleadings,[55] even after *Twombly* and *Iqbal* circuits continue to allow plaintiffs to remedy identified deficiencies by filing an amended complaint either prior to ruling on the motion before the court or quite frequently even after ruling for the defendants but with leave for plaintiffs to amend their complaint. In fact, most of the included cases that granted defendants' motion to dismiss either dismissed the complaint at issue *without prejudice*, were adjudicating *a previously amended complaint*, or dismissed the complaint but *granted leave to amend*. If the deficiencies identified appear to arise from the complaint's lack of key facts to support an essential element of the claim, but the court believes the plaintiff has the ability to re-plead this claim with sufficient facts to that particular element, then the court is likely to allow amendment.

For example, in *In re Graphics Processing Units Antitrust Litigation*, a class of direct and indirect purchasers of graphics processing units successfully met their pleading burden in alleging a Section 1 claim for price fixing with amended pleadings. After their initial pleading was dismissed for lack of specificity under *Twombly*, plaintiffs alleged facts concerning a shift in pricing pattern and behavior that supported their other allegations of conspiracy. Specifically, plaintiffs averred that, prior to 2003, defendants introduced equivalent and directly competing goods at different times and at different prices. However, according to the amended complaint, after 2003, competing products were introduced to the market at the same time by different competitors, and purportedly at the same price. After allowing the plaintiff to replead his complaint, the court denied defendants motion to dismiss. As such, defendants should not expect a court to apply any heightened requirements in assessing plaintiff's ability to amend.

But, if after amending and plaintiffs still have yet to sufficiently allege enough facts to the existence of a particular element of the claim or the court realizes that plaintiffs cannot allege sufficient facts in support of an essential element of their claim, courts are then more likely to deny plaintiffs' leave to amend as futile.

Trend No. 5: Plaintiffs' Reliance on Government Investigations

Historically civil antitrust litigation has often been sparked by government investigations and prosecutions. But, post-*Twombly*, the case law suggests that mere government investigation with little

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[54] *In re Text Messaging Antitrust Litig.*, No. 08-7082, 2009 WL 5066652, at * 10 (N.D. Ill. Dec. 10, 2009) (internal quotation marks omitted).

[55] Under Federal Rule of Civil Procedure 15(a), a party can amend their pleading with the court's leave and "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2) (2009).

else is insufficient[56] to allege a violation of the Sherman Act; but where the government investigation reveals direct evidence of an unlawful agreement,[57] results in defendants' subsequent guilty pleas,[58] or provides a context for parallel conduct to suggest a conspiracy,[59] such government investigations are likely permissible factual assertions to plausibly infer an agreement. To this end, courts are most likely to permit a plaintiff's reliance on government investigations where the complaint has sufficiently alleged a nexus between the government investigation or the guilty plea[60] and defendants' conduct, *i.e.*, sufficient factual allegations of an overlap.[61] To aver this nexus, plaintiffs usually assert factual allegations similar to plus factors to establish defendants' involvement in the conspiracy.

When plaintiffs, however, fail to aver the nexus between a government investigation (foreign or domestic) and defendants' conduct the complaint is likely to be dismissed,[62] especially if the complaint relies entirely on parallel conduct, conclusory averments of conspiracy and references to a foreign investigation into

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[56] *See, e.g.*, *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1149, n.11 (N.D. Cal. 2009) (Plaintiffs allege that the Department of Justice had begun investigating Defendants for price-fixing flash memory to suggest that this development may be used to create an inference of anti-competitive activity, but the court noted that the mere fact that an investigation is under way is not by itself an appropriate consideration for purposes of determining the adequacy of the pleadings.) citing *In re SRAM*, 580 F. Supp. 2d at 903 ("The Court agrees that the existence of the investigation [regarding SRAM] does not support Plaintiffs' antitrust conspiracy claims"); *see also Hinds County, Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499 (S.D.N.Y. 2009) (Complaint's allegations relating to a government investigation that the "IRS has stated that it has come across instances of price-fixing, bid-rigging and kickbacks" though suggestive were too general to make an antitrust claim plausible to any specific Defendant).

[57] *See In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 553 (M.D. Pa. 2009) (The investigation purportedly revealed that Glenn Stevens, president of a non-defendant provided the catalyst for a Canadian price-fixing agreement by transmitting several letters to senior managers of the Canadian defendants, including his initial letter entitled "TAKE ACTION NOW!!!").

[58] *See In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2009 WL 3443405, at *1 (E.D.N.Y. Aug. 21, 2009) (the additional fact that numerous Defendants had pled guilty to criminal charges of fixing prices on air cargo shipments further supported the conclusion of a conspiracy to inflate prices); *cf In re California Title Insurance*, at *6 (Defendants have not admitted that they acted improperly in setting rates in the state with rate setting organizations—this is not a situation where the Defendants have admitted to conspiring in one market, which might allow the Court to infer a conspiracy in another market).

[59] *In re Flat Glass Antitrust Litig. (II)*, MDL No. 1942, 2009 WL 331361, at *1 (W.D. Pa. Feb. 11, 2009) (Complaint alleged that there was a history of inability to raise and maintain prices and varying surcharges by region of the country prior to June of 2002, but after June 2002 defendants did not vary their surcharges by region for 30 months, until in February 2005 when the European Commission launched raids upon the European construction flat glass market. Subsequent to that investigation defendants did not engage in lock-step parallel conduct. Court found the European investigation helped to provide a factual context for the parallel behavior that plausibly suggested an unlawful agreement.).

[60] *See In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 541 F. Supp. 2d 487, 492 (D. Conn. 2008) (rejecting Plaintiff's reliance on Defendants' admittance to participating in a conspiracy and pleading guilty to criminal conspiracy charges when that conspiracy involved different conduct (different trade route involving an unlawful conspiracy to raise prices) than the conduct alleged by the Plaintiff (predatory pricing, *i.e.*, unlawful conspiracy to lower prices).

[61] *See In re Chocolate*, at 577 (finding the complaint sufficient where as the operational and structural similarities between the American and Canadian markets lent plausibility to plaintiffs' allegations of conspiratorial pricing agreements in the U.S. and Defendants had ample opportunity to consult with one another about the U.S. and Canadian price increases).

[62] *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1258 (W.D. Wash. 2009) (Plaintiffs alleged that only one of these individuals had any involvement with Defendant Horizon's Hawaii or Guam routes and did not allege that this person's charges or guilty plea implicated the Hawaii or Guam trade in any way. Moreover, although plaintiffs quote press reports relaying the DOJ's belief that more indictments will follow, they provided no link between the Puerto Rico and Hawaii or Guam markets, nor did they allege that Defendant Matson was involved in the water trade between Puerto Rico and the United States mainland.).

price-fixing.[63] For example, *In re Hawaiian* where the complaint was framed relying on just factual allegations such as (1) information exchanged through trade associations and the like; (2) evidence of antitrust behavior in a different ocean trade revealed by a Department of Justice ("DOJ") investigation; and (3) parallel activities in a concentrated, incontestable market the court found the complaint insufficient to establish an antitrust violation.[64] Similarly, in *In re Elevator*, the Second Circuit affirmed the district court's dismissal for failure to state an antitrust violation. That court pointed to three factors to be assessed in determining if a complaint can rely on European investigations (1) the failure to specify particular activities by particular defendants, (2) non-specific allegations of parallel conduct, and (3) the lack of any facts establishing any possible nexus between the European conspiracy and any conduct in the U.S.[65]

Thus, it seems that many courts are taking a view strikingly similar to the Supreme Court's view of parallel conduct in *Twombly*. That is, absent factual allegations of direct evidence linking defendants to the alleged unlawful conduct a government entity is investigating or certain plus factors sufficiently linking the defendants to the conduct under investigation, courts are less likely to plausibly infer an agreement. Simply put, in many courts' views allegations pertaining to government investigations are "nonconclusory factual allegations" that alone do not give rise to a plausible suggestion of a conspiracy.

Trend No. 6: Alleging Direct Evidence of an Agreement

As to whether a plaintiff must plead specific facts, *i.e.*, direct evidence of an unlawful agreement, there appears to be a budding circuit split between two of the dominant circuits active in ruling on motions to dismiss antitrust actions in the wake of *Twombly*. Earlier this year, in *Starr v. Sony BMG*, the Second Circuit held that, when a claim rests on the parallel conduct, plaintiffs are not required to mention a specific time, place, or each person involved in the alleged conspiracy.[66]

However, for almost two years now, under *Kendall v. Visa*, the Ninth Circuit has been requiring a plaintiff to pled the specific time, place, and person when bringing a § 1 conspiracy violation. In the Ninth Circuit "to state a claim under § 1 of the Sherman Act, claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce, . . . (3) which actually injures competition."[67] Likewise in *In re Travel Agent*, the Sixth Circuit affirmed the dismissal of the complaint noting that plaintiffs failed to

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[63] *See In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007) (*per curiam*).
[64] *In re Hawaiian* at 1256, 1260-62.
[65] *In re Elevator* at 50.
[66] *Id.* at 325.
[67] *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 669 (9th Cir. 2009) quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

identify defendants' attendees by name or title that they alleged to have had the opportunity to conspire at committee meetings.[68] As one district court has noted courts have reached opposite results as to the viability of the antitrust complaints based on the distinguishing factor of whether the complaint includes specific allegations concerning time, place, and person versus general allusions to secret meetings, communications, or agreements.[69] For example, numerous courts have cited plaintiffs' failure to include this information as part of the grounds for granting defendants' motion to dismiss.[70]

This requirement of heightened pleading of "evidentiary facts" likely explains why amongst the leading three circuits, the Ninth Circuit contrary to many plaintiffs' preconceived expectations has largely been pro-defendants when it comes to the dismissal of federal antitrust claims.

Trend No. 7: Pending Congressional Action

In July 2009, Senator Arlen Specter introduced the Notice Pleading Restoration Act[71] to overturn *Twombly* and *Iqbal* and reinstate *Conley v. Gibson* and "no set of facts" as the controlling federal standard. Similarly, several Representatives introduced a bill in November 2009 to the same effect.[72] Most noticeably, neither proposed bill provides for an antitrust carve out to protect antitrust defendants from the liberal discovery rules that was the undercurrent in the *Twombly* decision. Even if such legislation were to be enacted, it is unclear, in antitrust actions where numerous district court judges have for decades applied a heightened pleading standard in lieu of *Conley*, whether either statute would be applicable.

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[68] *In re Travel Agent Commission Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009).

[69] *In re Hawaiian* at 1256-1257.

[70] *See, e.g.*, *In re Text Messaging Antitrust Litig.*, at *10 (plaintiff failed to allege any specific facts as to time, place or defendants involved in the conspiracy); *West Penn Allegheny Health Sys., Inc. v. UPMC*, No. 09-CV-0480, 2009 WL 3601600 (W.D. Pa. Oct. 29, 2009) (same); *In re LTL Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219 (N.D. Ga. Jan. 28, 2009) (same); *Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield*, No. 1:05-CV-519, 2007 WL 2156657 (S.D. Ohio July 25, 2007) (same).

[71] In pertinent part, the bill provides that "[e]xcept as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under Rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 1 (2009).

[72] In pertinent part, the bill provides that "[a] court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by a judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged." Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 1 (2009).

Conclusion

The plausibility standard has undoubtedly created additional hurdles for plaintiffs bringing antitrust claims that lack specific factual information. With this knowledge, defendants have inundated the courts with motions to dismiss for failure to state a claim. As one district court noted, "an undesired effect of *Twombly* is that the argument that plaintiffs have not pleaded sufficient facts appears to have become the mantra of defendants in antitrust cases."[73]

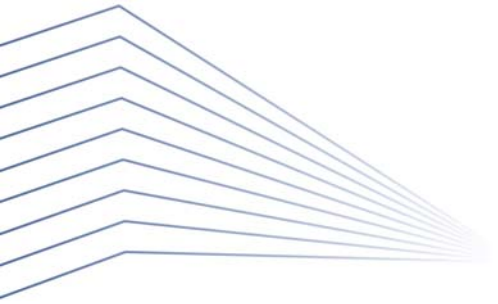
[73] *Home Quarters Real Estate Group, LLC v. Mich. Data Ex., Inc.*, No. 07-12090, 2009 WL 276796 (E.D. Mich. Feb. 5, 2009).

Conclusion

Antitrust Digest

The building of momentum towards congressional action suggests just how much the plausibility standard has altered the pleading landscape, especially in antitrust actions where plaintiffs have traditionally relied on the courts acceptance of the veracity of their legal conclusions but only time will reveal whether such legislation is in fact ever enacted. So, for now, the developing case law implies that plaintiffs can no longer proceed on mere theory and the knowledge that courts seldom constrain discovery; thus allowing plaintiffs to move past the pleading stage with general, unsupported allegations in the hope of later uncovering sufficient facts to survive summary judgment or leveraging their claims and the costs of discovery into more favorable settlement terms.

As the cases in this digest allude to, the most likely antitrust complaints at risk of dismissal are those filed on the heels of government investigations where there are few public details about the activity under investigation. Lawyers who want to win the race to the courthouse to claim the position of lead counsel in follow-on class action lawsuits may now want to either wait for sufficient information to emerge from the investigation or conduct an "inquiry reasonable under the circumstances" themselves that demonstrate defendants involvement in the alleged conduct. Either way, their complaint when filed must contain more than "threadbare recitals" and legal conclusions.



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Cases

In re New Motor Vehicles Antitrust Litigation (2008)[74]

INDUSTRY: Automotive leases

ANTITRUST VIOLATION(S) ALLEGED: Unlawful agreement pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Lessees of new automobiles brought putative class action alleging that automobile manufacturers and their captive leasing companies conspired to prevent lower priced Canadian cars from entering the American market during certain periods, thereby illegally driving up or artificially maintaining American prices and rental payments, in violation of the Sherman Act.

DEFENDANTS' MOTION: Defendants appealed the dismissal of their putative antitrust class action lawsuit in which they sought antitrust damages under § 1 of the Sherman Act.

DISPOSITION: United States Court of Appeals, First Circuit **AFFIRMED** and **GRANTED** the motion for summary judgment.

COURT'S RATIONALE: Court held that lessees were not direct purchasers and thus lacked standing to sue Defendants under federal antitrust laws. Plaintiffs failed to adequately allege antitrust standing because:

- Plaintiffs did not join dealers as Defendants, nor did they plead sufficiently or argue consistently that dealers were part of the conspiracy;
- Plaintiff's complaint described a horizontal conspiracy among the manufacturers that adversely affected dealers as well as the ultimate consumers, thus it did not alleviate the court's concern about the risk of double recovery because they failed to join dealers as Defendants; and
- Complaint failed on its face to allege a scenario in which Plaintiffs could be direct purchasers.

[74] *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 533 F.3d 1 (1st Cir. 2008).

Cases

American Steel Erectors, Inc. v. Local Union No. 7 (2008)[75]

INDUSTRY: Steel erection contract bids

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): American Steel Erectors Inc. ("ASE") and Local Union No. 7, International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers ("Local Union") are both engaged in bidding on steel erection contracts in the Boston area. To make their union more competitive with non-unionized outfits, Local Union subsidized many of the bids for their members' steel erection contracts. Plaintiff alleged that Defendant employed several unlawful practices to facilitate their market recovery program; and that these practices excluded Plaintiffs from a large part of the structural steel market in the greater Boston area.

DEFENDANTS' MOTION: Plaintiffs appealed the district court's granting of summary judgment.

DISPOSITION: United States Court of Appeals, First Circuit **REVERSED** and **DENIED** the motion for summary judgment.

COURT'S RATIONALE: Court held that there were sufficient genuinely disputed issues of material fact that rendered summary judgment inappropriate because:

- Plaintiff alleged concerted union-employer action that extended beyond the wage deduction provided for in the contractor's bargaining agreement and the job-by-job subsidy agreements, to collaboration in the identification and acquisition of target projects;
- Plaintiff alleged that signatory contractors and the fabricators or general contractors that employ them were complicit in the union's efforts to shut out open-shop outfits; and
- The district court did not squarely address this issue.

[75] *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68 (1st Cir. 2008).

Cases

Dahl v. Bain Capital Partners (2008)[76]

INDUSTRY: Securities

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs[77] brought this action on behalf of all persons who had an ownership interest in securities in any publicly listed company traded on any U.S. securities market. The class claimed that the Defendants illegally conspired to purchase companies through leveraged buyouts. Specifically, Plaintiffs claimed that Defendants conspired to pay less than the fair value for the target companies, thereby depriving the target companies' shareholders of the true value of their shares.

DEFENDANTS' MOTION: Defendants filed a joint motion to dismiss the Third Amended Complaint for failure to state a claim upon which relief could be granted. The Defendants argued:

- That Plaintiffs' claims were pre-empted from consideration under antitrust laws because the conduct at issue was regulated by the Securities and Exchange Commission; and
- That Plaintiffs failed to properly plead a § 1 Sherman Act claim.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: In contrast with *Twombly*, the court held the circumstances plausibly suggested that an illegal agreement existed in violation of § 1. The court came to this conclusion because:

- The complaint provided detailed descriptions of nine transactions which illustrated what Plaintiffs called the overarching conspiracy;
- The presence of the same private equity firms in multiple transaction tied the Defendants together in a way that *Twombly* Defendants were not; and
- The overlap in the firms, coupled with the shareholders allegations that the PE Firms conspired to prevent open, competitive bidding for the target companies plausibly suggested an illegal agreement.

[76] *Dahl v. Bain Capital Partners, LLC*, No. 07-12388, 2008 WL 5206990 (D. Mass. Dec. 15, 2008).

[77] Plaintiffs included a trust, a public retirement trust fund, and a group of five individuals that owned shares in companies that the Defendants purchased.

Cases

Booklocker.com, Inc. v. Amazon.com, Inc. (2009)[78]

INDUSTRY: Print on demand publishing

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): An independent print on demand (POD) publishing company, BookLocker.com brought a class action claiming a violation of federal antitrust laws against Amazon.com, a leading online retailer for allegedly tying its online bookstore services to the printing services provided by its wholly-owned subsidiary. Amazon's Bookstore is the dominant channel through which consumers purchase POD books in the online book market and BookSurge is one of its subsidiaries. Specifically, the complaint alleged that beginning no later than February 10, 2008, Amazon began notifying POD publishers that Amazon would only continue to sell POD books through the Direct Amazon Sales Channel if the publisher agreed to print its books through BookSurge. Plaintiff contended that such action constituted a *per se* tying violation.

DEFENDANTS' MOTION: Defendants moved to dismiss for Plaintiff's failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the allegations in BookLocker's amended complaint, combined with Amazon's letter, support the inference that some POD publishers have been coerced by Amazon's threats. The allegations that the court held sufficient to support a claim of illegal tying, in the face of uncertainty at this early stage, included:

- Allegation that there were a variety of printing companies competing to provide POD book printing services, including Amazon's subsidiary;
- Allegation that Amazon's actions prevented POD publishing companies from selecting a printing service on a competitive basis;
- Allegation that Amazon's requirement that POD publishers sign a contract with BookSurge to have access to the Direct Amazon Sales Channel applied across the board to all publishers using POD printing services;
- Allegation that Amazon had significant power in the online book market with a market share of up to 70%;
- Allegations that at least four POD publishers had been coerced into signing a contract with BookSurge to secure and retain customers; and

[78] *Booklocker.com, Inc. v. Amazon.com, Inc.*, 650 F. Supp. 2d 89 (D. Me. 2009).

Cases

Allegation that BookLocker had been harmed financially by Amazon's actions because several potential clients stated that they refused to use Plaintiff's POD publishing services after being informed that Plaintiffs had not signed the BookSurge contract.

Cases

Mendez Internet Management Services (2009)[79]

INDUSTRY: Internet management services

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy and group boycott pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs trade in dinars. Plaintiffs alleged that Defendants forged a *de facto* conspiracy through the misrepresentations published on Dr.Shopper.com and the financial institution-Defendants refusal to do business with the Plaintiffs. This *de facto* conspiracy alleged prevented Plaintiffs from selling dinars in Puerto Rico because Defendants sought to monopolize the Puerto Rican dinar market.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiffs' complaint contained only bare allegations of an agreement among Defendants, with no information as to how, when, and where the Defendants came to the alleged agreement. The court further found Plaintiffs' allegations inherently implausible since Defendants did not compete with Plaintiffs.

[79] *Mendez Internet Mgmt Servs. v. Banco Santander De P.R.*, No. 08-2140 (D.P.R. May 15, 2009).

Cases

Bailey Lumber & Supply Co. v. Georgia-Pacific Corp. (2009)[80]

INDUSTRY: Structural Panel Retail

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, purchasers of plywood and oriented strand board allege that Defendants[81] engaged in a conspiracy to fix prices for these materials in violation of the Sherman Act. Plaintiffs alleged that Defendants beginning in 2001 conspired to restrict the supply of structural panels.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiffs' allegations were insufficient to state a claim against BlueLinx for violation of § 1 of the Sherman Antitrust Act, because:

- If the price information was legitimately published twice weekly for all to see, it was difficult to discern an illegal conspiracy revolving around privately sharing the same information;
- The Plaintiffs had alleged no anti-competitive effect resulting from the conspiracy to privately share price information as opposed to any effect from the sharing of price information in a twice-weekly publication;
- Plaintiff failed to allege or argue that BlueLinx was part of the agreement to reduce capacity in the structural panel market, only that it continued in the price information sharing aspect of the conspiracy; and
- The purchaser's allegation that panel prices in an industry publication kept the panel manufacturers and the reseller apprised of each other's prices in absence of direct communication about the prices did not plausibly suggest agreement unfavorable to competition.

[80] *Bailey Lumber & Supply Co. v. Georgia-Pacific Corp.*, No. 1:08-CV-1394, 2009 WL 2425973 (S.D. Miss. August 6, 2009).

[81] Defendants included: Georgia-Pacific Corp., Weyerhouser Company, Louisiana-Pacific Corp.; and Defendant BlueLinx is a distributor of building products allegedly formed in May 2004 when it was spun off from Georgia-Pacific.

Cases

In re Elevator Antitrust Litigation (2007)[82]

INDUSTRY: Elevator manufacturers and elevator maintenance and repairs services

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Purchasers of elevators and elevator maintenance services brought a putative class action against Defendants,[83] alleging a horizontal price-fixing conspiracy for the sale and the continuing maintenance of elevators. Specifically, Plaintiffs alleged that beginning in 2000, Defendants agreed to suppress and eliminate competition in the market for sale and service of elevators. Defendants allegedly fixed prices of elevators, replacement parts, and services and rigged the bidding for contracts for and service of elevators. Plaintiffs asserted that part of the conspiracy occurred in Europe as well.

DEFENDANTS' MOTION: Defendants' motion to dismiss was granted. Plaintiffs appealed.

DISPOSITION: Court of Appeals for the Second Circuit **AFFIRMED** and **GRANTED** Defendants' motion to dismiss.

COURT'S RATIONALE: Court held that the conspiracy claims provided no plausible ground to support the inference of an unlawful agreement. Specifically, the court found that the complaint failed to satisfy *Twombly* because:

- Purchasers failed to allege plausible inferences of agreement;
- Purchasers failed to allege that sellers terminated any prior course of dealings;
- Allegations of anti-competitive wrongdoing in Europe—absent any evidence of linkage between such foreign conduct was inappropriate because conduct merely suggested that if it happened there, it could have happened in the U.S.;
- Without adequate allegations of facts linking transactions in Europe to transactions and effects in the U.S., conclusory allegations did not nudge the Plaintiffs' claims across the line from conceivable to plausible; and
- Complaint merely listed bald assertions of every type of possible conspiratorial behavior by Defendants such as:
  - Participating in meetings to discuss pricing and market divisions;

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[82] *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007) (*per curiam*).

[83] The named Defendants included United Technologies Corp.; Otis Elevator Co.; Kone Corp.; Kone Inc.; Schindler Holding Ltd.; Schindler Elevator Corp.; ThyssenKrupp AG; ThyssenKrupp Elevator Corp.; and Thyssen Krupp Elevator Capital Corp.

Cases

- Agreeing to fix prices for elevators and services;
- Rigging bids for sales and maintenance;
- Exchanging price quotes;
- Allocating markets for sales and maintenance;
- Collusively requiring customers to enter long-term maintenance contracts;
- Collectively trying to drive independent repair companies out of business; and
- Engaging in illegal parallel conduct via similarities in contractual language, pricing, and equipment design.

Cases

Port Dock & Stone Corp. v. Oldcastle Northeast, Inc. (2007)[84]

INDUSTRY: Aggregate stone distribution

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Aggregate distributor and its subsidiaries brought suit against aggregate manufacturers,[85] alleging they attempted to and did monopolize the relevant market for manufacturing crushed stone or aggregate by buying out its only significant competitor, then refusing to sell aggregate to Plaintiffs. In doing so, Defendants allegedly deprived Plaintiffs of any supply and forced them to sell their assets to Defendants at below-market value.

DEFENDANTS' MOTION: Defendant's motion to dismiss for failure to state a claim upon which relief could be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Second Circuit **AFFIRMED** and **GRANTED** Defendant's motion to dismiss.

COURT'S RATIONALE: Court held that distributor did not allege antitrust injury from manufacturer's alleged monopolization of production levels, and allegations did not support the claim alleging monopolization at the distribution level. In fact, the court recognized that Defendant had an apparent legitimate business reason for Defendant's refusal to deal: efficiency. The complaint failed because:

- Plaintiff failed to allege how the Defendant's practices were anti-competitive;
- Plaintiff failed to allege how it suffered injury;
- Plaintiff failed to allege that Defendant had an economic incentive to exclude it;
- Plaintiff failed to allege any such circumstances that would make Defendant's vertical integration and refusal to deal with it anti-competitive; and
- Plaintiff failed to allege how Defendant's refusal to deal was done for the purposes of monopolizing the aggregate market.

[84] *Port Dock & Stone Corp. v. Oldcastle N.E., Inc.*, 507 F.3d 117 (2d Cir. 2007).
[85] The named Defendants included CRH, PLC, Oldcastle Northeast, Inc., and Tilcon, Inc.

Cases

Wellnx Life Sciences v. Iovate Health Sciences Research (2007)[86]

INDUSTRY: Dietary supplement manufacturing

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott that unreasonably restrained trade pursuant to §§ 1 and 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that Defendants,[87] with Iovate acting as the architect of a conspiracy, agreed with publishers of bodybuilding periodicals to boycott Wellnx in the market for advertising space in bodybuilding publications. Wellnx and Iovate were direct competitors in the dietary supplements market that primarily advertised in fitness magazines.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the amended complaint failed to allege facts sufficient to infer a horizontal agreement between any two publishers. The principle basis advanced for inferring a horizontal agreement was parallel conduct. Plaintiffs failed to allege sufficient factual enhancements to infer an agreement between Defendants. The allegations the court held that failed to meet *Twombly*'s plausibility standard included:

- Allegation that refusal of Wellnx advertisements was a departure from prior practice;
- Allegation that each publisher was aware the Defendant Iovate solicited similar agreements from others;
- Allegation that each publisher had a substantial profit motive for refusing Wellnx;
- Allegation that the refusal to deal was uniformly the same by each publisher; and
- Allegation that refusing Wellnx's business was against publishers' self interest because it caused them to reject valid offers for advertising space.

Court found that the inference that emerged was that each Defendant publisher was presented with a choice between Wellnx or Iovate. The facts alleged did not imply an agreement, but rather a substantial profit motive incentive that each could have independently reached.

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[86] *Wellnx Life Scis., Inc. v. Iovate Health Scis. Research, Inc.*, 516 F. Supp. 2d 270 (S.D.N.Y. 2007).

[87] The named Defendants included: Iovate Health Sciences Group Inc.; Iovate Health Sciences, Inc.; Iovate Health Sciences U.S.A. Inc.; Canusa Products Inc.; and Musclemag International Corp. U.S.A. Inc.

Cases

As to Plaintiff's allegation that the refusal to deal described in the amended complaint had the effect of unreasonably restraining trade in the sale of advertising space, the court held that Plaintiffs failed to allege that agreements between Iovate and the publishers adversely affected price, output, or quality of services in the overall market. As to the § 2 claim—Plaintiff failed to allege that any Defendant was a monopolist.

Cases

In re Short Sale Antitrust Litigation (2007)[88]

INDUSTRY: Securities

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Electronic Trading Group alleged, *inter alia*, in its second amended complaint that Defendants[89] violated federal antitrust laws. Plaintiffs, who acted as short sellers in short sale security transactions, brought action against Defendants-brokers alleging that brokers violated antitrust laws by charging artificially inflated and unjustified fees to brokers in connection with the borrowing of certain classes of securities.

DEFENDANTS' MOTION: Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Relying on the Supreme Court's decision in *Credit Suisse Secs. (USA) LLC v. Billing*[90], Defendants argued that the securities laws implicitly precluded application of the antitrust laws to the conduct alleged in the amended complaint.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that federal securities laws implicitly precluded application of the antitrust laws to alleged conduct of brokers in conspiring to classify particular securities involved in short sale transactions as hard-to-borrow and in fixing minimum borrowing rates. The court found that the liquidity and pricing benefits created by the short sales placed those transactions "within the heartland" of federal securities regulation and were "central to the proper functioning of well regulated capital markets."

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[88] *In re Short Sale Antitrust Litig.*, 527 F. Supp. 2d 253 (S.D.N.Y. 2007).

[89] The named Defendants included: Morgan Stanley & Co., Inc.; Morgan Stanley DW Inc.; Bear Stearns Companies, Inc.; The Goldman Sachs Group, Inc.; Goldman Sachs & Co.; Goldman Sachs Execution & Clearing, L.P.; UBS Financial Services, Inc.; Merrill Lynch, Pierce, Fenner & Smith, Inc.; Citigroup Inc.; Citigroup Global Markets, Inc.; Credit Suisse Inc.; Credit Suisse Securities L.L.C.; Deutsche Bank Securities, Inc.; Lehman Brothers, Inc.; Banc of America Securities L.L.C.; Van der Moolen Specialists USA, L.L.C.; and CIBC World Markets Corp.

[90] *Credit Suisse Secs. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

Cases

Arista Records v. Lime Group (2007)[91]

INDUSTRY: Music digital recordings

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 and monopolization or attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Thirteen major record companies that collectively owned rights to a majority of copyrighted sound recordings sold in the U.S. alleged that Lime Group infringed on their copyrights through use of a music file-sharing application that utilized peer to peer technology. Defendant filed an antitrust counterclaim alleging restraint of trade in violation of the Sherman Act.

DEFENDANTS' MOTION: Arista Records moved to dismiss for failure to state a claim upon which relief could be granted arguing that Lime Group lacked standing to prosecute such antitrust claims and had not suffered an antitrust injury.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Lime Group failed to demonstrate the requisite antitrust injury necessary to establish standing to challenge Arista Records' pricing schemes at either the wholesale or retail levels. Lime Group failed to allege an actual injury that it had suffered as a result of these restraints. The counterclaim was also found to be insufficient because:

- Distributor's allegations failed to plausibly suggest existence of a conspiracy;
- The counterclaim failed to allege who participated in illicit agreements and when and where they took place;
- The counterclaim contained no facts that plausibly suggested that Arista Records' refusal to provide Lime Group with "reasonable access to the hashes of their copyrighted works" was the result of anything other than independent decision-making by each company to refrain from doing business with Lime Group;
- The counterclaim failed to allege either that counter-Defendants sought to unite in a single monopolistic entity or that they sought to allocate shares of the relevant market; and
- The counterclaim failed to allege market power.

[91] *Arista Records v. Lime Group*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007).

Cases

McCagg v. Marquis Jet Partners, Inc. (2007)[92]

INDUSTRY: Charter jet cards

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): In McCagg's amended complaint, it alleged that Defendants, [93] a private company that provided various packages of access to charter jets and accompanying services to customers, had a monopoly on charter jet frequent user cards and held its exorbitant prices for over five years in violation of antitrust laws.

DEFENDANTS' MOTION: Defendants moved for a motion to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that McCagg's amended complaint still did not plead a plausible market. It was highly unlikely that McCagg would be able to demonstrate market power in a properly pled market that included all charter services. Court found the complaint deficient under the plausibility standard because:

- Plaintiff failed to adequately identify the relevant market as to the rules of "interchangeability" or "cross-elasticity";
- Plaintiff failed to adequately allege the reduction in output or change in price; and
- Plaintiff failed to allege that prices in any market had increased to above competitive levels or that competition was excluded because of illegal agreements.

[92] *McCagg v. Marquis Jet Partners, Inc.*, No. 05-CV-10607, 2007 WL 2161786 (S.D.N.Y. July 27, 2007).
[93] The named Defendants included Marquis Jet Partners, Inc. and Netjets, Inc.

Cases

Temple v. Circuit City Stores, Inc. (2007)[94]

INDUSTRY: Credit cards services

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Action arose out of earlier settlement of a class action suit alleging Visa and MasterCard had violated the § 1 of the Sherman Act, where present Defendants and many other named Plaintiffs[95] filed suit on behalf of millions of merchants. In that suit, it was alleged that Visa and MasterCard had violated § 1 of the Sherman Act, by using their considerable market power in the credit card market to force merchant Plaintiffs through "Honor All Cards" policies to accept Visa and MasterCard debit cards as well. Plaintiffs in their Second Amended Class Action Complaint claimed merchants, Circuit City and Wal-mart, passed on to them additional costs incurred due to the unlawful tying practices of Visa by inflating their retail prices.

DEFENDANTS' MOTION: Circuit City and Wal-Mart both moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that dismissal was warranted because the Plaintiffs failed to establish that they suffered an antitrust injury. In light of *Twombly*, the Plaintiffs' allegations of a vertical conspiracy were insufficient to state a claim for relief. The complaint alleged conduct that was equally explained by independent decision. The allegations that the court held failed to satisfy the *Twombly* pleadings standard included:

- Allegation that Defendants elected to pay interchange fees imposed by Visa and MasterCard to protect their own profits; and
- Allegation that Defendants then overcharged customers to make up for paying the excessive transaction fees of Visa and MasterCard.

Furthermore, the complaint mentioned no facts to support the claim that such an agreement or conspiracy existed, and the repeated assertions of conspiracy were insufficient.

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[94] *Temple v. Circuit City Stores, Inc.*, No. 06-CV-5303, 2007 WL 2790154 (E.D.N.Y. Sept. 25, 2007).

[95] The alleged conspiracy participants included: Visa, MasterCard, numerous financial institutions, and Visa Card Class Action—Merchant-Plaintiffs, specifically: Circuit City Stores, Inc. and Wal-Mart Stores, Inc.

Cases

Ross v. Bank of America (2008)[96]

INDUSTRY: Credit card issuing banks

ANTITRUST VIOLATION(S) ALLEGED: Unlawful agreement and conspiracy to boycott pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Credit card holders brought putative antitrust class action against credit card issuing banks alleging that banks illegally colluded to force cardholders to accept mandatory arbitration clauses. Plaintiffs also alleged that the banks participated in a group boycott by refusing to issue cards to individuals who did not agree to arbitration.

DEFENDANTS' MOTION: Defendants moved to dismiss for Plaintiff's failure to state a claim upon which relief could be granted, arguing that Plaintiffs did not have standing under Article III of the U.S. Constitution to assert their antitrust claim. Motion was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Second Circuit **REVERSED** and **DENIED** Defendants' motion to dismiss because the court found that the Plaintiffs had Article III standing.

COURT'S RATIONALE: Court held that cardholders had adequately alleged antitrust injuries in fact because the reduction in choice and diminished quality of credit services to which the cardholders claimed they had been subjected were anti-competitive effects constituting Article III injury in fact. The court declined to assess the plausibility of the alleged injuries in fact, stating that presently only Article III standing was in issue.

[96] *Ross v. Bank of Am.*, 524 F.3d 217 (2d Cir. 2008).

Cases

In re Parcel Tanker Shipping Services Antitrust Litigation (2008)[97]

INDUSTRY: Parcel tankers manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff and Defendants[98] are in the business of shipping and transporting bulk liquid chemicals via specialized shipping vessels called parcel tankers. Plaintiffs alleged that Defendants engaged in a conspiracy to fix the price of international shipments of liquid chemicals, thereby driving the Plaintiff corporation out of business.

DEFENDANTS' MOTION: In light of *Twombly*, Defendants moved for reconsideration of the court's prior ruling on their motion to dismiss. Specifically, Defendants argued that Plaintiff's complaint:

- Failed to allege any facts in support of the claim for predatory pricing; and
- Failed to allege any facts to support the claim that certain Defendants participated in a conspiracy.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court found that the complaint contained only conclusions and labels and lacked the factual enhancements required after *Twombly*. The court found the complaint deficient under the plausibility standard because:[99]

- The complaint alleged general conspiratorial activity without reference to specific actions by a particular Defendant at a particular time;
- The complaint never alleged specific facts tending to support the alleged theories of conspiracy;
- The complaint set a time frame only with respect to alleged "clandestine meetings" among some of the Defendants, but stated no specific examples of the Defendants' conduct in the meetings, other than general allegations of conspiracy; and
- The complaint never cited to specific wrongful acts of specific Defendants to support the allegations of customer allocation, division of markets, bid rigging, predatory pricing, elimination of competitors, nor monopolization.

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[97] *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 541 F. Supp. 2d 487 (D. Conn. 2008).

[98] The named Defendants included Odfjell Terminals Houston LP, Stolt-Nielson, Stolthaven Terminals, Inc, Jo Tankers, Tokyo Marine, TMM, and Copenhagen Tankers.

[99] *See* note 60 *supra*.

Cases

In re Payment Card and Merchant Discount Antitrust Litig. (2008)[100]

INDUSTRY: Credit card issuers

ANTITRUST VIOLATION(S) ALLEGED: Monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Individual Plaintiffs alleged the existence of at least two relevant product markets where Defendant, MasterCard, had a monopoly of network services, namely the authorization, clearance, and settlement of retail transactions.

DEFENDANTS' MOTION: MasterCard moved to dismiss arguing:

- Its roughly 30% share of the General Purpose Market foreclosed the Plaintiffs' claims as a matter of law; and
- That the law strongly disfavored recognition of a Single-Brand Product Market.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Plaintiffs' two liability theories were viable provided they could demonstrate the existence of the facts alleged in their pleadings.[101] The allegations that the court held as sufficient to support MasterCard having a monopoly in the General Purpose Market included:

- Allegations that MasterCard controlled prices by setting pricing tiers, increased interchange fees, and established different rates for general and premium cards, without losing business;
- Allegation that MasterCard forced merchants to accept a series of rules that insulated its interchange fees from competition, such as a prohibitions against passing cost of interchange fees to customers or refusing to accept a higher fee-carrying MasterCard;
- Allegation that the cost to merchants of accepting the card had increased, but in a properly functioning market, one would see higher prices correlating with lower demand; and
- Allegation that the level of MasterCard's interchange fees had no relationship to the processing burdens that MasterCard or its member banks incurred thus allowing MasterCard to set the price of its cards without regard to its costs.

Plaintiffs' allegations sufficient to support MasterCard having a Single-Brand Market included:

- Allegation that MasterCard required merchants to use its network to process all cards with its brand logo; and

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100 *In re Payment Card Interchange Fee & Merch. Discount Antitrust Litig.*, 562 F. Supp. 2d 392 (E.D.N.Y. 2008).

101 Court noted that the instant motion was briefed and argued before *Twombly* was decided. No party had suggested in its brief that *Twombly* altered the analysis or the outcome of this case.

Cases

- Allegation that MasterCard prohibits issuing banks from issuing payment cards that processed transactions through any other network.

Cases

Louisiana Wholesale Drug Co. v. Sanofi-Aventis (2008)[102]

INDUSTRY: Pharmaceuticals—leflunomide manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that Defendant violated § 2 of the Sherman Act when it filed a sham citizen-petition to the Federal Drug Administration to block the approval of five generic manufacturers. Plaintiff contended that Defendant filed the petition willfully to maintain and extend its monopoly power over the drug leflunomide, thereby continuing their ability to charge supra-competitive prices for the drug.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted, alleging that Plaintiffs lacked antitrust standing to sue Sanofi-Aventis because Plaintiffs were not the most efficient enforcers of antitrust claims, and that Plaintiffs failed to allege a relevant market as required by § 2 of the Sherman Act.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Plaintiffs had sufficiently defined the relevant market of the alleged monopoly. Court found that the complaint satisfied *Twombly* because:

- Plaintiff alleged actual injury by directly purchasing drugs from Defendants;
- Plaintiff alleged identifiable damages and injuries;
- Plaintiff had an identifiable self interest in pursuing the claim; and
- Plaintiff correctly alleged the relevant market to be the brand drug and its generic AB-rated equivalents.

[102] *Louisiana Wholesale Drug Co. v. Sanofi-Aventis U.S., LLC*, No. 07 Civ. 7343 (HB), 2008 U.S. Dist. LEXIS 3611 (S.D.N.Y. Jan. 18, 2008).

Cases

Maverick Recording Co. v. Chowdhury (2008)[103]

INDUSTRY: Recordings/music downloads

ANTITRUST VIOLATION(S) ALLEGED: None

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, a group of record companies, sued individual Defendants for copyright infringement via the Internet. Defendants counterclaimed alleging *inter alia* "antitrust violations." In its entirety, Defendants counterclaimed: "Plaintiffs have violated the antitrust laws of the U.S. by collusively refusing to enter into separate settlements, instead of trying settlement with any one Plaintiff to settlement with every other Plaintiff, and conferring all settlement authority upon their cartel, the Recording Industry Association of America."

DEFENDANTS' MOTION: Maverick Recording, Plaintiffs-Defendants, moved to dismiss the counter claim for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Defendants-Plaintiffs failed to adequately plead any cognizable claim. Court found the complaint to be insufficient because:

- Defendants-Plaintiffs did not specify which provision of antitrust law they believed the Plaintiffs were violating, nor did they attempt to establish any specific elements of an antitrust claim;
- Defendants-Plaintiffs failed to allege enough facts to support even a possible, let alone a plausible antitrust violation; and
- Even if Defendant-Plaintiff had adequately alleged a plausible antitrust violation, Maverick Recording's initiation of a lawsuit to enforce its legitimate copyrights would be immune from antitrust liability.

[103] *Maverick Recording Co. v. Chowdhury*, No. 07 Civ. 200, 2008 WL 3884350 (E.D.N.Y. Aug. 19, 2008).

Cases

American Medical Ass'n v. United Healthcare Corp. (2008)[104]

INDUSTRY: Health insurers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade and conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs challenged Defendants' practices in relation to decisions involving the "usual, customary, and reasonable" ("UCR") rates paid by Defendants for out-of-network medical services in connection with certain health care plans. Plaintiffs claimed that Defendants' conspired to under-reimburse beneficiaries and medical care providers by manipulating UCR data.

DEFENDANTS' MOTION: Defendants' moved to dismiss alleging that Plaintiffs failed to state a claim upon which relief can be granted. In particular, Defendants highlighted Plaintiffs' claims regarding the relevant market and degree of market power as insufficient.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: The court held that Plaintiffs "easily satisfy" the *Twombly* standard with respect to the conspiracy allegation because the complaint included the following allegations:

- Specific persons at meetings;
- Specific times of meetings;
- Specific locations of meetings;
- That an association of health insurance companies created a database in 1973 that it used for making UCR determinations "in direct violation of their contractual requirements" to their respective subscribers so as to under-compensate their subscribers; and
- That the UCR rates were lower than the rates should have been due to the use of purposely flawed data.

The court also noted that Plaintiffs did not need to provide evidence that Defendants were acting contrary to their "independent business interests."

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104 *Am. Med. Ass'n v. United Healthcare Corp.*, No. 00 Civ. 2800, 2008 WL 3914868 (S.D.N.Y. Aug. 22, 2008).

Cases

U.S. Information Systems v. Int'l Brotherhood (2008)[105]

INDUSTRY: Subcontractors

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade and conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): U.S. Information Systems employees, belonging to the Communications Workers of America (CWA union), alleged that Local 3, in conspiracy with the Defendant subcontractors, coerced general contractors to only use Local 3 subcontractors. CWA alleged that a general contractor who used CWA subcontractors for telecommunications work ran the risk of incurring vandalism or sabotage of the CWA subcontractor's work.

DEFENDANTS' MOTION: Defendants moved to dismiss alleging that Plaintiffs failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: The court held that Plaintiffs' complaint satisfied *Twombly* because:

- The complaint alleged that a specific meeting took place where Local 3's losing of bids to CWA subcontractors was discussed;
- The complaint alleged that after the meeting, Local 3 enforced a "total job policy" of attempting to exclude CWA workers from obtaining or keeping local telecommunication jobs;
- The complaint alleged several instances where a contract went to a Local 3 subcontractor after Local 3 had forced a general contractor to abandon CWA labor;
- The complaint included examples of Local 3 sabotaging building sites where CWA labor had been hired or was about to be hired;
- The complaint alleged that Defendant subcontractors were the longtime beneficiaries of Local 3's illegal activities; and
- The complaint alleged meetings where Local 3 representatives threatened contractors with slowdowns if they used CWA subcontractors.

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[105] *U.S. Info. Sys. Inc. v. Int'l Bhd of Elec. Workers Local Union No. 3*, No. 07 Civ. 127, 2008 WL 4090143 (S.D.N.Y. Sept. 2, 2008).

Cases

In re Digital Music Antitrust Litigation (2008)[106]

INDUSTRY: Digital music recordings

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs sought to represent a putative nationwide class of purchasers of digital music. Digital music is manufactured as a digital file and delivered in two interchangeable formats, compact discs and through Internet downloads. Defendants,[107] described as the four largest record companies in the U.S., allegedly control 80% of that market. Plaintiffs alleged that Defendants conspired to fix or artificially maintain the price of digital music by inflating and maintaining the price at supra-competitive levels. Defendants allegedly achieved this by fixing a high price for restraining the availability of Internet music, which in turn buoyed the price of CDs despite declining costs of production associated with the introduction of new technologies.

DEFENDANTS' MOTION: Defendants moved to dismiss the Second Consolidated Amended Complaint ("SCAC") for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.[108]

COURT'S RATIONALE: Court held that Plaintiffs failed to state a claim for relief because the instances of parallel conduct Plaintiff relied on did not place Defendants' conduct in the "context that raises a suggestion of preceding agreement." Importantly, the court noted that Defendants' "antitrust record" did not support an inference of illegal agreement. Rather, the court found mere investigation by government agencies not to be tantamount to an antitrust record. The allegations that the court found insufficient to infer an agreement included:

- Allegation that Defendants' subsequent adoption of parallel price and use restrictions resulted from an agreement based on their creation of or membership in a joint venture;
- Allegation that trade associations created an opportunity to communicate;
- Allegation that Defendants' imposition of price and use restrictions were against Defendants' economic self interest was implausible against the backdrop of widespread unauthorized music downloading; and

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106 *In re Digital Music Antitrust Litig.*, No. 06-MDL-1780, 2008 WL 4531821 (S.D.N.Y. Oct 9, 2008)

107 The named Defendants included: Bertelsmann, Inc.; SONY BMG Music Entertainment; Sony Corp. of America; Capitol Records, Inc. d/b/a EMI Music North America; EMI Group North America, Inc.; Capitol-EMI Music, Inc.; Virgin Records America, Inc.; Time Warner, Inc.; UMG Recordings, Inc.; Warner Music Corp.

108 This case was subsequently reversed on appeal by *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010). See page 65 of the digest for a summary of the Second Circuit's decision.

Cases

- Plaintiffs' ambiguous allegation of price increases did not support an inference of agreement because, as alleged, that conduct was merely consistent sequential parallelism.

Cases

Williams v. CitiGroup, Inc. (2009)[109]

INDUSTRY: Financing

ANTITRUST VIOLATION(S) ALLEGED: Horizontal and vertical conspiracies pursuant to § 1 and monopolization and attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Airport terminal financing, specifically Airline Special Facility Bonds ("ASF"), is issued by municipalities to airlines in to finance passenger terminals at airports. Plaintiff, an attorney who specializes in facility financing including sports arenas and airport terminals, developed a patent-pending structure for ASF bonds that she alleged was superior to the already existing ASF bonds and would provide significant financial benefits to airlines, airports, and bondholders. Defendant is a market leader in underwriting ASF bonds through its wholly owned subsidiary. Williams alleged that Defendants conspired with other banks, ASF underwriters and affiliates to unlawfully restrain trade by blocking Plaintiff from licensing her structure for use in ASF bond issuance.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiff's complaint did not allege the further facts required by *Iqbal* and *Twombly* to properly allege an agreement and therefore state a § 1 claim based on horizontal and vertical boycotts or state a § 2 claim for monopolization or attempted monopolization. Specifically, the complaint failed the plausibility standard because:

- Plaintiff identified only two parties (a parent and its subsidiary) as actual conspirators, but a parent and its wholly owned subsidiary are viewed as a single entity for conspiracy purposes;
- Plaintiff failed to identify a single conspirator with any particularity;
- Plaintiff failed to include any detail about how, when, where, and which airline Defendants threatened or coerced into boycotting the use of her structure; and
- Plaintiff did not allege that Defendants terminated a prior course of dealing.

[109] *Williams v. Citigroup*, No. 08-CV-9208, 2009 WL 3682536 (S.D.N.Y. Nov. 2, 2009).

Cases

RxUSA Wholesale Inc. v. Alcon Labs (2009)[110]

INDUSTRY: Pharmaceuticals

ANTITRUST VIOLATION(S) ALLEGED: Refusal to deal pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff RxUSA, a secondary wholesaler of pharmaceutical products, alleged that Defendants (pharmaceutical manufacturers, authorized pharmaceutical wholesalers, and individuals in control of a pharmaceutical enterprise) willfully acquired and sought to maintain a monopoly to exclude competition by secondary wholesalers in the wholesale pharmaceutical industry.

DEFENDANTS' MOTION: Various Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiff's § 2 monopolization claims against Defendants failed to state a claim because Plaintiff failed to allege that any Defendant possessed monopoly power in the relevant market and Plaintiff's § 1 claim failed to plausibly suggest an agreement. The court noted:

- Plaintiff failed to allege that Defendants possess market power;
- Plaintiff failed to allege when the conspiracy began, where it occurred, or what statements the Manufacturing Defendants made to one another;
- Plaintiff failed to place allegations in a context that raises a suggestion of a preceding agreement and not merely parallel conduct; and
- Because there is nothing suspect about a manufacturer's decision to decline to expand an existing and crowded distribution network, the complaint fails to allege facts suggesting an anti-competitive motive.

[110] *RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, No. 06-CV-3447, 2009 WL 3111728 (E.D.N.Y. Sept. 24, 2009).

Cases

In re Air Cargo Shipping Services Antitrust Litigation (2009)[111]

INDUSTRY: Air cargo carriers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that Defendants conspired and agreed to artificially inflate the prices of airfreight shipping services.

DEFENDANTS' MOTION: Magistrate judge issued a report and recommendation in which he recommended that Plaintiffs' Sherman Act claims be dismissed. Plaintiffs objected to the judge's recommendation.

DISPOSITION: District court respectfully disagreed with the judge and concluded that Plaintiff's complaint should not be dismissed for failure to state a claim upon which relief could be granted. Motion **DENIED**.

COURT'S RATIONALE: Court held that the complaint's allegations established plausible grounds to infer an agreement among the Defendants to artificially inflate the prices. Specifically, the court noted:

- The additional fact that numerous Defendants had pled guilty to criminal charges of fixing prices on air cargo shipments further supported the conclusion of a conspiracy to inflate prices;
- In the intervening months, since the Magistrate Judge's recommendation, the number of Defendants that had pled guilty had risen to 15, and three more had entered the Department of Justice's leniency program; and
- The admissions of price-fixing by so many of the Defendants certainly was suggestive enough to render a § 1 conspiracy plausible.

[111] *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2009 WL 3443405 (E.D.N.Y. Aug. 21, 2009).

Cases

Smugglers v. Smugglers (2009)[112]

INDUSTRY: Recreational property management services

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Defendants own and operate Smugglers' Notch, a four season residential and recreational community and Plaintiffs were the homeowners' association representing itself and all of its members. Defendants provide community and quasi-municipal services to Plaintiffs. Plaintiffs alleged four antitrust claims each of which sounded in an illegal tying arrangement in violation of § 1 of the Sherman Act based on Defendants' management contracts for various services it provided to Plaintiffs and its members.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiffs failed to adequately allege an appropriate geographical market. Specifically, the court noted:

- Plaintiffs failed to demonstrate why the vacation properties and recreational facilities at Smugglers' Notch were different from any of the myriad of other options at ski resorts in Vermont; and
- Plaintiffs' geographic and product markets were insufficient because they did not encompass all interchangeable substitute products.

[112] *Smugglers Notch Homeowners' Ass'n, Inc. v. Smugglers Notch Mgmt. Co.*, No 1:08-CV-186, 2009 WL 1545829 (D. Vt. May 29, 2009).

Cases

Simon-Whelan v. Andy Warhol Foundation (2009)[113]

INDUSTRY: Art Collections

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff alleged that for 20 years Defendants, including the Andy Warhol Foundation for the Visual Arts, Inc. (the "Foundation"), the Estate of Andy Warhol (the "Estate"), and the Andy Warhol Authentication Board, Inc. (the "Board"), conspired to control the market for Andy Warhol artwork. The Foundation and the Board are allegedly the central actors in the conspiracy. According to Plaintiff, Defendants have complete control over the authentication of Warhol artwork by virtue of the Board's status as sole recognized authentication authority for Warhol works and the Foundation's publication of an official catalogue of Warhol works.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Defendants' motion was denied to the extent that Plaintiffs' federal monopolization and market restraint claims were based on the Board's rejection of Double Denied, an alleged Warhol painting purchased for $195,000 that was previously authenticated by the Foundation and the Warhol Estate, but subsequently its authenticity was denied twice by Defendants, as an authentic Warhol. The court noted that Plaintiff sufficiently identified a relevant geographic and product market in which trade was allegedly unreasonably restrained or monopolized. Allegations that the court found sufficient to infer an agreement included:

- Allegation that the Board was completely dominated and controlled by the Foundation;
- Allegation that the Board made unsolicited suggestions that owners of purported Warhol works submit their works for authentication;
- Allegation that the Board's authentication policies, to the extent that they existed, were applied inconsistently and allowed the Board to reverse prior determinations when doing so would further their conspiracy;
- Allegations that the Board had refused to authenticate works that the Foundation previously attempted, unsuccessfully, to purchase;
- Allegations that the Board had denied the authenticity of works that others associated with the Estate and the Foundation had previously authenticated; and

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113 *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07-CV-6423, 2009 WL 1457177 (S.D.N.Y. May 26, 2009).

Cases

- Allegation that the Board was populated by individuals who lacked expertise in the authentication of Warhol works and who were not independent of the Foundation.

Cases

Gurvey v. Cowan, Liebowitz & Latman (2009)[114]

INDUSTRY: Live Concert Recordings

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff was employed as Of Counsel for Cowan, Liebowitz & Latman ("CLL") when she invented business plans to edit, package, and distribute live recordings of live music events, as well as electronic ticketing methods related to these recordings. CLL stated that it would rather have Plaintiff as a client and not an employee and that one of their clients, Clear Channel Communications ("CCC"), was interested in her inventions. CLL filed two patents with the USPTO naming the Plaintiff as sole inventor, but later withdrew as the attorney on one of her patents because of a conflict of interest. Subsequently, an affiliate of CLL's client CCC posted ads on their website announcing a new program that would allow concert-goers to purchase its recordings. Plaintiff alleged that the CCC Defendants violated federal antitrust law and that CLL and its partners aided and abetted those antitrust violations.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiff's conclusory pleadings of an antitrust violation were insufficient to state a claim of an antitrust violation. The complaint failed to satisfy the *Twombly* standard because:

- Plaintiff made little attempt to define the market within which CCC's monopoly supposedly existed, alleging only that Defendants have made certain efforts to operate within "the relevant live concert venue market in the United States" or the "US pop concert venues and radio markets";
- Plaintiff failed to adequately plead a relevant market; and
- Plaintiff failed to adequately allege the holding or wielding of monopoly power, *i.e.*, the power to control prices in the relevant market or to exclude competitors.

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[114] *Gurvey v. Cowan, Liebowitz & Latman*, No. 06-CV-1202, 2009 WL 1117278 (S.D.N.Y. Apr. 24, 2009).

Cases

Nichols v. Mahoney (2009)[115]

INDUSTRY: Construction

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Construction workers and former employees of Defendant brought *inter alia* a § 1 Sherman Act violation against construction companies and principal alleging that Defendant's actions of depressing wages by knowingly hiring undocumented aliens constituted an illegal scheme to restrain free competition within the construction industry by giving Defendants an unfair advantage over competitors who did not employ illegal workers.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiffs were trying to use the antitrust laws to redress a violation of the immigrations laws and it simply did not work. Accordingly, Plaintiff's federal antitrust claim was dismissed with prejudice because:

- The complaint failed to allege an agreement, in that all the allegedly anti-competitive activity was committed by Defendants in the course of running their own business;
- Plaintiff did not suffer any antitrust injury and lacked standing to sue under antitrust laws;
- Plaintiff failed to allege how the use of illegal labor caused harm to competition in the market, rather than the competitors themselves or the workers; and
- The second alleged antitrust injury, that the Defendants inflated the size of the labor pool, was the antithesis of an injury to competition, which is the type of injury the antitrust laws are intended to prevent.

[115] *Nichols v. Mahoney*, 608 F. Supp. 2d 526 (S.D.N.Y. 2009).

Cases

Habitat, LTD v. Art of the Muse, Inc. (2009)[116]

INDUSTRY: Faux antique furniture

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 and of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a domestic retailer of antique faux furniture, brought suit against Defendant, a manufacturer and distributor of faux antique furniture, alleging that Defendant boycotted Plaintiff to maintain a monopolistic power over the Suffolk County, New York market for faux antique furniture or alternatively, to use its enormous market power to prevent competition in Suffolk County. Specifically, the complaint alleged that Defendant terminated its distribution agreement with Plaintiff (subsequently causing Plaintiff to go out of business) at the behest of a national distributor of Defendant's furniture.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted because the only harm alleged in the complaint was a harm to Plaintiff and not to competition in the relevant market.

DISPOSITION: Motion **GRANTED** with prejudice.

COURT'S RATIONALE: Court held that the fact that consumers can no longer purchase Defendant's furniture from Plaintiff or other hypothetical small retailers did not amount to an injury to competition as a whole.

- Plaintiff failed to demonstrate market-wide injury to competition; and
- Plaintiff's allegation which arose solely out of Defendant's termination of its distribution agreement with Plaintiff failed to allege harm to competition in a manner that the antitrust laws were meant to guard against.

[116] *Habitat, LTD v. Art of the Muse, Inc.*, No. 07-CV-2883, 2009 WL 803380 (E.D.N.Y. Mar. 25, 2009).

Cases

All Star Carts & Vehicles, Inc. v. BFI (2009)[117]

INDUSTRY: Solid waste management services

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 and attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs brought an antitrust class action on behalf of all persons and entities that had contracted with and purchased small containerized waste disposal services from Defendants, who collectively were engaged in the provision of non-hazardous solid waste management services in the U.S. Plaintiffs alleged that certain of Defendants' contractual provisions were anti-competitive and allowed Defendants to maintain their market power.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED** in part and **DENIED** in part.

COURT'S RATIONALE: Court held that the allegations of conspiracy were general in nature—those allegations alluded to nothing more than Defendants' participation in meetings, conversations and communications. Some allegations were nothing more than a recitation of the terms of the agreements and nothing more. Such allegations did not state facts sufficient to nudge Plaintiffs' claims across the line from conceivable to plausible. As it related to the monopolization claim, however, the court found the complaint clearly identified the relevant product and geographic market. The court found the complaint sufficiently stated monopolization and attempted monopolization claims because:

- Plaintiffs' categorizations of the relevant product and geographic market, *i.e.*, the market for small containerized waste hauling and disposal services in Long Island, New York were sufficient;
- The complaint clearly defined the market;
- Plaintiffs alleged that Defendants control approximately 65% of the relevant market;
- Plaintiff alleged that the contracts gave Defendants the ability to exclude competition and set prices; and
- The market-share alleged, along with specific claims of anti-competitive conduct, was sufficient.

[117] *All Star Carts & Vehicles, Inc. v. BFI Can. Income Fund, IESI Corp.*, 596 F. Supp. 2d 630 (E.D.N.Y. 2009).

Cases

In re Currency Conversion Fee Antitrust Litigation (2009)[118]

INDUSTRY: Credit Card companies/financing

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, who hold general purpose credit cards issued by one or more of the Defendants, brought a putative antitrust class action alleging that certain general purpose credit card issuers colluded to force cardholders to accept mandatory arbitration clauses in cardholder agreements in violation of § 1 of the Sherman Act. Complaint asserted that Defendants formed an organization uniquely devoted to collectively promoting and implementing mandatory arbitration clauses in their cardholder agreements known among participants as the "Arbitration Coalition" that convened on at least 19 different occasions. Plaintiffs contended that the purpose of the Arbitration Coalition was to further a conspiracy to suppress competition and impede access to the court system.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted due to lack of antitrust standing.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Plaintiffs allegations were sufficient to raise Plaintiffs' claims above the merely speculative level and because Plaintiffs sufficiently alleged that they had suffered an antitrust injury and were efficient enforcers of that injury they had antitrust standing. The court found the complaint sufficient because:

- Plaintiffs alleged a number of meetings between the Defendants, American Express and Discover;
- Plaintiffs alleged the times and purposes of those meetings; and
- Plaintiffs alleged the specific product of the conspiracy and its anti-competitive effect.

[118] *In re Currency Conversion Fee Antitrust Litig.*, No. MDL 1409, 2009 WL 151168 (S.D.N.Y. Jan. 21, 2009).

Cases

Hinds County, Miss. v. Wachovia Bank, N.A. (2009)[119]

INDUSTRY: Municipal derivatives

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, municipalities and other purchasers of municipal derivatives brought an antitrust action arising out of an alleged conspiracy on the part of more than 40 corporate Defendants and others to illegally rig bids, limit competition, and fix prices in the municipal derivative market, all in violation of § 1 of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED** in part and **DENIED** in part.

COURT'S RATIONALE: Court held that the Plaintiffs failed to make well-pled allegations that, taken as true, raise a reasonable expectation that discovery will reveal evidence of illegal agreement with respect to the Joint Defendants against whom the complaint makes no specific factual averment of involvement in the alleged conspiracy. The complaint was insufficient to meet the plausibility standard because:

- Complaint failed to state claim as to joint Defendants about whom it made no specific allegations;
- Specific allegations, taken as true, made Plaintiffs' claims of conspiracy plausible as to three joint Defendants, but not all;
- Complaint failed to make specific allegations regarding the following Joint Defendants' involvement in the alleged conspiracy: AIG; Financial Security Holdings; Financial Security Assurance; Financial Guaranty; GE; Genworth; AIG SunAmerica; UBS; XL Capital; XL Funding; XL Life; Merrill Lynch; Morgan Stanley; NatWest; Investment Management Advisory; First Southwest; Kinsell Newcomb; Shockley; Cain Brothers; Morgan Keegan and Trinity Funding;
- Complaint's reliance on some of the Joint Defendants' involvement in trade associations or conferences could not support the complaint's allegations of a conspiracy; and
- Complaint's allegations relating to a government investigation that the "IRS has stated that it has come across instances of price-fixing, bid-rigging and kickbacks" though suggestive were too general to make an antitrust claim plausible to any specific Defendant other than Bank of America.

With regard to specific Defendants CDR, JP Morgan, and Bear Stearns, the court found the allegations plausible, especially in light of BoA's participation in the DOJ leniency program and the admission of criminal antitrust activity that it entailed.

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[119] *Hinds County, Miss. v. Wachovia Bank, N.A.*, 620 F. Supp. 2d 499 (S.D.N.Y. 2009).

Cases

Starr v. Sony BMG Music Entertainment (2009)[120]

INDUSTRY: Digital Media/Music

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs brought suit against Defendants, producers, licensors, and distributors of music sold as digital files online via the Internet and on compact discs, alleging that Defendants conspired to fix prices of digital music by using most favored nations clauses in their licensing agreements, joint ventures, and secret agreements to fix the prices and terms under which their music would be sold over the Internet in violation of § 1 of the Sherman Act.

DEFENDANTS' MOTION: Defendant's motion to dismiss for failure to state a claim upon which relief could be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Second Circuit **REVERSED** and **DENIED** Defendant's motion and **REMANDED** for further proceedings consistent with its opinion.

COURT'S RATIONALE: Court held that the second consolidated amendment complaint contained plausible grounds to infer an agreement, thus the district court erred in dismissing the complaint. The court noted that:

- Defendants' price fixing was currently the subject of a pending investing by the Office of the New York State Attorney General regarding wholesale prices charged for Internet music;
- Defendants' price fixing was currently the subject of a Department of Justice ("DOJ") investigation into collusion and price fixing commenced in March 2006;
- Defendants' price fixing was currently the subject of a DOJ investigation into whether Defendants misled DOJ about the formation and operation of Music;
- Plaintiffs alleged that they were injured by paying more for Internet music and CDs than they would have in the absence of an illegal agreement;
- Plaintiffs alleged that dramatic cost reductions and elimination of fixed costs such as copying the CD's, packaging, producing the CD case, labels, anti-shoplifting packaging, shipping, shelving, staffing, and shrinkage were not accompanied by dramatic price reductions for Internet music;
- Plaintiffs alleged that Defendants' joint ventures due to several reasons such as their restrictive licensing terms, requirement that previously purchased music would have to be repurchased every year, interface set up that upon customers unsubscribing to service they would immediately lose all of

120 *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010).

Cases

their music, and unreasonable price points made the joint ventures against the Defendants' self interests;

- Plaintiffs alleged that all Defendants refused to do business with eMusic, the #2 Internet Music retailer behind only iTunes; and

- Plaintiffs alleged that certain Defendants had side agreements with licensees that assured them their terms would be no less favorable than certain other Defendants.

Cases

Howard Hess Dental Labs., Inc. v. Dentsply Int'l (2007)[121]

INDUSTRY: Artificial teeth manufacturers and dealers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Dental Laboratories brought an antitrust class action against manufacturers of artificial teeth and designated dealers.[122] Plaintiffs alleged exclusive dealing and price-fixing conspiracies to maintain a purported monopoly on the manufacturing of artificial teeth for sale in the U.S., restraint of trade by the implementation of exclusive dealing arrangements, and sale of teeth at anti-competitive prices.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the amended complaint contained no facts to support an inference that Defendants acted in unison or shared a unity of purpose or a meeting of the minds as opposed to parallel conduct. The complaint failed to satisfy the *Twombly* standard because:

- Plaintiffs failed to plead facts from which the court could reasonably infer the intent of the dealers to create and maintain a monopoly; and
- Plaintiffs failed to offer facts that demonstrated a concerted action between the Defendants as required for Plaintiffs' § 1 claims.

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121 *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 516 F. Supp. 2d 324 (D. Del. 2007).

122 The moving Defendants included Arnold Dental Supply Co.; Atlanta Dental Supply Co.; Dental Supplies & Equipment, Inc.; Iowa Dental Supply Co., LLC; Johnson & Lund Co., Inc.; Kentucky Dental Supply Co.; n/k/a KDSA Liquidation Corp.; Marcus Dental Supply Co. Inc.; Mohawk Dental Co.; Ryker Dental of Kentucky, Inc.; Accubite Dental Lab, Inc.; Benco Dental Co.; Burkhart Dental Supply Co.; Darby Dental Laboratory Supply Co., Inc.; Hendon Dental Supply, Inc.; Henry Schein, Inc.; Jahn Dental Supply Co.; Nowak Dental Supplies, Inc.; Patterson Dental Co.; and Pearson Dental Supplies, Inc.

Cases

Behrend v. Comcast Corp. (2007)[123]

INDUSTRY: Cable services provider

ANTITRUST VIOLATION(S) ALLEGED: Per se violation based on horizontal allocation of markets pursuant to § 1 and monopolization or attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Consolidated class actions arising from cable televisions corporation's activities in Philadelphia, Chicago, and Boston geographic markets. In their consolidated amended class action complaint, Plaintiffs alleged that because of prior swap agreements between AT&T and Charter Communications, Cablevision Systems Corp., and MediaOne in the Boston Cluster prior to AT&T Broadbands' merger with Comcast, Comcast was liable for antitrust liability arising from the creation of the Boston cluster. Plaintiffs asserted that the swap transactions in Boston eliminated actual and potential competitors, constituting an unreasonable restraint on competition for cable television services in the Boston cluster.

DEFENDANTS' MOTION: Defendants moved for a judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court first distinguished from *Twombly* in that in this case, the complaints allege sufficient facts to show an "agreement." Court held that the complaints satisfied the antitrust pleading standard announced in *Twombly* based upon a per se violation of § 1 of the Sherman Act because the following factual averments were found:

- Before the transactions, the Philadelphia market contained numerous competitors;
- Parties to the swap transactions were in actual or potential competition with each other;
- The swap transactions physically removed actual and potential competitors from the Philadelphia and Chicago clusters, making the competitors' return to those areas financially unattractive and further raising barriers to entry for other competitors;
- The swap transactions removed a check on Comcast's ability to raise prices;
- Potential competitors had not entered or re-entered the Philadelphia and Chicago markets;
- The swap transactions further suppressed competition by increasing already high barriers to entry by actual or potential competitors, including over-builders;

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123 *Behrend v. Comcast Corp.*, 532 F. Supp. 2d 735 (E.D. Pa. 2007).

Cases

- Comcast received competitors' cable systems and cable subscribers in the Philadelphia and Chicago cable markets in exchange for Comcast's cable systems and cable subscribers in other parts of the country;
- At that time, Comcast controlled 94% and 92% of the cable market in Philadelphia and Chicago clusters; and
- Comcast used its monopoly power to raise cable prices in the Philadelphia and Chicago clusters to artificially high, supra-competitive levels.

Cases

In re Linerboard Antitrust Litigation (2007)[124]

INDUSTRY: Manufacturers of corrugated sheets

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that several U.S. linerboard manufacturers conspired to restrict linerboard (which includes any grade of paperboard suitable for use in the production of corrugated sheets used in manufacture of corrugated boxes) output in order to increase the price of corrugated sheets and corrugated boxes.

DEFENDANTS' MOTION: Defendants *inter alia* moved for summary judgment arguing that Plaintiffs' conspiracy evidence did not rule out the possibility that Defendants acted independently.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that there was sufficient evidence of a conspiracy to deny the motion because:

- The facts strongly suggested, and were not merely consistent with, a price-fixing conspiracy;
- Defendants took "market downtime" at linerboard mills, or the idling of machines that are capable of full production;
- Plaintiffs alleged that market downtime was incredibly expensive to Defendants because it entailed shut-down costs, start-up costs, and opportunity costs of foregone sales;
- Plaintiffs alleged that prior to this market downtime, one of the Defendants had never taken any market downtime in its 40+ year history of operating linerboard mills and another Defendant had only taken one in 10 years before the downtime in issue;
- Plaintiffs alleged that the linerboard industry was susceptible to collusion because linerboard was a homogeneous commodity sold in a concentrated market with high barriers to entry and "huge" fixed costs of production; and
- Plaintiffs produced "immense" support and documentation of a possible agreement between the Defendants to fix prices.

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[124] *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38 (E.D. Pa. 2007).

Cases

In re Hypodermic Products Antitrust Litigation (2007)[125]

INDUSTRY: Medical/pharmaceutical suppliers

ANTITRUST VIOLATION(S) ALLEGED: Unreasonable restraint of trade and unlawful tying pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs were pharmacies in Tennessee and New York and healthcare providers and distributors in the pharmaceutical and medical device industry that purchased various disposable hypodermic products manufactured by Defendant through a distributor or wholesaler. Plaintiffs alleged that Defendant, a medical device manufacturer that supposedly controlled a dominant share of the relevant market for hypodermic products in the early 1980s, engaged in anti-competitive and illegal practices to foreclose competition in the relevant market by suppressing competition from current competitors and/or product innovators in violation of the Sherman Act. Specifically, the Plaintiffs alleged that Defendant committed anti competitive practices with the imposition of market share purchase requirements on persons purchasing disposable hypodermic products; Defendant's bundling of its goods for exclusionary and predatory purposes; Defendant's, exclusionary contracts with certain GPOs; and Defendant's bundling of its goods with the goods of other manufacturers for exclusionary purposes.

DEFENDANTS' MOTION: Defendant moved to dismiss Plaintiffs' consolidated class action complaint for failure to state a claim upon which relief could be granted. Defendant argued that Plaintiffs did not adequately allege the essential elements or necessary facts of any of its federal antitrust claims, such as a relevant market, anti-competitive effects, antitrust injury, standing, and unlawful exclusive dealing or exclusionary conduct.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the complaint satisfied *Twombly* because:

- Complaint alleged that Defendant entered into anti-competitive arrangements with Group Purchasing Organizations ("GPOs"), such as Premier, whereby it would pay the GPOs millions of dollars in cash payments as well as equity positions;
- Complaint cited to an article from February 1997 which stated that, as a result of a recent deal between Defendant and Premier, Premier would receive a portion of administrative fees in the form of warrants to buy Defendant's stock;
- Complaint alleged that Defendant entered into agreements with certain customers which included bundled financial incentives and exclusive dealing commitments;

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125 *In re Hypodermic Prod. Antitrust Litig.*, No. 05-CV-1602, 2007 WL 1959224 (D.N.J. June 29, 2007).

Cases

- Complaint alleged that the object of such arrangements was to prevent Plaintiffs from purchasing disposable hypodermic products made by other manufacturers;
- Complaint alleged that Plaintiffs were injured by Defendant's exclusionary practices;
- Complaint alleged that Defendant attempted to maintain monopoly power by bundling prices with intent to foreclose competition; and
- The complaint adequately alleged four different relevant markets.

Cases

In re OSB Antitrust Litigation (2007)[126]

INDUSTRY: Oriented strand board manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, direct and indirect purchasers of Oriented Strand Board, filed class action alleging a horizontal price-fixing conspiracy among the nine major OSB manufacturers.[127]

DEFENDANTS' MOTION: Defendants moved for judgment on the pleadings alleging Plaintiffs' complaint did not meet the *Twombly* pleading standard because Plaintiff failed to allege sufficient facts of an agreement.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Plaintiffs satisfied the *Twombly* standard by stating a claim of relief that was plausible on its face, by making independent allegations that supported an inference of an actual agreement among Defendants that would go beyond parallel conduct. The allegations that the court held satisfied *Twombly* included:

- Allegation that Defendants together controlled 95% of the OSB market;
- Allegation that on or about June 1, 2002, Defendants together tacitly agreed to raise OSB prices to revitalize the stagnate OSB market;
- Allegation that Defendants fixed prices using the twice-weekly published price list in *Random Lengths*, which included lists of OSB prices by region;
- Allegation that by agreement Defendants continued to curtail production over the next two years despite increasing industry demand and skyrocketing OSB prices;
- Allegation that Defendants confirmed their agreements at industry trade show meetings; and
- Allegation that acting in concert Defendants took the following actions to reduce the supply of OSB in accordance with such agreement:

    (1) Kept OSB from the market through mill shutdowns;

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126 *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419 (E.D. Pa. Aug. 3, 2007).

127 Named Defendants included Louisiana-Pacific; Norbord; Weyerhauser; Potlatch; Ainsworth; and Grant Forest Products, Inc. Defendant Grant Forest sought dismissal on pleadings because it was only explicitly mentioned as Defendant in one lone paragraph. Court denied dismissal noting that Plaintiffs need only allege a Defendant joined and participated in the alleged price-fixing conspiracy. Court cited *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 822 (3d Cir. 1982) (district court should not "compartmentalize" a conspiracy claim by conducting "a seriatim examination of the claims against each of five conspiracy Defendants as if they were separate lawsuits").

Cases

(2) Delayed or canceled the construction of new OSB mills;

(3) Bought OSB from competitors instead of manufacturing it themselves (which they could have done at lower cost); and

(4) Maintained low operating rates at mills.

Cases

Building Materials Corp. of America v. Rotter (2008)[128]

INDUSTRY: Manufacturing of roofing products

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff-Defendant[129] was the dominant manufacturer and marketer of commercial and residential roofing products and accessories in the U.S. Defendant-Plaintiff alleged that Plaintiff-Defendant entered into an exclusive contract with a supplier of non-woven mesh used in Defendant-Plaintiff's competing roof vents with the intent to harm the competitiveness of his product by forcing him to buy non-woven mesh from overseas.

DEFENDANTS' MOTION: Plaintiff-Defendant brought motion to dismiss Defendant-Plaintiff's counterclaims.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Defendant-Plaintiff did not adequately allege relevant product market on a claim of illegal restraint of trade nor did Defendant-Plaintiff adequately allege relevant product market on monopoly leveraging claim. Court found that in neither his counterclaim nor in his brief did Defendant-Plaintiff provide any factual basis to support his bare assertion that the relevant market was asphalt shingle roof-ridge vents. The court held the complaint failed to satisfy the *Twombly* pleading standard because:

- Defendant-Plaintiff made no reference to the price of and/or demand for asphalt shingle roof ridge vents relative to the roofing products industry as a whole;
- Defendant-Plaintiff defined the relevant product market without reference to the rule of reasonable interchangeability and cross-elasticity of demand; and
- Defendant-Plaintiff's monopoly leveraging claim failed to provide proof of a threatened or actual monopoly in the leverage market and failed to allege a relevant product.

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128 *Bldg Materials Corp. of Am. v. Rotter*, 535 F. Supp. 2d 518 (E.D. Pa. 2008).

129 The named Plaintiff-Defendants were Building Materials Corp. of America, d/b/a GAF Materials Investment Corp.

Cases

In re Pressure Sensitive Labelstock Antitrust Litigation (2008)[130]

INDUSTRY: Manufacturers/producers of pressure sensitive labelstock ("PSL")

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Self-adhesive labelstock purchasers brought a class action asserting a conspiracy among self-adhesive labelstock producers[131] to fix prices.

DEFENDANTS' MOTION: Defendants moved for a motion on the pleadings arguing that *Twombly* required that each allegation be assessed separately as to its consistency with competitive behavior.

DISPOSITION: Motion **DENIED** as to Defendant MAC, but **GRANTED** as to Defendant, Bemis.[132]

COURT'S RATIONALE: Court held that *Twombly* was distinguishable because it involved state-created monopolies that created a unique market, from which to assess the conscious parallelism. Allegations against MAC that the court held satisfied *Twombly* included:

- Allegation that prior to UPM's expansion into the North American market, Defendants MAC and Avery elected not to compete for customers;
- Allegation that UPM entered the U.S. market despite the excess production capacity and cut prices by 10% because prices were maintained at supra-competitive levels;
- Allegation that such agreement was contrary to MAC's economic self interest in light of the newly developed and considerable excess production capacity;
- Allegation that there was excess capacity industry-wide;
- Allegation that as a consequence of such forbearance, the conspirers' respective market shares and prices remained relatively stable;
- Allegation that prices for PSL were set a supra-competitive levels, as evidenced by UPM's entry into the U.S. market despite the existence of considerable excess capacity in the industry and its ability (through Defendant Raflatac) to undercut prices by 10% or more;
- Allegation that UPM's goal was to acquire 20% of the U.S. market and that two of the named Defendants held meetings to discuss easing price competition between them;

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130 *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363 (M.D. Pa. 2008).

131 The named Defendants included: Morgan Adhesives Company (MAC); Bemis Company, Inc. (the parent of Morgan Adhesives); Avery Dennison Corp. (largest producer of PSL in the US); Raflatac, Inc. (the second largest PSL producer); and UPM-Kymmene (Finnish Corp., major producer of various types of paper used to produce PSL).

132 Bemis, the parent company of MAC, was not held liable merely because its subsidiary was liable, but because Plaintiff failed to attribute to Bemis the conduct of MAC.

Cases

- Allegation that Bemis agreed and sold MAC to UPM as part of the conspiracy to restrain trade, as evidenced by selling said division for half the price it had rejected two years earlier;
- Allegation that MAC CEO appointed by UPM predicted "discipline" in the market; and
- Allegation that MAC announced a price increase that Avery later followed which occurred after employees from both attended an October 2000 conference together.

Cases

BabyAge.com v. Toys "R" Us (2008)[133]

INDUSTRY: Retailers of baby and juvenile products

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade and conspiracy to monopolize under § 1 and monopolization and attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, retailers and consumers of baby and juvenile products, alleged that Babies "R" Us ("BRU") conspired with manufacturers of products sold in their stores to sell goods at or above a certain price, causing consumers to pay above and beyond what they would have paid under competitive conditions.

DEFENDANTS' MOTION: Defendant moved to dismiss for failure to state a claim upon which relief can be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Plaintiffs' allegations, if proven, would demonstrate a §§ 1 or 2 claim. The following specific allegations regarding restraint of trade were sufficient:

- There are "high-end" markets for various baby products such as strollers or car seats; and
- A hypothetical monopolist could profitably raise prices in each of the respective markets for a short time, supported by data on interchangeability and cross-elasticity of demand.

The court held that the Plaintiffs pleaded widely-acceptable "plus factors" in support of their claim of concerted action. Those allegations included:

- That the parallel conduct at issue was against each manufacturers' independent self interest because minimum resale price maintenance agreements ("RPMs") ultimately diminish sales;
- That BRU wielded sufficient influence over each manufacturer to inflict duress; and
- That BRU threatened to retaliate against any manufacturer that did not implement RPMs.

The court found the following allegations in support of anti-competitive action sufficient:

- Each manufacturer depended upon BRU for a large portion of its retail sales because of its monopolistic-share of the relevant markets; and
- That BRU's RPMs blocked certain sales.

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133 *BabyAge.com v. Toys "R" Us*, 558 F. Supp. 2d 575 (E.D. Pa. 2008).

Cases

The court found the following allegations sufficient to support Plaintiffs' monopolization claims:

- The relevant markets have significant barriers to entry because of high start-up costs and industry regulation and BRU contributed to the barriers by procuring anti-competitive RPMs;
- BRU's monopolization caused injury to the consumer Plaintiffs who paid higher prices and for the retailer Plaintiffs who lost sales volume; and
- Numerous meetings took place regarding the RPMs and BRU enforced them via threats.

Cases

Univac Dental Company v. Dentsply Int'l (2008)[134]

INDUSTRY: Manufacturers of prefabricated artificial teeth

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): The U.S. Department of Justice instituted an antitrust action against Dentsply. Reversing the district court, the Third Circuit found that Dentsply's aggressive market-control strategies violated § 2 and final judgment against Dentsply was entered. Over a year later, Lactona, and its predecessor entity, Univac Dental Company, alleged that Dentsply monopolized the market for artificial teeth.

DEFENDANTS' MOTION: Defendant moved to dismiss for failure to state a claim upon which relief can be granted on two grounds. First, it argued that the claim was time-barred because when Lactona filed, the statute of limitations forbade all claims except those accruing on or after January 5, 1995 and no specific allegations were made about conduct occurring after that time. Second, Dentsply alleged that Lactona's complaint failed to allege a substantive antitrust injury.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Lactona's complaint, predicated upon Dentsply's 1994 actions and two undated incidents, was sufficient under the four-year statute of limitations because Lactona did not need to allege the precise timing of every instance of conduct. There is no heightened pleading standard with respect to a statute-of-limitations argument. The court also held that Lactona pled allegations that, if proven, would demonstrate a § 2 claim because:

- Dentsply controlled approximately seventy-five percent of the U.S. market for prefabricated artificial teeth, a share about fifteen times as large as that of the second-largest producer;
- Because laboratories expect dealers to stock Dentsply products, due in part to its market dominance, Dentsply wielded considerable influence over the terms and conditions on which dealers purchased and sold its products and those of its competitors;
- Dentsply threatened to cease supplying teeth to one dealer that had ordered $25,000 Lactona teeth;
- Dentsply purchased and destroyed another dealer's inventory of Lactona teeth;
- Dentsply threatened other dealers with termination if they continued to sell competitor's teeth;
- In 1993, Dentsply promulgated Dealer Criterion No. 6, which prohibited its dealers from carrying competitors' new products; and

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[134] *Univac Dental Co. v. Dentsply Int'l, Inc.*, No. 1:07-CV-0493, 2008 WL 2486134 (M.D. Pa. June 17, 2008).

Cases

- No Dentsply dealer added competing tooth lines to its inventory between 1993 and 1999.

Cases

Alarmax Distributors v. Tyco Safety Prods. Canada (2008)[135]

INDUSTRY: Tyco distributors

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): In 2002, Plaintiff and Defendant reached a settlement agreement regarding breach of an oral distribution agreement. Plaintiff contended that the agreement was renewed on June 28, 2007 and set to expire on June 27, 2009. This distribution agreement required Plaintiff and other independent distributors to become exclusive dealers and carry only Defendant's products. Plaintiff refused to sign the agreement and brought suit alleging *inter alia* violation of §§ 1 & 2 of the Sherman Act.

DEFENDANTS' MOTION: Defendant moved to dismiss arguing that:

- Plaintiff's claimed product market definition was legally invalid;
- Plaintiff failed to plead a cognizable antitrust injury; and
- Plaintiff failed to plead an actual agreement.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the facts as pled would raise a reasonable expectation that discovery would reveal evidence of an agreement. Thus, the court held that dismissal was not merited under *Twombly* because:

- The complaint contained allegations indicating that the independent distributors were the customers;
- The complaint included allegations as to why the manufacturers were unable to employ their own distribution channels;
- The complaint alleged that barriers to entry in the industry were high;
- The complaint alleged an adequate injury in that the sale of burglar alarm products has been unreasonably restrained; installers and contractors had to pay artificially-high prices; and Tyco competitors had been foreclosed from competing; and
- The complaint sufficiently alleged an unlawful agreement in that Plaintiff referenced a distribution agreement with which Defendants were attempting to force it to sign that Defendant told Plaintiff all of Tyco products' distributors had to sign.

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135 *Alarmax Distribs., Inc. v. Tyco Safety Prods. Canada Ltd.*, No. 7-CV-1744, 2008 WL 2622899 (W.D. Pa. June 27, 2008).

Cases

Teva Pharmaceutical Indus. v. Apotex (2008)[136]

INDUSTRY: Pharmaceutical manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Monopolization and attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Teva sued Apotex alleging that Apotex infringed three of its patents. Apotex counterclaimed alleging that Teva violated § 2 of the Sherman Act based on its sham litigation of a patent infringement suit.

DEFENDANTS' MOTION: Plaintiff, responding to Defendant's counterclaim, moved to dismiss, arguing that Apotex's § 2 claim must fail because it had not alleged sufficient facts to show that Teva's lawsuit was objectively baseless.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the amended answer was deficient. Court agreed with Teva that Apotex's antitrust counterclaims constituted sham litigations, thus the *Noerr-Pennington* exception did not apply. The court dismissed the claim pursuant to *Twombly* because:

- Apotex failed to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand; and
- Apotex failed to allege Teva's market power.

[136] *Teva Pharm. Indus., Ltd. v. Apotex, Inc.*, No. 07-5514, 2008 WL 3413862 (D.N.J. Aug. 8, 2008).

Cases

In re Compensation of Managerial Antitrust Litigation (2008)[137]

INDUSTRY: Oil industry staffing

ANTITRUST VIOLATION(S) ALLEGED: Unlawful restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs (several managerial, professional, and technical ("MPT") employees of certain major U.S. oil companies) alleged that Defendant oil companies, in violation of § 1 of the Sherman Act, exchanged detailed salary information so as to suppress the growth in oil industry salary levels and eliminate the so-called oil industry premium paid on the salaries of MPT employees.

DEFENDANTS' MOTION: Defendants moved for summary judgment under Rule 56(c) arguing that Plaintiffs failed to present evidence sufficient to create a triable issue of fact with respect to the claim of information sharing causing anti-competitive effects in the relevant market. Defendants argued that:

- The relevant product market was limited to oil and petrochemical industry employers or that Plaintiffs lacked substitutable job opportunities outside of those employers; and
- The court, in denying class certification, had already rejected any attempt by Plaintiffs to proceed without having to prove a relevant product market.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that direct evidence must be "moored" to an appropriate relevant market. Although Plaintiffs may not need to define the relevant market with the same level of precision that is required under the traditional method of demonstrating market power, Plaintiffs are required to prove, at least roughly, the parameters of the relevant labor markets.

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[137] *In re Compensation of Managerial, Prof'l & Technical Employees Antitrust Litig.*, Nos. MDL 1471, 02-CV-2924, 2008 WL 3887619 (D.N.J. Aug. 20, 2008).

Cases

Black Box Corp. v. Avaya, Inc. (2008)[138]

INDUSTRY: Telecommunications software and maintenance

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying and illegal conspiracy pursuant § 1 and monopolization, attempt to monopolize, and conspiracy to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff filed an amended complaint asserting *inter alia* five causes of action for violations of the Sherman Act. Plaintiff alleged that Avaya monopolized, conspired to monopolize, and attempted to monopolize the market of post-warranty service and maintenance for Definity and other ECG Platform equipment including the submarkets for the provision of service and maintenance and the sale of maintenance contracts in the United States.

DEFENDANTS' MOTION: Defendants moved to dismiss the claim arguing that the complaint did not allege facts sufficient to establish a conspiracy because Plaintiff failed to (1) identify any of the other alleged co-conspirators by name; (2) identify any particular communication supporting the conspiracy; and (3) identify any of the steps that were used by the co-conspirers to eliminate competition.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: The court rejected Defendants' arguments, stating that "in *Twombly*, the concern was not that the allegations in the complaint were insufficiently particularized, but warranted dismissal because it failed *in toto* to render Plaintiff's entitlement to relief plausible." The complaint satisfied *Twombly* because on the facts before the court, the conspiracy allegations were plausible based on specific and actual agreements that were alleged, and not mere parallel conduct.

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138 *Black Box Corp. v. Avaya, Inc.*, No. 07-6161, 2008 WL 4117844 (D.N.J. Aug. 29, 2008).

Cases

Heartland Payment Systems, Inc. v. MICROS Systems, Inc. (2008)[139]

INDUSTRY: Credit card processing services

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Heartland is a credit and debit card processing corporation that provides credit and debit card processing and additional services for more than 160,000 restaurants, hotels, and retail merchants throughout the United States. Defendant MICROS is the leading developer of restaurant point-of-sale information systems, including hardware and software for such systems and operational applications. Defendant Merchant Link is a network-based company that provides merchants with a single interface to connect with all major payment processors. Plaintiff alleged that MICROS and Merchant Link entered into an agreement for MICROS devices to exclusively use Merchant Link Services for the transmission of electronic transactions from MICROS terminals and network and help-desk services for such terminals.

DEFENDANTS' MOTION: Defendants moved to dismiss *inter alia* the federal antitrust claims for failure to state a claim upon which relief could be granted. Specifically, Defendants' asserted:

- That Heartland failed to adequately plead its tying and conspiracy claims because the merchants the purchasers of the tying product were not required by Defendants to purchase the services of Merchant Link; and
- That Heartland lacked standing to bring its tying claim.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that assuming Plaintiff's allegations as true, Defendants' scheme clearly implicated the antitrust concern against tying arrangements. The court held that the complaint regarding the allegation of tying met the *Twombly* standard because:

- Plaintiff alleged that due to Defendant MICROS' market power, Defendant Merchant Link could charge supra-competitive transaction fees;
- Plaintiff alleged that as a result of the tie, competition in the interface market was stifled; and
- Plaintiff participated in the pertinent market as a customer of the tied product, and therefore had standing to sue.

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139 *Heartland Payment Sys., Inc. v. MICROS Sys., Inc.*, No. 3:07-CV-5629, 2008 WL 4510260 (D.N.J. Sept. 29, 2008).

Cases

St. Clair v. Citizens Financial Group (2008)[140]

INDUSTRY: Banking services

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 and monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): St. Clair alleged that the overdraft fees he was forced to pay were not a product of market forces, but instead were falsely inflated as a result of a conspiracy between Defendants and various "unknown person conspirators of competitor banks and/or bank enterprises" or because of Defendants' monopolization of the market.

DEFENDANTS' MOTION: Defendant moved to dismiss alleging that Plaintiff lacked antitrust standing and that even if he had such standing; he failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED** as to the failure to state a claim.

COURT'S RATIONALE: Court held that, although Plaintiff had antitrust standing, he did not submit factual allegations to raise his claim of conspiracy beyond a speculative level. Plaintiff offered only the following conspiracy allegations:

- That the banks were engaged in parallel conduct because their overdraft fees were similar; and
- That Defendant's individual officers had experience working for other banks.

Plaintiffs' monopoly claim similarly failed because Plaintiff pointed only to the relative success of Citizens Financial Group as evidenced by its $159 billion in assets and the fact that it is one of the largest ten commercial bank holding companies in the United States. The court found that the Plaintiff failed to set forth any facts showing:

- The strength of competition;
- The development of the industry;
- The barriers to entry;
- The nature of the anti-competitive conduct;
- The elasticity of consumer demand; or
- The particular percentage of any relevant market controlled by Defendants.

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[140] *St. Clair v. Citizens Fin. Group*, No. 08-1257, 2008 WL 4911870 (D.N.J. Nov. 12, 2008).

Cases

West Penn Allegheny Health System, Inc. v. UPMC (2009)[141]

INDUSTRY: Hospital Services

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff and Defendant are both non-profit community hospital systems in Pennsylvania. Plaintiff alleged that since 2002, Defendants (Pittsburgh's dominant hospital system, UPMC, and its dominant health insurer, Highmark) have conspired to reduce competition and raise prices at the expense of Plaintiff's employers, consumers, and patients.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that that the Amended Complaint did not set forth any facts supporting these conclusory statements that an agreement was reached to limit reimbursements to West Penn Allegheny because:

- The complaint fell short on any plausible facts to support its bald allegations of a conspiracy;
- Plaintiff failed to plead any facts to support their conclusion that Defendants communicated with each other to form the alleged agreement other than broad allegations that there were "frequent meetings";
- Plaintiff failed to allege specifically which members of UPMC and Highmark executive management allegedly made this agreement;
- Plaintiff failed to provide any notice as to the time, place, or person involved in the concerted action, other than general references to the Summer of 2002 when the new contract was signed between UPMC and Highmark;
- Plaintiff could not allege an antitrust injury when any injury it may have suffered was caused by conduct that was not anti-competitive; and
- Plaintiff's allegations failed to evidence an agreement, a common scheme, or a meeting of the minds.

[141] *West Penn Allegheny Health Sys., Inc. v. UPMC*, No. 09-CV-0480, 2009 WL 3601600 (W.D. Pa. Oct. 29, 2009).

Cases

Warfield Philadelphia v. Nat'l Passenger R.R. Corp. (2009)[142]

INDUSTRY: Garage/Parking lot facilities

ANTITRUST VIOLATION(S) ALLEGED: §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff owns and operates a parking facility in Philadelphia at less than a 1/3 the cost of Defendants and provides a shuttle to the 30th Street Station (the "station"). Defendant's parking facility is adjacent to the station. Plaintiff contracted with the management company for the station to set up an advertisement table in the station, but was subsequently notified that there was an exclusivity and conflict with the Amtrak garage that prevented them from promoting their cheaper parking facility. Next, Plaintiff contracted with CBS Outdoor for the use of a billboard that was in proximity to the station. Defendant Amtrak wrote a letter to CBS demanding that they remove the advertisement and CBS complied. Based solely on Amtrak's actions regarding the marketing table and the billboard, Warfield alleged that Amtrak had violated §§ 1 & 2 of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that because Warfield had failed to allege facts to support a conclusion that there had been an antitrust injury or that Defendants' actions caused such an injury, the Plaintiff's claims should be dismissed. According to the court, the complaint failed to satisfy the plausibility standard because:

- There were no facts in Plaintiff's complaint to support its claim that Amtrak's supposed restrictions on its parking advertising reduced, restrained, or eliminated competition in the relevant market or precluded others from entering it;
- Warfield's claims do not survive a motion to dismiss simply by using the word "effect";
- Warfield provided no connective tissue between the purported cause of the harm and harm it alleged had occurred;
- Warfield offered no explanation as to how its inability to advertise at the marketing table or on one billboard led to any negative effect on its business or on the market; and
- Warfield failed to identify any other entity that wanted to enter the market it had defined.

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142 *Warfield Philadelphia v. Nat'l Passenger R.R. Corp.*, No. 09-1002, 2009 WL 4043112 (E.D. Pa. Nov. 20, 2009).

Cases

Willow Creek Fuels, Inc. v. Farm & Home Oil Co. (2009)[143]

INDUSTRY: Petroleum Oil Suppliers

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Willow Creek Fuels, Inc. supplies petroleum products, including fuel oil, diesel fuel, gasoline, kerosene, and propane to homes, businesses, school districts, and other government entities. Between December 2006 and May 2007, Willow Creek entered into a series of petroleum sales agreements with Defendant, Farm & Home, whereby Plaintiff would buy specified quantities of oil and gasoline products from Defendant with payments and deliveries to occur monthly. Farm & Home was later acquired by a larger national oil distributor, BEH, who soon began to place bids with Plaintiffs' customers.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted due to Plaintiff's lack of standing to pursue its antitrust claims under the Sherman Act.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Willow Creek's amended complaint fell short of the pleading standard articulated in *Twombly* because:

- Willow Creek failed to allege the percentage of the relevant market controlled by Defendants;
- Willow Creek failed to plead any facts regarding the presence or strength of competitors in the market or the elasticity of consumer demand;
- Willow Creek failed to clearly define the market in terms of product type or geography;
- Willow Creek's allegation that Defendants merged soon after the petroleum service agreements were terminated was insufficient to support a § 1 conspiracy; and
- Willow Creek failed to allege facts to plausibly suggest any agreement between Defendants in violation of trade.

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143 *Willow Creek Fuels, Inc. v. Farm & Home Oil Co.*, No. 08-5417, 2009 WL 3103738 (E.D. Pa. Sept. 18, 2009).

Cases

Korkala v. Allpro Imaging, Inc. (2009)[144]

INDUSTRY: Radiography manufacturers

ANTITRUST VIOLATION(S) ALLEGED: §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs are in the business of selling x-ray imaging systems for use in the security explosive ordnance disposal ("EOD") and nondestructive testing ("NDT") to U.S. government agencies, U.S. military facilities, law enforcement agencies, and commercial government prime contractors. Defendant Allpro is engaged in the manufacture and sale of computer radiograph ("CR") x-ray scanners and Defendant Televere is engaged in the production of computer software for use with CR scanners. In 2005, Defendants developed their respective products to enter EOD and NDT markets which led to the development of Scanx System which was marketed as the combination of both Defendants' products and has proven to be highly useful for EOD and NDT purposes. Plaintiff asserted that Defendants' developing and marketing of their joint product violated §§ 1 & 2 of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiff's alleged facts did not suffice to plead a relevant product market. The court noted:

- Korkala alleged that Defendant Allpro's scanner and Defendant Televere's software together the Scanx System established a single nationwide market;
- A relevant market cannot be defined as a single product market where a combination of elements that can be acquired from other sources make a specialty product; and
- Korkala failed to sufficiently define the outer boundaries of the EOD and NDT markets because it did not assert sufficient facts that support a reasonable interchangeability of use or the cross-elasticity of demand between the Scanx System and its substitutes.

144 *Korkala v. Allpro Imaging, Inc.*, No. 08-2712, 2009 WL 2496506 (D.N.J. Aug. 12, 2009).

Cases

St. Clair v. Citizens Financial Group. (2009)[145]

INDUSTRY: Banking Services

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 and monopoly pursuant to the Sherman Act

NATURE OF ALLEGED VIOLATION(S): St. Clair alleged that the overdraft fees which he was forced to pay were not a product of market forces, but instead were falsely inflated as a result of a conspiracy between Defendants and various "unknown person conspirators of competitor banks and/or bank enterprises" or because of Defendants' monopolization of the market.

DEFENDANTS' MOTION: Defendants' motion to dismiss for failure to state a claim upon which relief could be granted was granted. Plaintiffs appealed.[146]

DISPOSITION: United States Court of Appeals for the Third Circuit **AFFIRMED** the **GRANT** of Defendants' motion to dismiss.

COURT'S RATIONALE: Court held that as in *Twombly*, St. Clair's conspiracy claims fail because he too has alleged only parallel conduct and gross speculation. His conspiracy claims rely on the parallel fee structures of several competing banks and the assertion that the individual Defendants, officers of Citizens Bank, each had prior work experience at other banks. The court also found the complaint insufficient because:

- Plaintiff failed to allege the percentage of the relevant market controlled by Defendants;
- Plaintiff failed to plead any facts regarding the strength of competition;
- Plaintiff failed to allege the nature of the anti-competitive conduct;
- Plaintiff failed to allege the elasticity of consumer demand;
- Plaintiff failed to allege the Defendants' market power;
- Plaintiff failed to allege facts of an agreement; and
- Plaintiff failed to allege any plus factors.

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145 *St. Clair v. Citizens Fin. Group*, 340 F. App'x. 62, No. 08-4870, (3d Cir. July 23, 2009) (Not selected for publication in the federal reporter).

146 See page 87 of the digest for a review of the district court's decision.

Cases

Villare v. Beebe Medical Center, Inc. (2009)[147]

INDUSTRY: Physician Practice/Services

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 and monopolization or attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Dr. Villare is a general surgeon specializing in thoracic and vascular surgery and is the sole shareholder of Plaintiff DVPS. Plaintiffs alleged that Defendants entered into a contract, combination, or conspiracy to unlawfully force Plaintiffs from conducting business in the Sussex County area in violation of § 1 of the Sherman Act by conspiring to prevent Dr. Villare from obtaining medical staff privileges at Beebe and SDSC, thereby preventing him from providing services to his patients of the Sussex County area in violation of § 2 of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that although Plaintiff had alleged that Dr. Stancofski in his dual roles as a member of Beebe's Credentials Committee and medical director of SDSC influenced the decision making process at both institutions so as to affect the exclusion of Dr. Villare from both staffs and eliminate Dr. Villare and DVPS as competitors, the court read the Third Circuit precedent to suggest some allegation regarding a Defendant hospital's or physician's interstate dealings was required to substantiate the court's assumption that the exclusion of a Plaintiff physician from a hospital's medical staff affected interstate commerce. The court noted that despite this very low threshold, Plaintiffs did not point to, and their complaint did not appear to contain any such factual allegations.

147 *Villare v. Beebe Med. Ctr., Inc.*, 630 F. Supp. 2d 418 (D. Del. 2009).

Cases

Martrano v. Quizno's Franchise Co. (2009)[148]

INDUSTRY: Franchise Restaurants

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Prospective State-wide class action brought suit alleging Defendant's illegal and exploitative manipulation of a fast-food "toasted sandwich" franchise system violated the Sherman Act. Plaintiffs alleged that they were not provided information sufficient to enable them to understand the high failure rates for the franchisees. Plaintiffs asserted that Defendants, nine Quizno's-related entities, violated § 1 of the Sherman Act by requiring that franchisees purchase supplies and services from Quizno's-affiliated and Quizno's-mandated vendors, which amounted to illegal tying arrangements that were either illegal *per se* or otherwise unreasonably restrained competition.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that because Plaintiffs' relevant market was legally insufficient, the motion to dismiss must be granted.

- Plaintiffs' claim of exploitation by control of the tying product market rested on an unreasonably narrow definition of the market; and
- Plaintiffs' market as defined, "the Quick Service Toasted Sandwich Restaurant" franchise market, failed to consider interchangeability and cross-elasticity of demand and did not encompass all interchangeable substitute products.

[148] *Martrano v. Quizno's Franchise Co.*, No. 08-0932, 2009 WL 1704469 (W.D. Pa. June 15, 2009).

Cases

Burtch v. Milberg Factors, Inc. II (2009)[149]

INDUSTRY: Textiles

ANTITRUST VIOLATION(S) ALLEGED: Unlawful agreement pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a Chapter 7 Trustee for Factory 2-U Stores, Inc. (a discount clothing retailer), sought damages for an alleged price-fixing conspiracy and group boycott to deny credit to a chain of retail stores in violation of § 1 of the Sherman Act. The alleged antitrust violations arise out of factoring, which is a form of commercial finance that propels the garment industry, by facilitated transactions between garment manufacturers and garment retailers. Defendants were eight of the top ten factors in the U.S. based on factoring volume. Specifically, Plaintiff alleged that the industry's largest factors, including many of the Defendants, routinely shared confidential information about their manufacturer clients and these clients' retailer-customers and reached illegal agreements.

DEFENDANTS' MOTION: Plaintiff objected to Magistrate Judge's Report and Recommendation *inter alia* to dismiss the complaint.

DISPOSITION: The District court overruled the objection and **GRANTED** Defendant motion for dismissal.

COURT'S RATIONALE: Court held that in reviewing the decision of the Magistrate Judge under the *de novo* standard of review, the Magistrate Judge properly applied *Twombly* and under *Twombly* Plaintiff's complaint must be dismissed because:

- Complaint failed to even suggest parallel conduct by Defendants;
- Magistrate Judge's assessment of the parallel conduct allegations in this case went no further than the Supreme Court's own language in both *Twombly* and *Iqbal*;
- The type of credit information sharing alleged in the complaint did not violate the Sherman Act; and
- Conduct alleged did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained, by lawful unchoreographed free-market behavior.

[149] *Burtch v. Milberg Factors, Inc.*, No. 07-556, 2009 WL 1529861 (D. Del. May 31, 2009).

Cases

Burtch v. Milberg Factors, Inc. (2009)[150]

INDUSTRY: Garment Manufacturing/Financing

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy, group boycott, and anti-competitive agreement pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a Chapter 7 Trustee for Factory 2-U Stores, Inc. (a discount clothing retailer), sought damages for an alleged price-fixing conspiracy and group boycott to deny credit to a chain of retail stores in violation of § 1 of the Sherman Act. The alleged antitrust violations arise out of factoring, which is a form of commercial finance that propels the garment industry, by facilitating transactions between garment manufacturers and garment retailers. Defendants were eight of the top ten factors in the U.S. based on factoring volume. Specifically, Plaintiff alleged that the industry's largest factors, including many of the Defendants, routinely shared confidential information about their manufacturer clients and these clients' retailer-customers and reached illegal agreements.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that complaint failed to meet *Twombly*'s standards for alleging an unlawful anti-competitive agreement in violation of the Sherman Act because a sufficient allegation of such an agreement was an essential element of Plaintiff's claims. The court noted that:

- The complaint contained no factual allegations as to whether any of the Defendants participated in a form group to share information, nor whether Factory 2-U was discussed at any formal meeting;
- The complaint failed to alleged the specifications of what the "terms and conditions" of financing were, or the discount rate at which the Defendants purchased Factory 2-U's receivables, or even whether Defendants agreed to extend credit to Factory 2-U at all;
- The complaint failed to allege how many of the Defendants had reached these agreements;
- The complaint only offered vague allegations of unspecified agreements made under four general categories and implemented at an unspecified time;
- The complaint failed to set forth enough factual matter to suggest that the alleged agreements were actually reached;

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150 *Burtch v. Milberg Factors, Inc.*, No. 07-556, 2009 WL 840589 (D. Del. Mar. 30, 2009).

Cases

- It could be just as likely that Defendants' parallel conduct was the result of independent, rational, and wholly lawful decisions by each Defendant to limit its exposure to Factory 2-U's deteriorating financial condition; and

- The exchange of information between business firms concerning the creditworthiness of customers had long been held not to violate the Sherman Act.

Cases

Ethypharm S.A. France v. Abbot Labs. (2009)[151]

INDUSTRY: Pharmaceutical manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a French pharmaceutical manufacturer, brought action against Defendant, an American pharmaceutical manufacturer, alleging Sherman Act violations relating to interference with market and selling of French manufacturer's product under exclusive licensing agreement with an American distributor. Both parties are manufacturers of the pharmaceutical drug fenofibrate. Ethypharm alleged that Abbott had interfered with Ethypharm's licensee from marketing and selling Ethypharm's fenofibrate product under an exclusive licensing agreement with an American distributor.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: The court held that Ethypharm's alleged injury is inextricably intertwined with the injury Abbott allegedly sought to inflict on the fenofibrate market because:

- Ethypharm participated in the relevant market through a third party, and should be permitted to challenge Abbott's restrictive dealings with respect to that party; and
- The absence of specific supporting facts regarding Reliant's missed opportunities at the pleading stage did not render Ethypharm's proffer on causation inadequate.

[151] *Ethypharm S.A. France v. Abbot Labs.*, 598 F. Supp. 2d 611 (D. Del. 2009).

Cases

In re Flat Glass Antitrust Litigation (II) (2009)[152]

INDUSTRY: Flat glass manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff brought an antitrust class action on behalf of themselves and all entities that purchased construction flat glass in the U.S. alleging that certain U.S. manufacturers[153] of high-quality flat glass used for construction and architectural application engaged in price-fixing in violation of § 1 of the Sherman Act. They alleged that Defendants agreed to raise and fix prices through a combination of collusive energy surcharges and price increases.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted because the various allegations therein were insufficient under the pleading standard of *Twombly* to infer the existence of an agreement or conspiracy to restrain trade.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the allegations of the complaint nudged over the line of sufficiency because:

- Complaint alleged that there was a history of inability to raise and maintain prices prior to the conspiracy;
- Complaint alleged that there was a history of varying surcharges by region of the country, but after June of 2002, Defendants did not vary their surcharges by region;
- Complaint alleged that an agreement that existed for over 30 months beginning in June of 2002, by raising prices by identical percentages and charging energy surcharges in virtual lockstep while providing customers with identical charts and justifications for the same, until February of 2005;
- Complaint alleged that in February of 2005 the European Commission launched raids upon the European construction flat glass market;
- Complaint alleged that after the raid, Defendants did not engage in lock step parallel conduct; and
- That dismissal of the complaint was not warranted based on Defendants' European Commission allegation arguments and arguments of parallel conduct.

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152 *In re Flat Glass Antitrust Litig. (II)*, No. MDL 1942, 2009 WL 331361 (W.D. Pa. Feb. 11, 2009).

153 Defendants are AGC America, Inc., AGC Flat Glass North America, Inc. (collectively "AGC"), Guardian Indus. Corp. ("Guardian"), Pilkington North America, Inc., Pilkington Holding Inc. (together "Pilkington"), and PPG.

Cases

Redbox Automated Retail v. Universal City Studios (2009)[154]

INDUSTRY: Digital Video Rentals

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a company offering digital video disks for sale or rental through self-service kiosk machines, brought an antitrust action against Defendant, a movie studio and the producers of films Redbox provides to consumers, alleging that Defendant had engaged in illegal actions which proximately caused them economic and other injuries. Redbox's claim allegedly arose when Universal pressured VPD and Ingram (Redbox's two biggest distributors of Universal's movies) to cease filling Redbox's orders for Universal DVDs after Redbox declined Universal Studios' proposed revenue sharing agreement.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that it was convinced that Plaintiff had sufficiently pleaded that Universal had induced or otherwise convinced others to boycott Redbox in distribution of Universal DVDs, producing anti-competitive effects, specifically Redbox's inability to compete in the DVD rental and sales markets of Universal DVDs. The court further noted that Plaintiff had sufficiently pled the illegality of Universal's actions, and that those acts were the proximate cause of economic and other injuries to Redbox.

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154 *Redbox Automated Retail, LLC v. Universal City Studios, LLLP*, No. 08-766, 2009 WL 2588748 (D. Del. Aug. 17, 2009).

Cases

In re Chocolate Confectionary Antitrust Litigation (2009)[155]

INDUSTRY: Chocolate Confectionary Products

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Defendants are members of four multinational corporate families that produce chocolate confectionary products for the international markets. Plaintiffs brought antitrust class action lawsuits, alleging that from 2002 to 2007 Defendants conspired to fix and artificially inflate prices in the American chocolate candy market.

DEFENDANTS' MOTION: All Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

DISPOSITION: Motions **DENIED** in part and **DEFERRED** in part.

COURT'S RATIONALE: In relevant part, the Court denied the Defendants' motions to dismiss, holding that Plaintiffs had adequately stated a plausible antitrust claim. Specifically, the Court held that:

- The operational and structural similarities between the American and Canadian markets (for example, the integration of Defendants' Canadian and American corporate structures and the fusion of U.S. and Canadian manufacturing and distribution channels) lent plausibility to the Plaintiffs' allegations of conspiratorial pricing agreements;
- Detailed interaction between the American and Canadian markets where authorities have identified strong evidence of price fixing, including regular trade association conferences, further bolster the probability that pricing information was exchanged and an inter-market price-fixing conspiracy was implemented;
- The Plaintiffs successfully painted the picture of a market "ripe for collusion, punctuated by declining demand and product saturation," establishing their allegations of the Defendants' antic-competitive activity as economically sensible under the circumstances; and
- As per the *Twombly* standard, these and other contributing facts alleged in this case (taken as true) demonstrate a plausible right to relief, "nudging the Plaintiffs' claims across the line from conceivable to plausible" and compelling the Court to deny the motion to dismiss the Sherman Act claims under Rule 12(b)(6).

[155] *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538 (M.D. Pa. 2009).

Cases

Navo South Development Partners v. Denton Co. Electric (2009)[156]

INDUSTRY: Property developers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff is a residential real estate developer and Defendant is a not-for-profit, member-owned electric cooperative which provides electricity to in excess of 142,000 homes and businesses in the North Texas area. Plaintiff and Defendant had previously entered into an electrical contract for phase one of Plaintiff's development project. Navo brought suit alleging that Defendant participated in a contract to fix prices in restraint of trade, and compelled Plaintiff to pay unreasonably high prices.

DEFENDANTS' MOTION: Defendant moved to dismiss for failure to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that much of Navo's complaint as to antitrust was merely boiler plate and conclusory. The court further held that Navo's antitrust claim should be dismissed for lack of standing because:

- There was nothing in the antitrust laws which prohibited a supplier of electrical power from owning the infrastructure used to supply power even if part or all of the cost was borne by the developer;
- The only conveyance referenced in the agreement was a non-exclusive easement, which was not the type of injury contemplated by the antitrust laws;
- Defendant was not a monopoly contemplated by the Sherman Act, for mere possession of a sole provider in a market share was not indicative of a monopoly in the sense that violated § 2 of the Sherman Act;
- Plaintiff had merely alleged single-company dominance in a market; and
- Plaintiff failed to show anti-competitive conduct and that Defendant was a monopoly as contemplated by the Sherman Act.

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156 *Navo South Development Partners, LTD v. Denton County Electric Cooperativeicar, Inc.*, No. 2:05-CV-5426, 2009 WL 1796053 (D.N.J. June 22, 2009).

Cases

City of Moundridge v. Exxon Mobil Corp. (2008)[157]

INDUSTRY: Natural gas suppliers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Municipalities brought action against Defendants' energy companies[158] alleging Defendants illegally agreed to artificially inflate the price of natural gas. Despite Defendants' claims of a dwindling natural gas supply, Plaintiff maintained that no natural gas shortage existed and that Exxon reaped substantial profits from their unlawful agreement.

DEFENDANTS' MOTION: In light of *Twombly*, Defendants moved for reconsideration of the January 9, 2007 order that denied their motion to dismiss the price-fixing claim in light of *Twombly*. Defendants argued:

- *Twombly* changed the Rule 8 pleading standard for claims under § 1 of the Sherman Act;
- The complaint failed to provide factual allegations to suggest an actual agreement among Defendants; and
- Plaintiff failed to allege facts suggesting that higher natural gas prices resulted from an agreement as opposed to an independent business decision to increase profits.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that municipalities properly stated a claim for price-fixing conspiracy under the Sherman Act. Unlike in *Twombly*, the court found that Plaintiff did not rely on only bare allegations of parallel conduct. The allegations that the court held satisfied *Twombly* included:

- Allegation that the natural gas total resource base had not decreased;
- Allegation that the natural gas prices had risen and never fallen below an agreed-upon price;
- Allegation that Defendants had reported high profits;
- Allegation that Hurricanes Katrina and Rita should not have affected the market as the Defendants claimed;

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157 *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1 (D.D.C. 2008).

158 The named Defendants included Exxon Mobil Corp.; BP America, Inc.; ConocoPhillips Corp.; and Coral Energy Resources, LP (their motion to dismiss was granted on January 9, 2007). Plaintiffs moved to amend to add Shell Oil Company, but the Court denied without prejudice because the proposed amended complaint included previously-dismissed claims.

Cases

- Allegations that these Hurricanes were only pretenses to justify withholding market supply to create an artificial shortage;
- Allegation that Defendants falsified their natural gas shortage statements to increase their profits; and
- Allegation of specific years, dates, and locations where the agreement was reached and the Defendants who participated in the agreement.

Cases

In re Rail Freight Fuel Surcharge Antitrust Litigation (2008)[159]

INDUSTRY: Transportation services

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs[160] consolidated complaint from 18 separate class actions alleged that the four major U.S. railroads[161] conspired to fix prices through their use of fuel surcharges. Direct purchasers alleged that, in 2003, Defendants, who controlled about ninety percent of all domestic rail freight traffic, conspired to increase their profits through the imposition of a new uniform, artificially-high, fuel surcharge.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim. Defendants asserted that the facts pled showed only price matching and follow-the-leader pricing, not a restraint of trade. Defendants argued that, at a time of dramatically-fluctuating fuel costs, the new system allowed them to adapt their rates to better reflect the changing cost of fuel.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the Plaintiffs alleged substantially more circumstantial evidence than those in *Twombly*, and they demonstrated a plausible theory that Defendants' behavior was collusive and anti-competitive. The allegations that the court found sufficient included:

- Allegation that surcharges varied in the past and fuel cost differed widely among the railroads, yet they imposed identical fuel surcharges for 3 years, adjusting to agreed upon triggers;
- Allegation that top executives from each Defendant met regularly at restaurants and recreational and conference facilities beginning in the spring of 2003 to discuss fuel surcharges, in July 2003, BNSF and UP began charging identical fuel surcharges;
- Allegation that, during the October and December 2003 meeting of the Association of American Railroads, dominated by Defendants, they agreed to create a new cost escalation index to raise rates without undergoing the difficulty of extensive contract renegotiation;
- Allegation that CSX and NS then began charging the same fuel surcharges as BNSF and UP;
- Allegation that the new method achieved was "complex and completely new," which *Twombly* suggested made inferences of conspiratorial agreement more plausible; and

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159 *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27 (D.D.C. 2008).

160 Plaintiffs were divided into two putative classes: direct and indirect purchasers.

161 Defendants included BNSF Railway Company; CSX Transportation, Inc.; Norfolk Southern Railway Company; and Union Pacific Railway Company.

Cases

- Allegation that the Defendants' actions resulted in billions of dollars of additional profits because they raised rates far beyond the real increased cost of fuel.

Cases

E.I. DuPont v. Kolon Indus. (2009)[162]

INDUSTRY: Manufacturing of aramid and para-aramid fibers

ANTITRUST VIOLATION(S) ALLEGED: Attempted Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff E.I. DuPont de Nemours and Co. ("DuPont"), a company that has developed a highly specialized capability to design, manufacture, and sell aramid fiber, sued Defendant Kolon Industries, Inc. ("Kolon") for misappropriation of trade secrets and confidential information. Kolon filed a counterclaim against DuPont pursuant to the Sherman Act for monopolization and attempted monopolization of the para-aramid fiber market. Specifically, Kolon alleges that exclusionary conduct in the form of execution of various "long-term supply agreements," disparagement of Kolon's para-aramid fibers, and execution of joint ventures with rivals has led to DuPont's monopolization of the market.

DEFENDANTS' MOTION: DuPont, Plaintiffs-Defendants, moved to dismiss the counterclaim for (i) failure to assert a relevant geographic market, (ii) failure to allege anti-competitive conduct, and (iii) failure to allege antitrust injury.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that DuPont's motion to dismiss was well-taken overall, but did not find Kolon's counterclaim to be entirely lacking in substance and consequently granted Defendant-Plaintiff leave to amend. With respect to the three-pronged motion to dismiss regarding relevant geographic market, anti-competitive conduct, and antitrust injury, the court found, respectively, that:

- Kolon's assertion that the relevant geographic market was the U.S. was lacking in detail, conclusory, and self-defeating in that it was contradicted by the international scope of their general allegations, and therefore granted Defendant-Plaintiff leave to amend with greater specificity and consistency;
- Certain details concerning the long-term supply agreements in question go beyond the type of "naked assertions" deemed insufficient in *Twombly*; and
- Kolon adequately alleged that DuPont actively excluded them from participation in the aramid fiber market and that the resulting damage to the competitive process significantly impacted both Kolon and ordinary consumers, thereby compelling the court to deny DuPont's motion to dismiss in this respect, as Kolon's allegations were sufficient to state a claim for antitrust injury.

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[162] *E.I. DuPont De Nemours and Co. v. Kolon Indus., Inc.*, No. 3:09-CV-58, 2009 WL 2762614 (E.D. Va. Aug. 27, 2009).

Cases

E.I. DuPont v. Kolon Indus. (2009)[163]

INDUSTRY: Manufacturing of aramid and para-aramid fibers

ANTITRUST VIOLATION(S) ALLEGED: Attempted monopoly and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): This action arises out of a trade dispute between E.I. du Pont de Nemours and Co. ("Du Pont") and Kolon Industries, Inc. ("Kolon") over a product known generally as para-aramid fibers, which includes DuPont's commercially successfully KEVLAR.

DEFENDANTS' MOTION: Kolon moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED** with leave to amend.

COURT'S RATIONALE: Court held that because Kolon's proffered geographic market failed as a matter of law, its attempted monopolization claim must be dismissed. But, because the elements of a monopolization and an attempted monopolization claim are very similar, if leave to amend is granted respecting actual monopolization, it is proper to grant leave as to the attempted monopolization claim as well. Since Kolon may have a plausible § 2 claim, it should be given one more chance to plead it adequately. The court noted that:

- Kolon demonstrated the existence of a *potentially* plausible monopolization claim;
- Its plausibility is only potential because Kolon failed to allege a geographic market that included the bases of operation for Kolon and Teijin;
- Kolon also failed, in its pleadings, to account for those customers which, because the Berry Amendment did not apply, could practically buy from Kolon; and
- Because there appears some chance that Kolon could make out a plausible claim on these facts, it should be given a chance to do so in perspective of the relevant geographic market.

[163] *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, No. 3:09-CV-58, 2009 WL 4927159 (E.D. Va. Dec. 18, 2009).

Cases

Westmoreland, D.O. v. Pleasant Valley Hospital, Inc. (2009)[164]

INDUSTRY: Medical/Physician services

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 and attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff was a board certified family practice physician, licensed in West Virginia, Ohio, and Florida. In October 2007, Plaintiff received a letter from Defendant that he did not meet the requirements for renewal of staff privileges. Plaintiff brought suit alleging that Defendants, Pleasant Valley Hospital and the members of the peer review committee that voted to revoke his privileges, each conspired with one another to terminate his staff privileges.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that according to the complaint, the individual Defendants were at all relevant times employees of the Defendant hospital, such that they were acting as a single entity during the peer review process. Thus they were incapable of conspiracy and this allegation could not serve the basis of a cause of action under § 1 of the Sherman Act. The court also noted that Plaintiff failed to allege any allegations of how Defendants respective practices overlap his own and thus no allegation of a probability that they would achieve monopoly power.

[164] *Westmoreland D.O. v. Pleasant Valley Hospital, Inc.*, No. 3:08-1444, 2009 WL 1659835 (S.D.W. Va. June 12, 2009).

Cases

Norris v. Hearst Trust (2007)[165]

INDUSTRY: Newspaper distributors in Houston, Texas

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Six former distributors of the *Houston Chronicle* sued the newspaper owners[166] alleging *inter alia* violation of antitrust laws. In their second amended complaint, Plaintiffs alleged that Defendants terminated Plaintiffs' contracts because they refused to falsely testify to the Audit Bureau of Circulations so as to mislead potential advertisers.

DEFENDANTS' MOTION: Defendants' motion to dismiss was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Fifth Circuit **AFFIRMED** and **GRANTED** Defendants' motion to dismiss.

COURT'S RATIONALE: Court held that Plaintiffs failed to allege antitrust injury and lacked antitrust standing under *Twombly* because Plaintiffs were not consumers of the *Chronicle* or its advertising services, and they were not producers or sellers of competing publications or media. Specifically, the complaint failed *Twombly* because:

- Plaintiffs failed to allege any harm or increased price or cost to subscribers or readers;
- Plaintiffs failed to allege sufficient facts suggesting that alleged antitrust violations came before the distributors were terminated; and
- Plaintiffs failed to allege that the termination of the Plaintiffs had any adverse effect on anyone else, either by increasing the price or decreasing the availability of the *Chronicle* to subscribers.

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165 *Norris v. Hearst Trust*, 500 F.3d 454 (5th Cir. 2007). Decided on September 18, 2007.

166 The named Defendants included: The Hearst Trust, The Hearst Corp., and Hearst Newspapers Partnership, LP.

Cases

Hydril Company v. Grant Prideco (2007)[167]

INDUSTRY: Manufacturers of drill pipe used in drilling of oil and gas wells

ANTITRUST VIOLATION(S) ALLEGED: Obtaining a patent through fraud and misuse of that patent in violation of § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff filed an amended complaint, alleging Grant Prideco obtained the patent through fraud, and therefore the company's assertion of rights under that patent constituted a violation of antitrust laws.

DEFENDANTS' MOTION: Defendant moved to dismiss, alleging that Plaintiff did not have standing to assert an antitrust claim and that Plaintiffs did not allege proper antitrust injury.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint failed to allege facts that supported Plaintiff's standing to pursue an antitrust claim. The patent at issue did not extend to areas outside the U.S. and it was only outside the U.S. that Plaintiff competed in the relevant market. The complaint failed *Twombly* because:

- Complaint failed to allege facts to support Plaintiff's conclusory assertion that it suffered an "antitrust injury" because it did not demonstrate an injury in the market in which it competed; and
- Complaint failed to demonstrate, with adequate factual support, that Plaintiff was a potential competitor in the market at issue, and merely formulaically recited the Plaintiff's intention and preparedness to enter the field.

[167] *Hydril Co., L.P. v. Grant Prideco, L.P.*, No. H-05-0337, 2007 WL 1791663 (S.D. Tex. June 19, 2007).

Cases

Schafer v. State Farm Fire and Casualty Co. (2007)[168]

INDUSTRY: Home insurance

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Insured Plaintiffs filed putative class action against insurer and computer software developer alleging that software used by insurance claims adjusters utilized below market pricing database to give Plaintiffs less than the value of their property. Plaintiffs alleged that State Farm conspired with other insurers to payout less than the market price for repair services through use of the Xactimate program, although the insurers were required to pay the market price for the loss under the terms of their respective contracts.

DEFENDANTS' MOTION: Defendants moved to dismiss.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court found that the Plaintiffs did not present the necessary factual predicates that plausibly suggested the existence of a conspiracy. The Defendants' behavior was natural considering the strong economic incentive to keep payouts low and nothing in the complaint suggested the conduct was anything other than unilateral.

[168] *Schafer v. State Farm Fire & Cas. Co.*, 507 F. Supp. 2d 587 (E.D. La. 2007). Decided on August 22, 2007.

Cases

Love Terminal Partners v. City of Dallas (2007)[169]

INDUSTRY: Airport leases

ANTITRUST VIOLATION(S) ALLEGED: Illegal agreement in violation of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Leaseholders of airport land brought antitrust action against cities, two commercial airlines, and an airport board, alleging that Defendants engaged in an illegal conspiracy to allocate markets between horizontal competitors that ultimately resulted in a contractual commitment by the city to demolish the airport terminal.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that leaseholders failed to state an antitrust claim against Defendants for conduct leading up to the passage of the Wright Reform Act, and Defendants did not violate antitrust laws by implementing provisions of the Act.

169 *Love Terminal Partners v. City of Dallas*, 527 F. Supp. 2d 538 (N.D. Tex. 2007).

Cases

Golden Bridge Technology, Inc. v. Motorola Inc. (2008)[170]

INDUSTRY: Wireless service providers/networks

ANTITRUST VIOLATION(S) ALLEGED: Refusal to deal pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, Golden Bridge Technology ("GBT") develops wireless communication technology for cellular networks. It is a member of a non-profit standard setting organization called Third Generation Partnership Project ("3GPP"). The 3GPP members are responsible for creating and developing the 3GPP standard that determines what technologies will be included in the standard as either mandatory or optional. GBT brought suit against 3GPP and other members alleging Defendants unlawfully conspired not to deal with the developer in violation of § 1 of the Sherman Act. Specifically, Plaintiff alleged Defendants conspired with each other to remove Common Packets Channel technology ("CPCH"), patented GBT software from the 3GPP standard, which resulted in the unlawful exclusion of GBT from the market.

DEFENDANTS' MOTION: Defendants' motion for summary judgment on developer's claim was granted. Plaintiff appealed.

DISPOSITION: United States Court of Appeals for the Fifth Circuit **AFFIRMED** and **GRANTED** Defendants' motion for summary judgment.

COURT'S RATIONALE: Court held that Plaintiff at best had only alleged parallel conduct. Thus, under *Twombly*'s pleading standard Plaintiff failed to allege enough plausible facts to allow the court to draw an inference of a conspiracy. The court held the complaint failed *Twombly* because:

- None of the emails or any other evidence GBT presented showed an explicit understanding between the Defendants to unlawfully collude to eliminate CPCH from the standard;
- The email offered in support actually revealed disagreement among the Defendants; and
- Developer failed to meet the threshold requirement of demonstrating the existence of agreement in restraint of trade.

[170] *Golden Bridge Tech., Inc. v. Motorola Inc.*, 547 F.3d 266 (5th Cir. 2008). Decided on October 23, 2008.

Cases

Mornay v. Travelers Insurance (2008)[171]

INDUSTRY: Home insurance

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Defendant,[172] along with other insurance companies, used a program called Xactimate that is produced by Xactware for the purpose of making insurance adjustments to customer homes. Plaintiffs alleged that there was a conspiracy among insurers and Xactware to fix the prices of repair services utilized in calculating the amounts to be paid under the terms of insurance contracts. The alleged purpose of the conspiracy was to depress the amount paid out under the terms of the insurance contracts to below-market prices and deprive customers with claims of the actual cash or replacement value of their damaged property.

DEFENDANTS' MOTION: Defendant moved to dismiss *inter alia* because Plaintiffs' allegations failed to allege that the anti-competitive actions where motivated by anything other than rational and competitive business strategy.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Defendant did not sufficiently allege an antitrust conspiracy. Court noted that Defendant had an independent basis that would support a notion of conscious parallelism. The fact that several insurers' price lists were identical suggested that they commonly used Xactware, which the Louisiana Insurance Department specifically suggested they do. Plaintiffs' complaint as alleged was insufficient to support a price-fixing conspiracy.

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171 *Mornay v. Travelers Ins.*, No. 07-5274, 2008 WL 2439941 (E.D. La. June 13, 2008).

172 The named Defendants included Standard Fire Insurance Co. and Xactware, Inc.

Cases

OLA, LLC v. Builder Homesite, Inc. (2009)[173]

INDUSTRY: Construction

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff owns several patents relating to the construction industry particularly to methods of coordinating, displaying, processing, and expediting selection processes of building options. OLA marketed its proprietary technology through an online demonstration website. Members of Defendant, the BHI (a consortium of homebuilders) accessed this online demo website after consenting to OLA's notice and confidentiality agreement. Subsequently, OLA brought suit alleging that Defendants *inter alia* engaged in an illegal group boycott and unreasonable restraint of trade to not use OLA's product or license the Plaintiff's patents.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that although OLA provided no direct evidence of a conspiracy to boycott, the complaint did allege facts that supported the inference of a conspiracy because:

- The complaint alleged for several months in 2000 and 2001, members of the BHI expressed strong interest in OLA's technology and regularly communicated with the Plaintiff;
- The complaint alleged that members' communication with OLA stopped abruptly in June 2001;
- The complaint stated that Defendants wanted an "industry owned" solution and the consortium was what made Plaintiff's product possible; and
- The complaint alleged plausible facts in the areas regarding valid market and antitrust injury.

[173] *OLA, LLC v. Builder Homesite, Inc.*, No. 2:08-CV-324, 2009 WL 3190443 (E.D. Tex. Sept. 29, 2009).

Cases

Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n (2009)[174]

INDUSTRY: Golf Country Club Facilities

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade or conspiracy pursuant to § 1 and monopoly pursuant § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): The dispute stems from the use of certain golf packages or voucher programs by Plaintiff and its respective members.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted contending that the complaint failed to plead an antitrust injury and failed to plead sufficient restraint of trade or conspiracy claims to state a plausible claim under § 1 of the Sherman Act, and that Plaintiff failed to plead sufficient monopoly or conspiracy claims to state plausible claims under § 2 of the Sherman Act.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that that although Plaintiff had not articulated sufficient factual allegations establishing any effect on interstate commerce, based on Rule 15 of the FRCP, the Court was of the opinion that Plaintiff should be granted leave to amend its Complaint in order to cure those defects. Thus, the court denied Defendant's motion to dismiss without prejudice.

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174 *Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n*, No. 1:08-CV-1430, 2009 WL 2448598 (S.D. Miss. Aug. 7, 2009).

Cases

PSKS, Inc. v. Leegin Creative Leather Products, Inc. (2009)[175]

INDUSTRY: High-end purse manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): The case arose when Leegin, a maker of high-end women's purses and other accessories sold under the Brighton trademark, terminated PSKS as a retailer because of clear and intentional violations of its resale pricing policy.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that in *Twombly*, the Supreme Court rejected an antitrust claim because the horizontal conspiracy was alleged without the level of detail, such as the who, what, when, where, and how. The court further noted that PSKS had likewise failed to allege what was necessary, and there was no evidence that there were facts that would support such a claim, and without those facts, PSKS was missing the requisite wheel in the classic hub and spoke arrangement. Specifically, the complaint failed because:

- Plaintiffs failed to allege a tenable dominant market to its alleged submarket;
- While Plaintiff alleged facts sufficient to plead a submarket, that alone did not get PSKS past the clear law that a single brand cannot be its own market;
- PSKS failed to define the relevant market in terms of the product itself and not the distribution level of the product;
- PSKS failed to allege facts that supported the allegation that brand names were important to interchangeability in this case;
- PSKS failed to allege the interchangeability, or lack thereof, between one subset of retailers and other retailers selling exactly the same products;
- PSKS failed to allege a tenable product market; and
- PSKS failed to sufficiently plead facts to sustain a hub and spoke conspiracy, in that there was no allegation that retailers agreed to the RPM among themselves.

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[175] *PSKS, Inc. v. Leegin Creative Leather Prods, Inc.*, No. 2:03-CV-107, 2009 WL 938561 (E.D. Tex. Apr. 6, 2009).

Cases

NicSand, Inc. v. 3M Co. (2007)[176]

INDUSTRY: Manufacturers of sandpaper

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a competitor in the sandpaper market brought suit against Defendant, 3M, a fellow competitor. Plaintiff claimed that Defendant's multi-year exclusive-dealing agreements with retailers with whom Plaintiff formerly had exclusive dealings with constituted an unlawful monopolization in violation of the Sherman Act.

DEFENDANTS' MOTION: Defendants' motion to dismiss because Plaintiff lacked antitrust standing was granted. Plaintiff appealed.

DISPOSITION: United States Court of Appeals for the Sixth Circuit **AFFIRMED** and **GRANTED** Defendants' motion to dismiss.

COURT'S RATIONALE: Court of Appeals held that Plaintiff satisfied Article III standing, but did not suffer a cognizable antitrust injury caused by any of competitors' actions or conduct.

[176] *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007).

Cases

Calabrese v. St. Mary's of Michigan (2007)[177]

INDUSTRY: Health care providers

ANTITRUST VIOLATION(S) ALLEGED: Violations of §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs filed an amended complaint after the court previously granted Defendants' motion to dismiss, alleging that Defendant Health Plus carbon copied Defendant Hospital as to the personal and private communications between Defendant Health Plus and Plaintiffs.

DEFENDANTS' MOTION: Defendants[178] moved to dismiss for failure to state a claim.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint failed to plead a viable antitrust cause of action. The complaint failed *Twombly* because:

- Failed to provide any evidence of an agreement;
- Failed to plead facts directly or inferentially that would identify the relevant geographic market;
- Failed to show the Defendants' capacity to affect the overall market; and
- Failed to identify the relevant product.

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177 *Calabrese v. St. Mary's of Mich.*, No. 06-13908-BC, 2007 WL 2128338 (E.D. Mich. July 25, 2007).

178 Defendants included St. Mary's of Michigan, Health Plus of Michigan, Inc., George Roller, M.D., Faith Abbot, D.O., Medly Larkin, D.O., and Charles Jessup, D.O.

Cases

Total Benefits Planning Agency Inc. v. Anthem BCBS (2007)[179]

INDUSTRY: Healthcare insurance providers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade in violation of § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): In their amended complaint, Plaintiffs alleged that they were in the business of selling health and life insurance to individuals and businesses, and had developed a strategy for controlling healthcare costs, called the Total Benefits Strategy ("the Strategy"). The Strategy used "a 51-year-old federal tax law to 'refinance' healthcare costs by raising deductibles on existing group insurance policies and administering benefits through a medical expense reimbursement plan." The Anthem Defendants were insurance companies, who later called the plan unethical. Until June 3, 2005, Plaintiffs maintained appointments with the Anthem Defendants to sell life and health insurance. Plaintiffs alleged that, during a meeting in September 2004, a representative of the Anthem Defendants informed Plaintiffs that the Anthem Defendants had concerns that the Total Benefits Strategy was not in the best interests of the Anthem Defendants. Plaintiffs alleged that Defendants conspired and engaged in practices to force them to stop using the Strategy and coerced and threatened certain insurance agents by threatening to 'blacklist' them and cancel their contracts to ensure that these agents did not do business with Plaintiffs. Plaintiff alleged that Defendants actions constituted a § 1 Sherman Act violation.

DEFENDANTS' MOTION: Defendants moved to dismiss arguing that Plaintiffs failed to plead a sufficient conspiracy or combination under the Sherman Act.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiffs merely alleged parallel, non-competitive behavior without any facts that would compel an inference as to the motive for that conduct. Complaint failed *Twombly* because:

- Plaintiffs did not allege that there was a set price or price level, nor did they identify a written agreement or the basis for inferring a tacit agreement;
- Complaint failed to include any specific time, place, or person involved in the alleged acts or omissions that pertain to the antitrust violation;
- Complaint failed to provide plausible grounds to infer an agreement;
- Complaint failed to adequately plead other elements under the rule of analysis;

[179] *Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield*, No. 1:05-CV-519, 2007 WL 2156657 (S.D. Ohio July 25, 2007).

Cases

- Complaint failed to identify the relevant market; and
- Complaint failed to adequately plead a scheme that produced anti-competitive effects.

Cases

In re Travel Agent Commission Antitrust Litigation (2007)[180]

INDUSTRY: Airlines

ANTITRUST VIOLATION(S) ALLEGED: Commission fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that Defendants[181] conspired to cap or cut the travel agent commissions on six separate occasions.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted asserting that Plaintiffs could not meet the new pleading standard enunciated in *Twombly*. Specifically Defendants argued:

- Plaintiffs failed to demonstrate parallel conduct as to some of the Defendants;
- Plaintiffs failed to allege any facts regarding KLM's participation in the alleged conspiracy;
- Defendants Delta, United and Northwest's asserted that their bankruptcies dismissed all claims against them; and
- Plaintiffs failed to plead sufficient facts that plausibly suggested an agreement or conspiracy.

DISPOSITION: Motions **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiffs had failed to meet the pleading standards enunciated in *Twombly*. Plaintiffs support was not grounded in fact but in mere conclusory statements. The allegations that the court held failed to satisfy *Twombly* included:

- Allegation that each Defendant knew that the other airlines were reducing and capping travel agent commissions because the information was common knowledge;
- Allegation that a series of price-fixing cases and investigations supported their allegations that the airlines conspired to reduce the commissions of the travel agents—specifically Plaintiffs referred to the government investigation of a conspiracy involving computer reservation systems from the late 1980s and early 1990s;
- Allegation that any airline unilaterally reducing or capping travel agent commissions would suffer a substantial loss of business when travel agents directed their customers to others;

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180 *In re Travel Agent Comm'n Antitrust Litig.*, Nos. MDL 1561, 1:03-CV-30000, 2007 WL 3171675 (N.D. Ohio Oct. 29, 2007).

181 The named Defendants included: Alaska Airlines, Inc.; Alaska Air Group, Inc.; Air Tran Airline, Inc.; American Airlines, Inc.; American West Airlines, Inc.; Continental Airlines, Inc.; Delta Airlines, Inc.; Horizon Air Indus.; Frontier Airlines, Inc.; KLM Royal Dutch Airlines; Northwest Airlines, Inc.; and United Airlines, Inc.

Cases

- Plaintiffs alleged that Defendants met frequently during the period when the cuts and caps were negotiated and that Defendants had opportunity to conspire through trade associations and jointly formed business ventures; and

- Allegation that Defendants took parallel actions to reduce or limit commissions paid to travel agents on six occasions, pointed to similar pricing and proximity in time as indications that Defendants conspired.

Cases

In re Southeastern Milk Antitrust Litigation (2008)[182]

INDUSTRY: Dairy farmers

ANTITRUST VIOLATION(S) ALLEGED: Plaintiffs alleged five Sherman Act violations: (1) conspiracy to monopolize and monopsonize in violation of § 2; (2) attempt to monopolize and monopsonize in violation of § 2; (3) unlawful monopolization in violation of § 2; (4) unlawful monopsony in violation of § 2; and (5) unlawful conspiracy to foreclose competition and price-fixing in violation of § 1.

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, were dairy farmers in the Southeastern United States, raised cows and produced milk. Defendants were entities and/or individuals involved in either the marketing and sale of milk on behalf of dairy farmers or the purchase and processing of that milk. Plaintiffs alleged that Defendants conspired to operate an unlawful cartel that refused to compete for the purchase of Grade A milk, foreclosed access to fluid Grade A milk-bottling plants and processors, and fixed prices for Grade A milk paid to farmers.

DEFENDANTS' MOTION: Defendants moved to dismiss the claim arguing the Plaintiffs failed to state a claim upon which relief could be granted, lacked antitrust standing, failed to define the relevant market, and that the statute of limitations barred the claim.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that, in accordance with *Twombly*, Plaintiffs had alleged enough facts to put the Defendants on notice concerning the basic nature of their complaints against the Defendants and the grounds upon which their claims exist. The court rejected Defendants' independent business action justifications. The complaint satisfied *Twombly* because:

- Plaintiffs alleged that using various controlled entities, the Defendants monitored prices, threatened to cut off and did cut off access to bottling plants, boycotted independent farmers, fixed prices, and flooded the Southeast milk market with milk from other regions;
- Plaintiffs alleged Defendants purchased bottling plants with the purpose and intent to further suppress competition;
- Plaintiffs alleged and Defendants conceded an actual agreement existed in the form of the vertical full supply and outsourcing agreements;
- Plaintiffs alleged that through the full supply and outsourcing agreements Defendants agreed to and did commit numerous illegal acts;

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[182] *In re S.E. Milk Antitrust Litig.*, 555 F. Supp. 2d 934 (E.D. Tenn. 2008).

Cases

- Plaintiffs alleged that the were sellers, not competitors and antitrust injury occurred when Defendants paid less than they otherwise would have paid in a competitive market;
- Plaintiffs alleged that the relevant market was defined as USDA Federal Milk Marketing Orders 5 and 7 or the Southeast; and
- Plaintiffs alleged that Defendants controlled significant portions of both the buy-side and the sale-side of the relevant product markets, which significantly established a prima facie case of monopoly power.

Cases

CBCInnovis, Inc. v. Equifax Information Services (2008)[183]

INDUSTRY: Credit bureaus

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs were in the business of gathering information from the three nationwide consumer-reporting agencies to form a tri-merged credit report. Plaintiffs bought Defendants' credit data to compose its reports for a period of two years without a reseller agreement. Defendants tried to get Plaintiff to enter such agreement but Plaintiff refused. Thereafter Defendants reduced the reissue fee for their proprietary information from previous cost to a new fee of only $1.05. Plaintiffs asserted that Defendants conduct caused and would cause harm to competition in the market for authentication of existing tri-merged reports and antitrust injury to CBC.

DEFENDANTS' MOTION: Defendants moved for a dismissal for failure to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiffs failed to assert market-wide injury or specify any competition reducing effect of Defendants' behavior. The complaint failed *Twombly* because:

- The amended complaint contained only speculation and no concrete facts as to the injury to competition caused by Equifax's Reissue policy; and
- Court found noticeably missing from the complaint any substantive facts relating to the harm suffered, such as the specific increase in cost of reissues, the identities of any specific reseller or lender that suffered any harm or whether any reseller including CBC had in fact lost a share of reissues because of the Reissue Policy.

[183] *CBCInnovis v. Equifax Info. Servs. LLC*, No. 2:06-CV-654, 2008 WL 320147 (S.D. Ohio Feb. 4, 2008).

Cases

Spahr v. Leegin Creative Leather Products (2008)[184]

INDUSTRY: Manufacturers of women's fashion accessories

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy and restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Purchasers of retail products manufactured and distributed by the Defendant filed their amended class complaint alleging both horizontal and vertical restraints of trade. Plaintiffs alleged an unlawful agreement between Defendant, a manufacturer that also distributes some of its own products, and other distributor retailers who distribute Plaintiffs' products. Leegin's participation in the retail market, argued Plaintiffs, transformed its retail price maintenance policy into a horizontal restraint. The class Plaintiffs also argued that Leegin, acting as a manufacturer, imposed an agreement on its distributors, imposing a vertical restriction.

DEFENDANTS' MOTION: Defendant moved to dismiss for failure to state a claim upon which relief can be granted. Specifically, Defendant contended that Plaintiffs defined a facially implausible product market by defining it as the market for the manufacture, distribution and/or sale of products manufactured and distributed by Defendant.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiffs' allegation that a horizontal price-fixing conspiracy between the Defendant and one of its branded lines was insufficient because it was premised only upon the following allegations:

- That Defendant was a distributor of its own brand;
- That Defendant entered into minimum resale pricing agreements with independent dealers of this brand line; and
- That Defendant coerced those dealers into selling at specified minimum resale prices through threats of economic sanctions.

The court rejected Plaintiffs' argument that Leegin's brand line products constituted a market by themselves. Plaintiffs failed to allege, even in a conclusory fashion, that there were no reasonably interchangeable substitutes. Plaintiffs alleged only that many brand line customers would not consider a substitute by asserting that in regard to Leegin's brand line there was:

- Customer loyalty;

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184 *Spahr v. Leegin Creative Leather Prods. Inc.*, No. 2:07-CV-187, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008).

Cases

- Reluctance on the part of consumers to consider substitute products; and
- Advertising slogans stating brand line was "one of a kind" or the "only major accessories line" featuring certain products.

Citing the Defendants, the court stated, "Plaintiffs insist that popular products are antitrust markets to themselves." The court also held that the Plaintiffs alleged only that the agreements resulted in higher prices for brand line products and that was not an anti-competitive effect.

Cases

Burda v. Wendy's Int'l, Inc. (2009)[185]

INDUSTRY: Fast food restaurant franchises

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a fast food restaurant franchisee, sued Defendant, franchisor, for *inter alia* federal antitrust violations from alleged tying arrangement by forcing the use of New Bakery buns and by requiring Plaintiffs to purchase food supplies from a specific vendor.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted because complaint failed to state an antitrust injury.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Plaintiff had asserted a Kodak-type lock-in theory of market power, by specifically alleging that at the time Burda entered into his franchise agreements, he could not have reasonably anticipated being required to purchase buns and food supplies from exclusive suppliers. The court noted:

- Plaintiffs had alleged that the market for tied-products—the buns and food supplies—was competitive prior to the alleged tie; and
- Consequently, the alleged addition of a four-percent surcharge to approved food suppliers or the alleged naming of an exclusive bun supplier created an lock-n tying arrangement.

[185] *Burda v. Wendy's Int'l, Inc.*, No. 2:08-CV-00246, 2009 WL 3064668 (S.D. Ohio Sept., 21, 2009).

Cases

Watson Carpet & Floor Covering v. Mohawk Indus. (2009)[186]

INDUSTRY: Carpet and Outdoor Flooring

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, an independent dealer of carpet and other floor coverings in the Nashville area, sells carpet and other floor coverings to homebuilders and retail customers, and installs these floor coverings in its customers' homes. Defendant Carpet Den is a competitor of Plaintiff and Defendant Mohawk Industries is a carpet manufacturer that sells carpet and flooring to both Watson and Carpet Den. In 1998, Defendant Rick McCormick, president and sole shareholder of Carpet Den, met with Mohawk's VP and sales representative and devised a plan to run Watson out of business and eliminate Watson from the market. As part of that plan, Mohawk would refuse to sell certain types of carpet to Plaintiff. Watson alleges that in furtherance of this conspiracy to put Watson out of business employees of Defendant made various accusations to damage its reputation around 2005, 2006, and 2007 in the industry and that Mohawk refused to sell to Watson the particular carpet it needed to service certain customers.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted. Defendant pointed out that there were no allegations that a reaffirmation of the alleged conspiracy between the various co-conspirators occurred at any time after 1999, and argued that the allegations claiming new harm in 2005, 2006, and 2007 could not rise above a speculative level because they were entirely unsupported by any factual link to the 1998 conspiracy.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that under *Twombly*, proof of a conspiracy "must include evidence tending to exclude the possibility of independent action" and "to rule out the possibility that the Defendants were acting independently." The court found the complaint insufficient because:

- Plaintiff failed to allege the existence of any meetings between the parties or any overt acts giving rise to an inference that the parties the parties reaffirmed the conspiracy at any time after 1998;
- Plaintiff failed to provide any factual allegations for its conclusory assertions that Mohawk's refusal to deal with Watson during a period of contentious litigation was pursuant to and in furtherance of the 1998 conspiracy; and
- The fact that the parties were engaged in litigation throughout the relevant time frame constitutes an eminently plausible reason for the Defendant Mohawk's refusal to deal with Watson.

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[186] *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, No. 3:09-CV-487, 2009 WL 2767055 (M.D. Tenn. Aug. 27, 2009).

Cases

Arnold v. Petland, Inc. (2009)[187]

INDUSTRY: Pet Store Franchises

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying and conspiracy to commit illegal tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs contracted with Defendant, a franchisor in the pet and pet supply industry after several exchanges to take over a failing corporate store as a franchisee for considerably less than the original franchise capital investment of $750,000 to $850,000. Under the final franchise agreement, the Arnolds paid Petland an initial franchise fee of 12,500. Under a separate asset purchase agreement, the Arnolds bought the store's fixtures, equipment, inventory, and related assets for $110,000.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiffs failed to adequately plead that Petland had dominant market power in the relevant product market. The court noted:

- Plaintiffs failed to sufficiently allege a relevant market because any number of other products created for the same purpose would be reasonably interchangeable, and a Petland franchise was but one of many investment opportunities Plaintiffs could have pursued; and
- Plaintiffs failed to allege and could not allege that Petland had sufficient market power in the relevant tying product market to force Plaintiffs to purchase the tied products.

[187] *Arnold v. Petland, Inc.*, No. 2:07-CV-01307, 2009 WL 816327 (S.D. Ohio Mar. 26, 2009).

Cases

Churchill Downs v. Thoroughbred Horsemen's Group, LLC (2009)[188]

INDUSTRY: Horse racetrack betting

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff brought suit asserting *inter alia* antitrust violations arising from an on-going dispute between the horse owners and trainers and the racetracks concerning the proceeds from all forms of off-track betting. To apply some financial leverage against the racetracks, the horsemen withheld their permission for the racetracks to sell the ability for off-track betting operators to accept wagers on the track's races. The complaint presented one theory of antitrust violation: price-fixing perpetrated by a group boycott. Plaintiffs alleged that various horsemen's groups contracted, combined, and conspired to raise the amounts they received from advanced deposit wagering and that the horsemen were engaging in an unlawful group boycott of racetrack operators in order to accomplish that objective.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED** to all Defendants except Maline and Hines because Plaintiffs provided no facts that support the required elements that these Defendants (considered to be agents of others) actively and knowingly engaged in the scheme.

COURT'S RATIONALE: Court held that Plaintiffs' allegations of a price-fixing scheme facilitated by a group boycott were sufficient to satisfy *Twombly*'s plausibility standard. The court noted:

- Plaintiffs made factual allegations that several horsemen's groups had stated in letters that they would not consent to the sale of the host track's signal unless the licensing agreement was signed;
- Plaintiffs alleged that Ky HBPA allied with THG in November 2007, thereby entering into an agreement with horsemen's groups at 40 other racetracks;
- Plaintiffs alleged that the views of the group were memorialized in a uniform Licensing Agreement that was attached to the complaint;
- Once signed by an ADW, the licensing agreement would dictate minimum prices for ADWs purchasing signals;
- The presence of a tangible and agreed-upon contract made the existence of a combination or conspiracy amongst horsemen plausible;

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188 *Churchill Downs Inc. v. Thoroughbred Horsemen's Group, LLC*, 605 F. Supp. 2d 870 (W.D. Ky. 2009).

Cases

- Plaintiffs defined the relevant market as the sale and licensing of the right to receive simulcast signals and to accept wagers on horse racing at locations other than the host racetrack; and
- Plaintiffs alleged that through the terms of the licensing agreement that provided that horsemen's groups must receive one-third of the takeout arising from the sale of signals, the horsemen's groups had allied to require that minimum fee.

Cases

CBC Companies, Inc. v. Equifax, Inc. (2009)[189]

INDUSTRY: Consumer Credit Information Resellers

ANTITRUST VIOLATION(S) ALLEGED: Attempted monopolization and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, resellers of consumer credit information in the business of purchasing information from all three consumer reporting agencies ("CRAs") and consolidating the data into a "tri-merged report," filed antirust action against consumer reporting agency and its reseller subsidiary, after agency implemented a contractual fee that reseller alleged restricts the ability of resellers to offer reissues. Reissues are a cheaper alternative to repurchasing consumer credit information from the CRAs. CBC contends that by requiring resellers to pay a fee upon selling each reissue, despite not purchasing new data, Equifax is harnessing monopoly power in the market of providing credit data.

DEFENDANTS' MOTION: District court granted Defendants' motion to dismiss.[190] Plaintiff appealed.

DISPOSITION: Court of Appeals for the Sixth Circuit **AFFIRMED** and **GRANTED** Defendant's motion to dismiss.

COURT'S RATIONALE: Court held that CBC's complaint contained only conclusory allegations, and not facts sufficient to support more than a speculative injury to competition because CBC failed to allege an antitrust injury and thus lacked standing, thus the district court's decision was affirmed. The court noted:

- The complaint failed to allege key facts to substantiate an antitrust injury—that is, that competition in the Mortgage Lender Market decreased due to Equifax's reseller agreement;
- The complaint failed to identify any of the other reseller, and never established whether any of these resellers signed a contract similar to the reseller agreement, thereby preventing the court from being able to determine the boundaries of the relevant product market;
- The complaint failed to allege any specific increases in costs for its reissues or lost market sales in the Mortgage Lender Market; and
- To the extent that CBC alleged an impact on the Mortgage Lender Market, the federal regulations were the more likely basis for any putative injury because no cognizable injury existed where the alleged injury was a byproduct of the regulatory scheme or federal law rather than of the Defendant's business practices.

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189 *CBC Cos, Inc. v. Equifax, Inc.*, 561 F.3d 569 (6th Cir. 2009).

190 See page 127 of the digest for a summary of the district court's decision in this case.

Cases

Watson Carpet & Floor Covering v. Mohawk Indus. (2009)[191]

INDUSTRY: Carpet and Outdoor Flooring

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, an independent dealer of carpet and other floor coverings in the Nashville area, sells carpet and other floor coverings to homebuilders and retail customers, and installs these floor coverings in its customers' homes. Defendant Carpet Den is a competitor of Plaintiff and Defendant Mohawk Industries is a carpet manufacturer that sells carpet and flooring to both Watson and Carpet Den. In 1998, Defendant Rick McCormick, president and sole shareholder of Carpet Den, met with Mohawk's VP and sales representative and devised a plan to run Watson out of business and eliminate Watson from the market. As part of that plan, Mohawk would refuse to sell certain types of carpet to Plaintiff. Watson alleges that in furtherance of this conspiracy to put Watson out of business employees of Defendant made various accusations to damage its reputation around 2005, 2006, and 2007 in the industry and that Mohawk refused to sell to Watson the particular carpet it needed to service certain customers.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted. Defendant pointed out that there were no allegations that a reaffirmation of the alleged conspiracy between the various co-conspirators occurred at any time after 1999, and argued that the allegations claiming new harm in 2005, 2006, and 2007 could not rise above a speculative level because they were entirely unsupported by any factual link to the 1998 conspiracy.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that it followed that if the claims against Mohawk were deficient, then the claims against Carpet Den Defendants were likewise deficient. The court further noted that the fact that an employee of Carpet Den was making strange gestures and faces at Mr. Watson (or behind his back) while Mr. Watson was meeting with a potential client in May 2007 did not by itself suggest that Carpet Den was participating in a conspiracy with Mohawk.

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191 *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, No. 3:09-CV-487, 2009 WL 2767052 (M.D. Tenn. Aug. 27, 2009).

Cases

Home Qtrs. Real Estate Group v. Michigan Data Exchange (2009)[192]

INDUSTRY: Real Estate in Michigan

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, formerly operating as a real estate brokerage, filed suit against Michigan Data Exchange and Realcomp II, Ltd, two professional trade associations alleging violations of § 1 of the Sherman Act.

DEFENDANTS' MOTION: Magistrate Judge issued a report and recommendation recommending that the Defendant's motion to dismiss be denied. Defendant objected.

DISPOSITION: District Court overruled Defendant's objected and adopted the district court's report and recommendation which **DENIED** Defendant's motion to dismiss.

COURT'S RATIONALE: Court held that Plaintiff made additional allegations to nudge its claim across the line from conceivable to plausible. In addition to the allegation of parallel conduct, the court noted:

- Plaintiff alleged that Defendants were comprised of Plaintiff's competitors;
- Plaintiff alleged that Defendants had overlapping memberships;
- Plaintiff alleged that Defendants operated in the same geographic region; and
- Plaintiff alleged that Defendants took action within 24 hours of one another to close off Plaintiff's access to Defendants' services.

The court also noted that an undesired effect of *Twombly* is that the argument that Plaintiffs have not pleaded sufficient facts appears to have become the mantra of Defendants in antitrust cases.

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192 *Home Quarters Real Estate Group, LLC v. Mich. Data Ex., Inc*., No. 07-12090, 2009 WL 276796 (E.D. Mich. Feb. 5, 2009).

Cases

In re Travel Agent Commission Antitrust Litigation (2009)[193]

INDUSTRY: Travel Agencies

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, owners of 49 travel agencies engaged in the business of selling Defendants' airline services, alleged a § 1 conspiracy based on a series of uniform base commission cuts adopted by Defendants over a 7-year-period. Base commissions were an industry-wide practice where travel agencies received a sales commission from the servicing airline that equaled a percentage of the purchased ticket price. According to Plaintiffs, each Defendant's decision to match the competitors' base commission cut was the product of Defendants' prior illegal agreement to eliminate the practice of paying all base commissions.

DEFENDANTS' MOTION: Defendant's motion to dismiss for failure to state a claim upon which relief could be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Sixth Circuit **AFFIRMED** and **GRANTED** Defendant's motion to dismiss.

COURT'S RATIONALE: Court held that Plaintiffs failed to allege sufficient facts plausibly suggesting an agreement in violation of § 1 of the Sherman Act because Defendants' conduct was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. Specifically, the court noted:

- Plaintiffs failed to identify Defendants' attendees by name or title that they alleged to have had the opportunity to conspire at committee meetings of the International Air Transport Association in 1997 and 1998;
- Plaintiffs' attempt to distinguish *Twombly* on the basis that they alleged an actual agreement failed because their averments were nothing more than legal conclusions masquerading as factual allegations;
- Plaintiffs' amended complaint failed to cite any specific meeting that involved both Continental and American, the only two remaining Defendants;
- The fact that American and Continental gathered at industry trade association meetings during the 7-year-period when Defendants reduced commission rates did not weigh heavily in favor of suspecting collusion;

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193 *In re Travel Agent Commission Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009).

Cases

- A mere opportunity to conspire did not, standing alone, plausibly suggest an illegal agreement because American's and Continental's presence at such trade meetings was more likely explained by their lawful, free-market behavior; and

Plaintiffs failed to allege that a statement made in 1983 by a former American Airlines executive who approved commission cuts that were the subject of this action was involved in the alleged conspiracy.

Cases

Hackman v. Dickerson Realtors, Inc. (2007)[194]

INDUSTRY: Realtors in Rockford, Illinois

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Realtor brought action against Defendants,[195] who were competitors, a state realtors' association, and a local realtor association. Realtor alleged Defendants excluded him from the local real estate market because he charged a lower commission rate than the 6-7% the Defendants-realtors were accustomed to receiving and sharing equally under local multiple listing rules. As a result, Plaintiff alleged that Defendants unlawfully conspired to boycott and exclude him from the Rockford, Illinois realtors market.

DEFENDANTS' MOTION: Defendants moved *inter alia* for dismissal, arguing that the Sherman Act did not apply to non-profits and that Plaintiff failed to plead that the realtor associations engaged in competitive conduct or possessed monopoly power.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the Sherman Act does apply to non-profits, but held that Plaintiff failed to allege that Defendants did more than encourage anti-competitive activity. The court found the allegations conclusory because Plaintiff presented no evidence other than parallel conduct. The court held that the complaint failed *Twombly* because:

- Plaintiff failed to allege that associations reached an actual agreement with other Defendants and failed to plead facts from which an agreement could be inferred;
- Plaintiff failed to sufficiently allege associations agreed or conspired with other Defendants to monopolize the market;
- Plaintiff failed to plead facts from which an agreement to monopolize the market could be inferred from other Defendants' actions; and
- Plaintiff failed to plead facts to show how or when the Defendants' conduct affected interstate commerce.

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194 *Hackman v. Dickerson Realtors, Inc.*, 520 F. Supp. 2d 954 (N.D. Ill. 2007). Decided on August 31, 2007.

195 The named Defendants included: Diane Parvin; Dickerson Realtors, Inc.; Whitehead, Inc.; Century 21, Premier Real Estate Brokerage Services d/b/a Coldwell Banker Premier; R. Crosby, Inc. d/b/a Prudential Crosby Realtors; McKiski-Lewis, Inc.; Illinois Association of Realtors ("IAR"); and Rockford Association of Realtors ("RAR").

Cases

Omnicare, Inc. v. Unitedhealth Group, Inc. (2007)[196]

INDUSTRY: Pharmaceuticals

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Pharmacy brought claim against managed care companies and prescription drug provider alleging merger agreement violated the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted because, as a matter of law, once the Defendants entered into a merger agreement they became a single entity for antitrust purposes.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Plaintiff pleaded an outright agreement, with enough specific facts, including exact wording of the agreement, to render the allegation of agreement plausible. The court, nevertheless, given the novelty of the issue, made its decision without prejudice to a limited additional briefing on the question of whether *Twombly* should be interpreted differently in its application to the facts of this case. Complaint satisfied *Twombly* because:

- Complaint's allegation that merger agreement restricted one Defendant's ability to enter into contracts was straightforward allegation of explicit agreement between Defendants;
- Complaint's allegations were sufficient to suggest that intent of merger agreement was to suppress price competition between the two firms; and
- Complaint's allegations were sufficient to state claim that it suffered antitrust injury.

196 *Omnicare, Inc. v. Unitedhealth Group, Inc.*, 524 F. Supp. 2d 1031 (N.D. Ill. 2007).

Cases

Justice v. Town of Cicero (2007)[197]

INDUSTRY: Municipal water services

ANTITRUST VIOLATION(S) ALLEGED: General federal antitrust violations

NATURE OF ALLEGED VIOLATION(S): Plaintiff alleged that the Town of Cicero's water department's rates and billing amounted to an antitrust violation.

DEFENDANTS' MOTION: Defendant moved to dismiss all accounts of the complaint for failure to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the facts stated in Plaintiff's complaint, even if true, did not give rise to a claim entitling him to relief. In light of *Twombly*, the court stated that making a bare assertion did not suffice. Plaintiff failed to provide the factual grounds of his entitlement to relief. The complaint failed to satisfy *Twombly* because:

- Plaintiff failed to identify which provisions of the antitrust laws the town allegedly violated; and
- Plaintiff failed to allege anti-competitive action by the town to support his allegation of the town having a monopoly of the water supply.

[197] *Justice v. Town of Cicero*, No. 06-CV-1108, 2007 WL 2973851 (N.D. Ill. Oct. 10, 2007).

Cases

Sheridan v. Marathon Petroleum Company, LLC (2008)[198]

INDUSTRY: Gasoline station franchises

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, franchisee petroleum dealers, filed a class action against franchisor oil company, Marathon, claiming *per se* violation of Sherman Act by franchisor's alleged tying of processing of all credit card sales to franchise under a tying agreement that required franchises to use franchisor's designated processing service for credit card sales. Plaintiffs claimed that franchisor conspired with banks to fix price of processing service.

DEFENDANTS' MOTION: Defendant's motion for failure to state a claim upon which relief can be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for Seventh Circuit **AFFIRMED** and **GRANTED** Defendant's motion to dismiss.

COURT'S RATIONALE: Court held that, under *Twombly*'s pleading standard, the Plaintiffs' bare assertion of Marathon's appreciable economic power was an empty phrase that did not save the complaint. The franchisor lacked the market power necessary to sustain a tying violation. The court also found that the franchisor did not conspire with credit card issuers. The court found that the complaint did not satisfy *Twombly* because:

- No monopolistic competition was alleged;
- The complaint failed to allege that Marathon was colluding with the other oil companies to raise the price of credit card processing;
- The complaint failed to allege that Marathon had significant unilateral power over the market price of gasoline and so could charge a supra-competitive price; and
- The complaint gave no hint of the role Marathon played in a conspiracy of card companies.

198 *Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590 (7th Cir. 2008).

Cases

Siemer v. Quizno's Franchise Company (2008)[199]

INDUSTRY: Franchise of fast food chain

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs claimed that Quiznos exercised its substantial economic power to coerce franchisees to purchase essential goods from its affiliates and approved vendors.

DEFENDANTS' MOTION: Quiznos moved to dismiss alleging that Plaintiffs failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: The court held that the complaint was insufficient under *Twombly* because:

- The definition of the relevant market, "Quick Service Toasted Sandwich Restaurant Franchises" was too narrow because the relevant product market must include all "products that have reasonable interchangeability for the purposes for which they are produced";
- The Plaintiffs failed to show that market power existed because they did not plead any facts to demonstrate that pre-contract, Quiznos had the power to force a potential franchisee to purchase something that it would not have had there been a competitive market; and
- The Plaintiffs made no suggestion that Quiznos was in a position to coerce investors, not otherwise determined to do so, to purchase its franchise.

[199] *Siemer v. Quizno's Franchise Co.*, No. 07-CV-2170, 2008 WL 904874 (N.D. Ill. Mar. 31, 2008).

Cases

Medical Consultants v. Iroquois Memorial Hospital (2008)[200]

INDUSTRY: Radiology services in Iroquois Memorial Hospital

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to § 1 and attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a board-certified radiologist, provides radiology services at Iroquois Memorial Hospital. Plaintiff, in his amended complaint, alleged Defendant conspired to boycott in violation of § 1 of the Sherman Act

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted. Defendants argued that Plaintiff failed to allege an antitrust injury; instead they only alleged an injury to themselves as competitors.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that complaint failed *Twombly* because:

- Plaintiff failed to allege that prices had increased or availability of services had declined;
- Plaintiff failed to allege that Defendant's conduct resulted in a decline in the availability of radiology services in general, only that Plaintiffs' ability to provide those services has declined;
- Plaintiff failed to allege an antitrust injury related to availability; and
- Plaintiff failed to allege that the quality of the radiology services had declined.

[200] *Med. Consultants, Ltd. v. Iroquois Mem'l Hosp.*, No. 07-CV-2083, 2008 WL 2477464 (C.D. Ill. June 16, 2008).

Cases

DSM Desotech Inc. v. 3D Systems Corp. (2008)[201]

INDUSTRY: Manufacturers of stereo-lithography machines

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying and restraint of trade pursuant to § 1 and attempt to monopolize under § 2 of the Sherman Act.

NATURE OF ALLEGED VIOLATION(S): 3D Systems ("3DS") was a manufacturer of large-frame stereo-lithography ("SL") machines. Stereo-lithography is a process by which a physical object is created layer by layer from liquid resin that is solidified into shape with a laser. Plaintiff, Desotech was the leader in the SL resin market and has two equipment patents allegedly covering the resin recoating technology used in eight of the SL machines produced by 3DS. Plaintiff alleged patent infringement and various antitrust claims against Defendants. Defendant raised an affirmative defense to the patent infringement claim and moved to dismiss antitrust claims under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. While that motion was pending, Plaintiff requested Defendants produce over eight years worth of business records.

DEFENDANTS' MOTION: Defendants moved to stay discovery requests until after motion to dismiss was decided.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that *Twombly* counseled in favor of granting Defendants' motion to stay because, as the *Twombly* court recognized, discovery in any antitrust case can quickly become enormously expensive and burdensome to Defendants.

[201] *DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08-CV-1531, 2008 WL 4812440 (N.D. Ill. Oct. 28, 2008).

Cases

Packaging Supplies, Inc. v. Harley-Davidson, Inc. (2009)[202]

INDUSTRY: Retailers, Manufacturers, and Franchise Operators

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, Packaging Supplies, Inc. ("PSI") is in the business of manufacturing and distribution plastic bags. PSI alleged that Harley-Davidson sent an edict to its dealers directing them not to purchase their bags from PSI and instead to purchase their bags only from Harley-Davidson's merchandising division. Plaintiff alleged that this edict to dealers constituted an illegal tying arrangement in violation of the Sherman Act.

DEFENDANTS' MOTION: Defendant moved to dismiss the complaint for failure to state a claim upon which relief could be granted arguing that PSI pleaded itself out of court by attaching the Notice, *i.e.*, the agreement containing the alleged tying language to its complaint.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Harley-Davidson may have been merely protecting its intellectual property rights, and if that was so, then the case may be easily resolved at the summary judgment phase, but it is not proper to examine the merits of the case on a motion to dismiss. The court, for purposes of denying Defendant's motion to dismiss, found it sufficient that:

- PSI alleged that many of Harley-Davidson's dealers would have preferred to buy bags from PSI but feared repercussions if they continued to do business with PSI; and
- PSI has adequately alleged a Harley-Davidson had market power in the tying market.

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202 *Packaging Supplies, Inc. v. Harley-Davidson, Inc.*, No. 08-CV-400, 2009 WL 855798 (N.D. Ill. Mar. 30, 2009).

Cases

In re Text Messaging Antitrust Litigation (2009)[203]

INDUSTRY: Wireless telecommunications

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff filed suit on behalf of all individuals who purchased text messaging services on a fee-per-message basis from Defendants or their predecessors, subsidiaries, or affiliates from January 1, 2005 to the present alleging that Defendants, Sprint/Nextel, Verizon, AT&T, and T-Mobile (four national wireless communications service providers), entered into and implemented a continuing contract, combination, and conspiracy to fix, raise, maintain, and stabilize prices for Text Messaging Services sold in the U.S. in violation of § 1 of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that given various factors specific to the wireless industry, parallel pricing in a single relatively narrow area of a larger competitive industry did not support a reasonably inference of an agreement not to compete. The court also noted:

- Plaintiffs failed to allege that there was an express agreement among any of the Defendants and they offered no specific time, place, or person involved in the alleged conspiracy;
- Plaintiffs failed to allege any specific facts that identify the parties, purpose, and approximate dates of a plausible conspiracy;
- Plaintiffs failed to make any allegations about particular meetings at which they contended any of the Defendants reached an agreement;
- Plaintiffs failed to allege any details about the structure and content of those meetings or the types of employees who attended those meetings;
- Plaintiffs failed to give any indication of the terms of the alleged agreement;
- September letter from the chairman of the Senate Antitrust Subcommittee sent to Defendants failed to make any direct allegation of price-fixing, thus the court could not infer an agreement to fix prices from Defendants' failure to deny such an allegation;

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[203] *In re Text Messaging Antitrust Litig.*, No. 08-7082, 2009 WL 5066652 (N.D. Ill. Dec. 10, 2009).

Cases

- Two five-cent price increases could hardly be characterized as complex or even historically unprecedented because the Defendants had arrived at a common per-message price of ten cents before the alleged conspiracy began;
- It would be difficult to characterize changes occurring over an eleven-month period as occurring at the same time; and
- Plaintiffs cited an obvious explanation in their complaint—as text messaging became more popular, Defendants sought to encourage consumers to purchase text messaging as part of a bundled plan.

Cases

In re Aftermarket, Filters Antitrust Litigation (2009)[204]

INDUSTRY: Aftermarket Filters

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Several putative Plaintiff classes alleged that Defendants, the leading manufacturers of automobile aftermarket filters, conducted a single conspiracy to fix filter prices beginning in March 1, 1999 and extending to the present.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the complaint sufficiently stated a claim of a single conspiracy beginning in 1999 and extending through the present. The court noted:

- Complaint contained detailed allegations of a number of specific instances of price-fixing conversations based on an eyewitness, Burch, who claimed to have witnessed several specific meetings and conversations that culminated in the agreement by the named Defendants to participate in a horizontal price-fixing conspiracy;
- Complaint contained factual allegation that in June 1999, at Sliverii's direction, Defendant Purolator faxed a draft price announcement to the Honeywell employee to whom Silverii had secretly spoken to at the trade show—detailing when Purolator intended to implement a price increase;
- The complaint contained allegations of a specific meeting at a trade show between September 26 and September 28, 2004, at which a Defendant coordinated a price increase of at least 5% with the other Defendants;
- In December 2004, Defendants successfully implemented a third price increase;
- The complaint, unlike in *Twombly*, alleged an actual agreement initiated by specified persons, witnessed in its inception and on several later occasions by an actual participant in the price-fixing scheme; and
- The complaint clearly alleged the inception of the conspiracy by Silverii, the methods that he directed to accomplish the scheme, and a specific meeting at which the scheme was discussed.

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[204] *In re Aftermarket, Filters Antitrust Litig.*, No. MDL 1957, 2009 WL 3754041 (N.D. Ill. Nov. 5, 2009).

Cases

In re Potash Antitrust Litigation (2009)[205]

INDUSTRY: Mineral and Chemical Salts Producers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Potash refers to mineral and chemical salts that contain potassium and a multitude of other elements in various combinations that are mined from naturally occurring ore deposits. Because potash is a homogenous product, buyers typically make purchase decisions based largely on price. Direct purchasers of potash *inter alia* brought actions against potash producers on behalf of themselves and all others who purchased potash products in the U.S. alleging that Defendants conspired to fix the prices of potash by engaging in coordinated restrictions in potash output that were contrary to the economic interests of the individual producers.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that when reading the allegations as a whole the complaint had satisfied the *Twombly* standard. The court found that the allegations that certain suspensions in production all took place over the same 12-day period and the announcement of one Defendant's suspension of production made by a purported competitor plausibly suggested an agreement. The court also noted:

- Plaintiffs alleged that Defendants routinely held meetings during the class period, which provided opportunities to conspire and exchange highly sensitive competitive information, including pricing, capacity utilization, and other import prospective market information;
- Plaintiffs alleged that on October 11, 2005 Defendants' executives met and discussed, among other things, highly sensitive production plans;
- Plaintiffs alleged that shortly following that meeting, in November and December 2005, PCS and Mosaic announced production shutdowns at certain mines, BPC reduced production, and IPC shut down certain mines;
- Plaintiffs alleged that Defendants' representatives attended an IFIA conference during which they announced an additional price increase on potash products;
- Plaintiffs alleged that the major potash suppliers had joint ventures or overlapping interests that involved competitors in the potash market; and

[205] *In re Potash Antitrust Litig.*, No. MDL 1996, 2009 WL 3583107 (N.D. Ill. Nov. 3, 2009).

Cases

- Plaintiffs alleged that an executive of one of the Defendants announced that due to the development of a sinkhole, it might have to suspend shipments from one of its mines, and within a day of that announcement PCS, Uralkali, Agrium, and BPC announced that they would suspend potash sales.

Cases

Standard Iron Works v. Arcelormittal (2009)[206]

INDUSTRY: Steel Products Manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Raw steel is a commodity good that is the primary input for a variety of steel products manufactured and sold by Defendants in the United States. Defendants manufacture raw steel, which they convert into steel products for sale to purchasers in various industries. Plaintiff, a direct purchaser of steel, brought a putative class action alleging that Defendants engaged in a multi-year antitrust conspiracy to reduce the production of steel products in the U.S. in violation of § 1 of the Sherman Act. Plaintiffs alleged that on at least three occasions each Defendant implemented coordinated productions cuts for the express purpose of raising the price of steel products.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that complaint sufficiently alleged parallel conduct, in addition to a number of facts that plausibly suggest an agreement to curtail production. The court noted:

- Plaintiffs alleged that the prevailing market price of steel was, at all relevant times, substantially higher than Defendants' marginal cost of production;
- Plaintiffs alleged that the U.S. market for steel was characterized by significant barriers to entry, including high capital requirements and regulatory barriers, while import competition was limited by transportation costs (including ocean freight shares), trade duties, and currency exchange rates;
- Plaintiffs alleged that restraints on imports impose substantial costs on imported steel, which effectively insulated domestic producers from import competition and allowed them to raise prices in the U.S. market;
- Plaintiffs alleged that the industry's rapid consolidation coincided with strong demand, prices, and earnings through mid-2004;
- Plaintiffs alleged that on March 1, 2005 Defendant Mittal's executive addressed a steel industry meeting in Chicago and criticized the industry's traditional business model and urged the industry to make adjustments;

206 *Standard Iron Works v. Arcelormittal*, 639 F. Supp. 2d 877 (N.D. Ill. 2009).

Cases

- Plaintiffs alleged that immediately following a series of executive level communication concerning the need to restrict industry output, Mittal and U.S. Steel curtailed several domestic furnaces in May 2005 for the express purpose of reducing the market supply;
- Plaintiffs alleged that by July 2005, all Defendants were alleged to have implemented massive and unprecedented production cuts; and
- Plaintiffs alleged that Defendants candidly admitted that the reason for their production cuts was to decrease supply to keep prices high.

Cases

Hon Hai Precision Industry Co. v. Molex, Inc. (2009)[207]

INDUSTRY: Electronics

ANTITRUST VIOLATION(S) ALLEGED: Attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff and its subsidiary develops, markets, and distributes, electronic components, including electrical connectors used to interconnect personal computers and audio/visual equipment. Defendant is a supplier of interconnect products and the owner of the DisplayPort patent that relates to a flexible digital interface capable of handling video and audio data over a common cable. The two parties entered into a licensing agreement in which Molex granted Hon Hai a license to the necessary claims for implementing the DisplayPort. Shortly after this agreement, Plaintiff filed suit, alleging *inter alia* that Defendant was attempting to gain monopoly power in the relevant industry.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Hon Hai had failed to state a claim for attempted monopolization because it had not shown that Molex engaged in unlawful anti-competitive or predatory conduct and the complaint on its face conceded competition in the relevant market.

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[207] *Hon Hai Precision Indus. Co. v. Molex, Inc.*, No. 08-5582, 2009 WL 310890 (N.D. Ill. Feb. 9, 2009).

Cases

DSM Desotech, Inc. v. 3D Systems (2009)[208]

INDUSTRY: Stereolithography machine manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying and restraint of trade pursuant to § 1 and attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff alleged that since 2007, Defendant has engaged in an unlawful tying arrangement in violation of § 1 of the Sherman Act. Defendant is a manufacturer of large frame stereolithography ("SL") machines. Stereolithography is a process by which a physical object such as a model is created layer by layer from liquid resin that is solidified into shape with a laser. Generally, Desotech alleged that 3DS conditioned the sale and maintenance of its SL machines on the purchase of the manufacturer's more expensive yet poorer quality resin, which amounted to various violations of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED** in part and **DENIED** in part.

COURT'S RATIONALE: Court held that Desotech did not adequately plead the third element of a tying arrangement—that the tying arrangement forecloses a substantial volume of commerce. The court further noted that Desotech's complaint failed to adequately allege coercion on the part of 3DS. Lastly, the court noted that to the extent that 3DS alleged that the service or maintenance of the machines was the tying market at issue for these consumers, Desotech had failed to identify, much less adequately allege, a market for such services, as would be required in order to allege that 3DS had market power in the tying market.

As it related to Plaintiff's attempted monopolization claim, the court held that Desotech's allegations that 3DS's market share had been increasing and, consequently, the shares of Desotech and other resin dealers steadily decreasing, that the relevant market was defined as resins used in large-frame SL machines in the U.S., and that 3DS had attempted to systematically remove from the market (or prevent from being serviced) older SL machines that lacked the new 3DS feature were sufficient to survive a motion to dismiss.

Lastly, as it related to Desotech's claim that Desotech committed an unreasonable restraint of trade in violation of § 1 of the Sherman Act, the court held that although Desotech's claims were premised largely on 3DS's unilateral declaration, Plaintiff's further allegation that the contract and licenses between 3DS and its customers constituted concerted action. It is worth noting that this decision was issued before

[208] *DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08-CV-1531 (N.D. Ill. Jan. 26, 2009).

Cases

Ashcroft v. Iqbal, and this court explicitly stated that the Seventh Circuit has explained that despite some language that could be read to suggest otherwise, the Court in *Twombly* made clear that it did not, in fact, supplant the basic-notice pleading standard.

Cases

Hackman v. Dickerson Realtors, Inc. (2009)[209]

INDUSTRY: Realtors in Rockford, Illinois

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Realtor brought action against Defendants,[210] who were competitors, state realtors' association, and local realtor association. Realtor alleged Defendants excluded him from the local real estate market because he charged a lower commission rate than the 6-7% the Defendants-realtors were accustomed to receiving and sharing equally under local multiple listing rules. As a result, Plaintiff alleged that Defendants unlawfully conspired to boycott and exclude him from the Rockford, Illinois realtors market.

DEFENDANTS' MOTION: All Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED** in part and **DENIED** in part.

COURT'S RATIONALE: Court held that Plaintiff's second amended complaint had now sufficiently pleaded the Defendant's knowledge and intent to engage in a group boycott.

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209 *Hackman v. Dickerson Realtors, Inc.*, 595 F. Supp. 2d 875 (N.D. Ill. 2009).

210 The named Defendants included: Diane Parvin; Dickerson Realtors, Inc.; Century 21, Premier Real Estate Brokerage Services d/b/a Coldwell Banker Premier; R. Crosby, Inc. d/b/a Prudential Crosby Realtors; McKiski-Lewis, Inc.; Illinois Association of Realtors ("IAR"); and Rockford Association of Realtors ("RAR").

Cases

Fair Isaac Corp. v. Equifax Inc. (2008)[211]

INDUSTRY: Credit bureaus

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing pursuant to § 1 and monopolization under § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): The Fair Isaac Corp. ("FICO") creates and markets the FICO Classic and other credit scores by modifying information collected by the Defendants.[212] Fair Isaac alleged that the Defendants, credit bureaus that collect and market credit scores quantifying an individual's credit worthiness, agreed jointly to create, own, and control VantageScore, which was designed to directly compete with FICO scores. Plaintiff further alleged VantageScore had the purpose and effect of extending the credit bureaus' 100% collective market power in the aggregated credit data market into the credit score market. Fair Isaac alleged that in selling credit scores to lenders, the credit bureaus manipulated the prices of their bundle of products and services so that the bundles that included Fair Isaac's credit scores were more expensive than bundles that included VantageScore.

DEFENDANTS' MOTION: Defendants moved for a partial judgment on the pleadings or alternatively for partial summary judgment in respect to antitrust claims of Plaintiff's Second Amended Complaint ("SAC").

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the SAC alleged a close temporal proximity between the credit bureaus agreement to jointly create, own, and control VantageScore and the beginning of the alleged parallel price manipulation and denial of access to the credit bureaus' data. The allegations that the court held satisfied *Twombly* included:

- Allegation that VantageScore was a joint venture created, controlled, and owned by the three credit bureaus and was developed specifically to compete with Fair Isaac's products;
- Allegation that these three combine to have a 100% share of the market of credit data;
- Allegation that simultaneously they increased the prices for accessing their credit data;
- Allegation that Defendants manipulated the prices of their product bundles to make bundles including Fair Isaac's credit scores more expensive than VantageScore bundles;

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211 *Fair Isaac Corp. v. Equifax Inc.*, No. 06-4112, 2008 WL 623120 (D. Minn. Mar. 4, 1980).

212 The named Defendants collectively represent the only three credit bureaus in the United States. They included Equifax Inc.; Equifax Information Services LLC; Experian Information Solutions Inc., Trans Union LLC; and VantageScore Solutions, LLC.

Cases

- Allegation that the aggregated credit data necessary to develop and apply credit scores was controlled exclusively by the credit bureaus;
- Allegation that Defendants charged Fair Isaac significantly higher prices for credit-score-and-credit-report bundles than the bureaus charged other resellers of credit reports; and
- Allegation that Experian's refusal to participate in a joint release of a prior collaboration with Fair Isaac to develop a bankruptcy score was against economic interests.

Cases

America Channel v. Time Warner Cable (2007)[213]

INDUSTRY: Cable providers

ANTITRUST VIOLATION(S) ALLEGED: Conspiratorial refusal to deal, to monopolize, to horizontally divide markets, and anti-competitive acquisition of another cable provider, pursuant to §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, The America Channel ("TAC"), filed an amended complaint, alleging that Defendants have "market power, if not monopoly power" in the multi channel video programming distributors market and that they conspired to engage in persistent and extensive discrimination against independent programming networks.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim. Defendants asserted that TAC's allegations were conclusory and failed to identify the roles each Defendant played in the conspiracy, the means by which the conspiracy was affected, or any specific communications.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the amended complaint failed to allege facts regarding Defendants' communication sufficient to state a claim for conspiratorial refusal to deal. The court found that the allegations did not exclude the possibility of independent action because it was in both Defendants' economic interest to promote their own affiliated networks. The anti-competitive acquisition claim was also found to be conclusory. The allegations that the court held failed *Twombly* included:

- Allegation that during the four years prior to the filing of the original complaint that Defendants "agreed, combined, and conspired to engage in a concerted refusal to deal with independent programming networks" including TAC, supported by statistics of Defendants' similar decisions not to carry other independent networks and detailing how difficult survival for any independent network is without carriage by the Defendants;
- Allegation that Defendants conspired because both allegedly declined to carry 112 of 114 networks that sought carriage; and
- Allegation that Defendants conspired to thwart TAC's effort to obtain carriage on Adelphia (another cable provider) based on "information and belief" that abrupt change in negotiations with Adelphia resulted from instructions from Defendants, who were at the time potential bidders for Adelphia.

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213 *Am. Channel, LLC v. Time Warner Cable, Inc.*, No. 06-2175, 2007 WL 1892227 (D. Minn. June 28, 2007).

Cases

Southeast Missouri Hospital v. C.R. Bard, Inc. (2008)[214]

INDUSTRY: Urological catheters manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Unlawful restraint of trade pursuant to § 1 and monopoly and attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, Southeast Missouri Hospital, alleged that Defendants acted in concert, combination, and conspiracy to maintain its monopoly power in the urological catheter markets by engaging in a campaign of disparagement and misinformation about the urological products manufactured by competitors. Plaintiff alleged that Defendants, Bard and Tyco, had exclusive dealings contracts with group purchasing organizations that conditioned discounts, rebates, and lower prices on a member hospital's agreement to purchase a specific percentage of urological catheters from them and penalizing the hospitals who purchase unrelated products from another vendor.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Tyco's motions were **GRANTED** as to both counts, Bard's motion regarding Plaintiff's § 1 claim was **GRANTED**, but Bard's motion regarding the § 2 claim was **DENIED**.

COURT'S RATIONALE: Court held that Plaintiff failed to allege, with any specificity, that Bard and Tyco had an agreement to act as one. The court adopted the view that a shared monopoly does not itself violate § 2 of the Sherman Act, rather in order to sustain a charge of monopolization or attempted monopolization, a Plaintiff must allege the necessary market domination of a particular Defendant. Thus, the court found that as to Tyco, Plaintiff failed to satisfy *Twombly* because:

- Tyco's market share was 20% at best, which was too little to establish any market power; and
- Without any specific allegations of an agreement between Defendants, Plaintiff cannot bootstrap its claims against Tyco by accumulating its market share with that of Bard.

[214] *S.E. Mo. Hosp. v. C.R. Bard, Inc.*, No. 1:07-CV-0031, 2008 WL 199567 (E.D. Mo. Jan. 22, 2008).

Cases

Windage v. U.S. Golf Ass'n (2008)[215]

INDUSTRY: Golf retailers

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff alleged that the United States Golf Association ("USGA"), and individuals that applied the Rules of Golf in the 13 national championships it conducts every year, arbitrarily applied the Rules of Golf to the Windage device (that allowed golfers to assess wind conditions without having to bend over to pluck grass), harmed competition, and stifled innovation in the market for golf products. The stated purposes of the Rules of Golf are to preserve the traditions of golf and to ensure that a player's score is the product of skill, and not equipment. Because more than twenty thousand golf courses and 25 million golfers voluntarily follow the Rules of Golf, Defendants' ruling negatively affected the sale of the Windage device. Windage alleged that the USGA, its members, affiliates, and those acting in concert engaged in a group boycott to restrain trade and inhibit research and development in the golf products market.

DEFENDANTS' MOTION: Defendants moved to dismiss arguing that Windage failed to adequately allege the existence of an illegal agreement.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Windage did not allege any facts that suggested an unlawful agreement between Defendants. The court concluded that golf retailers' parallel refusals to sell the Windage device did not create a plausible inference that the USGA and the golf retailers reached a preceding agreement. The complaint failed *Twombly* because:

- Plaintiff failed to provide a plausible factual context in which the USGA, golf pro shops, and golf retailers would conspire to interpret the Rules of Golf to exclude Windage's device;
- Plaintiff failed to allege that the USGA or the golf retailers were direct competitors of Windage; and
- Plaintiff failed to allege that USGA, a non-profit entity, had any economic motivation to exclude the Windage device.

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[215] *Windage, LLC v. U.S. Golf Ass'n*, No. 07-4697, 2008 WL 2622965 (D. Minn. July 2, 2008).

Cases

Best Pallets v. Brambles Indus. (2008)[216]

INDUSTRY: Recyclers of wood pallets

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs claimed that Brambles, d/b/a CHEP USA ("CHEP"), attempted to monopolize the national wood pallet market by instituting an Accelerated Volume Program ("AVP") which led to the addition of thousands of CHEP customers. First, the AVP leased pallets to CHEP customers with no requirement to return them, knowing that many of its pallets would be lost. Then, instead of collecting the pallets from its customers, CHEP purposefully waited for recyclers, who were bound by contract to collect the pallets, to accumulate them. CHEP then allegedly demanded the return of its leased pallets from the recyclers but did not compensate them or undercompensated them for the return. Plaintiffs also alleged that CHEP threatened and took legal action against recyclers who would not return the pallets.

DEFENDANTS' MOTION: CHEP moved to dismiss alleging that Plaintiffs failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: The court held that the following allegations were sufficient to establish CHEP's tendency to discipline or eliminate competition to enhance its long-term monopoly power:

- That CHEP embarked on the AVP knowing it would result in widespread loss of its pallets;
- CHEP purposefully permitted its pallets to come into the possession of pallet recyclers to use their established pallet-collection network for its own benefit without providing adequate compensation; and
- By not bearing the collection costs associated with its leasing program, CHEP gained a long-term pricing advantage at the expense of recyclers.
- The court held that the following allegations were sufficient to establish a realistic probability that CHEP could achieve a monopoly in the wood pallet market:
- CHEP was the largest producer of pallets in the pallet market;
- CHEP's AVP rapidly increased its customer base; and
- CHEP had the ability to shift its own costs to the pallet recyclers.

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216 *Best Pallets Inc. v. Brambles Indus., Inc.*, No. 08-2012, 2008 WL 3539627 (W.D. Ark. Aug. 11, 2008).

Cases

Little Rock Cardiology Clinic PA v. Baptist Health (2009)[217]

INDUSTRY: Medical/Physician Services

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Little Rock Cardiology Clinic ("LRCC") is a professional association of cardiologists located in Little Rock, Arkansas, practicing in both diagnostic and interventional cardiology procedures. Defendant Baptist Health is the largest hospital company in Arkansas, operating five hospitals in the state. Defendant Blue Cross and Blue Shield of Arkansas is a health-insurance company headquartered in Little Rock, Arkansas. LRCC filed suit against Defendants alleging that they conspired to restrain trade in, and monopolize the market, for cardiology services for privately insured patients.

DEFENDANTS' MOTION: District court granted Defendants' motion dismiss for failure to state a claim upon which relief could be granted. Plaintiff appealed.

DISPOSITION: United States Court of Appeals for the Eighth Circuit **AFFIRMED** the District Court's decision and **GRANTED** Defendants' motion with prejudice.

COURT'S RATIONALE: Court held that without a showing as to the proper relevant market, LRCC cannot establish the necessary predicate for their antitrust claims. The court noted:

- The relevant product market could not be limited to patients using private insurance; and
- The relevant geographic market could not be limited to a single city.

[217] *Little Rock Cardiology Clinic PA v. Baptist Health*, Nos. 08-3158 & 09-1786, 2009 WL 5092933 (8th Cir. Dec. 29, 2009).

Cases

Haines v. Verimed Healthcare Network, LLC (2009)[218]

INDUSTRY: Medical Technical Writing

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff is a medical doctor and president of Haines Medical Communications, Inc. Plaintiff, working as an independent contractor, supplies and reviews written content for publication on medical websites. Defendant Verimed hires independent contractors like Haines to produce certain content, and then sells that content to websites that have a need for it. Verimed had a contractual relationship with a third party medical website that would have bought Plaintiff's work product at significantly higher prices than Plaintiff was paid as an independent contactor. Haines brought suit alleging that agreement between medical website operator and Defendant that prohibited operator from utilizing services of any writer that had previously provided services sold by Defendant to it, was an unlawful restraint on trade in violation of Sherman Act.

DEFENDANTS' MOTION: Defendant moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: The court held that the type of agreement alleged was not the type of agreement the antitrust laws were designed to prevent, for the agreement was nothing more than a non-compete agreement—a common feature of countless independent contractor relationships in any number of industries. Thus, Plaintiff's complaint failed to establish an antitrust injury because the essential connection between Haines' injury and the aims of the antitrust laws was missing.

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[218] *Haines v. Verimed Healthcare Network LLC*, 613 F. Supp. 2d 1133 (E.D. Mo 2009).

Cases

In re Live Concert Antitrust Litigation (2007)[219]

INDUSTRY: Promotion of live concerts

ANTITRUST VIOLATION(S) ALLEGED: Monopolization and attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): This Multi-district litigation consisted of twenty-two class actions from across the country against Defendant Clear Channel Communications, Inc. and its subsidiaries (collectively, "CCC"). The Plaintiffs, individuals who purchased tickets to live rock concerts, alleged that CCC engaged in unlawful and anti-competitive activities to acquire, maintain, and extend its monopoly power in various regional ticket markets for live rock concerts. Plaintiffs alleged that Defendants' actions, *inter alia*, violated § 2 of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved for a judgment on the pleadings arguing that Plaintiffs did not have antitrust standing.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held, *inter alia*, that Plaintiffs had alleged sufficient facts to have antitrust standing to bring attempted monopolization claim. The complaint satisfied *Twombly* because:

- Plaintiffs alleged that CCC "has engaged in a vast array of anti-competitive, predatory and exclusionary practices in the course of acquiring, maintaining and extending its monopoly power in the relevant market";
- Plaintiffs alleged that CCC substantially eliminated competition in the radio and concert promotion markets by increasing its market power through the acquisition or merger of primary competitors;
- Plaintiffs alleged that CCC leveraged its market power in the radio market to increase its market power in the concert promotion market;
- Plaintiffs alleged that CCC "repeatedly has used its size and clout to coerce artists—including artists who had pre-existing business relationships with competitors—to use Clear Channel to promote their concerts or else risk losing airplay and other on-air promotional support on radio stations owned or otherwise controlled by Clear Channel";
- Plaintiffs alleged that airplay of music and concert promotion on radio stations could determine the financial success of a concert;

[219] *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98 (C.D. Cal. 2007).

Cases

- Plaintiffs alleged that CCC bids up the fees for artists to levels at which competing promoters cannot compete; and
- Plaintiffs alleged that CCC would guarantee artists more than 100 percent of gross sales in exchange for the right to promote the artist's concert, resulting in competing producers having to either pass on such artists or promote the artists at a guaranteed loss.

Cases

In re Netflix Antitrust Litigation (2007)[220]

INDUSTRY: Home delivery DVD rentals

ANTITRUST VIOLATION(S) ALLEGED: Monopolization or attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Customer brought putative antitrust class action against operator of online DVD-rental service, alleging, *inter alia*, violations of the Sherman Act. Netflix operates an online DVD-rental service that claims 5.2 million subscribers and obtained two patents on its DVD-rental service that described methods of ordering, but not transmission of DVDs via the Internet.

DEFENDANTS' MOTION: Defendants moved to dismiss Plaintiff's antitrust claims for lack of standing and for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiff failed to meet the *Walker Process Claim* test pursuant to the *Twombly* standard which required a claimant to show: (1) that the asserted patent was obtained by knowingly and willfully misrepresenting the facts to the PTO; (2) that the party enforcing the patent was aware of the fraud when bringing suit; (3) independent and clear evidence of deceptive intent; (4) a clear showing of reliance, *i.e.*, that the patent would not have issued but for the misrepresentation or omission; and (5) the necessary additional elements of an underlying violation of the antitrust laws. Thus, the court granted the motion because the Defendant showed that Plaintiff did not plead a sufficient level of patent enforcement against Netflix's potential competitors, so Plaintiff's federal antitrust claims failed.

[220] *In re Netflix Antitrust Litig.*, 506 F. Supp 2d 308 (N.D. Cal. 2007). Case was decided on June 14, 2007.

Cases

Perry v. Rado (2007)[221]

INDUSTRY: Medical providers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff alleged that Kadlec Medical Center ("Kadlec"), his former employer, revoked his credentials as a result of a conspiracy to restrain trade. Plaintiff alleged that Associated Physicians for Women ("APW") and its individual members drove Dr. Perry out of business in the entire Tri-City area of Washington.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim, contending that Plaintiff's complaint failed to allege an "antitrust injury" (harm to competition) and claimed "no more than Dr. Perry's personal grievance with the Defendants."

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court found that the complaint contained nothing but conclusions and that the factual allegations that Plaintiff said he could plead in an amended complaint were mere speculations. The allegations concerned the impact on Dr. Perry of the alleged agreement or conspiracy, rather than with injury to competition in general. The allegations that the court held failed to satisfy *Twombly* included:

- Allegation that APW and/or its individual members, in order to accomplish an "anti-competitive purpose," solicited and obtained agreements from doctors at Kadlec to exclude Dr. Perry from practice in the Tri-City area of Washington;
- Allegation that Defendants conspired to use the credentialing and quality assurance processes to boycott Dr. Perry to reduce and/or eliminate effective competition in the Tri-City Area;
- Allegation of exclusion from only some of the municipalities of the alleged geographic market and retaining privileges at hospitals in the actual Tri-Cities region; and
- Allegation that conspiracy had caused and will continue to cause a price increase for medical services, a reduction in quality of services, and/or will restrict or reduce the availability of medical services in the Tri-Cities area without specifying *which* medical services.

Because proposed amendment would not cure the defect of not alleging a cognizable antitrust injury, the court denied the motion to amend. Specifically, the Plaintiff failed to:

- Allege a rise in the price of OB/GYN services above a competitive level;

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221 *Perry v. Rado*, 504 F. Supp. 2d 1043 (E.D. Wash. 2007).

Cases

- Allege a decrease in the supply of OB/GYNs in the relevant market;
- Allege a decrease in the quality of OB/GYN services provided; and
- Allege domination of the Tri-Cities market for OB/GYN services by Defendants.

Cases

In re Late Fee and Over-limit Fee Litigation (2007)[222]

INDUSTRY: Credit card services

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): The Plaintiffs represented a putative class of credit cardholders who paid excessive late fees and/or over-limit fees to the Defendants,[223] most of the large credit card issuers in the United States. Plaintiffs alleged, *inter alia*, that Defendants conspired to fix prices and maintain a price floor for late fees in violation of § 1 of the Sherman Act. Complaint contended that the Defendants together controlled over 70% of the United States credit card market.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint's substantive allegations referred to the Defendants in collective terms and did not advance any individualized allegations about particular Defendants. Court found specific allegations suggested a rational and competitive business strategy because Defendants all faced: declining interest rate revenue, increased competition from new market entrants, elimination of annual fees as a revenue source, and higher costs due to expanded reward and affinity programs. Specifically, the court found that the complaint failed to satisfy *Twombly* because:

- Plaintiffs failed to identify any actual agreement;
- Plaintiffs failed to provide details as to when, where, or by whom the alleged agreement was reached that would support an inference that Defendants agreed to increase late fees;
- Plaintiffs failed to identify which of the Defendants (if any) issued a credit card to him or her, no Plaintiff specified which type of fee (*e.g.*, late fee or over-limit fee) he or she paid;
- No Plaintiffs alleged which of the Defendants (if any) he or she paid the unspecified fee;
- Plaintiffs did not allege that the Defendants' holding companies issued their credit cards, imposed late or over-limit fees on them, or otherwise took any action in connection with the conduct that the complaint raised; and

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222 *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953 (N.D. Cal. 2007).

223 The named Defendants were Bank of America, N.A.; Bank of America Corp.; N.B. Holdings; NBNA American Bank, N.A.; Capital One Bank; Capital One FSB; Capital One Financial Corp.; Chase Bank USA, N.A.; JPMorgan Chase & Co.; Bank One Corp.; Bank One; Citibank South Dakota, N.A.; Citigroup, Inc.; Washington Mutual Bank; Washington Mutual, Inc.; Providian; Wells Fargo & Company; Wells Fargo Bank, N.A.; Wells Fargo Financial Bank; and Wells Fargo Financial National Bank.

Cases

- Allegations were too vague—*e.g.*, "some of the Defendant banks, at some times during the last decade, had late fee terms on some credit card accounts that were in part parallel behavior, or 'lockstep pricing' of late fees."

Cases

Person v. Google, Inc. (2007)[224]

INDUSTRY: Internet advertising

ANTITRUST VIOLATION(S) ALLEGED: Monopolization and attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff filed a second amended complaint alleging that Google had attained or will attain a monopoly in the market for search advertising and, as a competitor with Google, he had been injured by Google's discrimination among users and failure to give reasonable access to a search advertising program that had "not been able to be duplicated by Yahoo or MSN."

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: The court held that the complaint failed to distinguish between the "search advertising market" and the larger market for Internet advertising. The complaint failed *Twombly* because:

- Complaint failed to properly plead a relevant market;
- Complaint failed to demonstrate how Google's action threatened Plaintiff; and
- Complaint failed to plead facts that could show Google has monopolized the Internet advertising market.

[224] *Person v. Google, Inc.*, No. 06-7297, 2007 WL 1831111 (N.D. Cal. June 25, 2007).

Cases

Kumho Petrochemical v. Flexsys America LP (2007)[225]

INDUSTRY: Manufacturers of 6PPD, a rubber chemical

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to reduce production pursuant to § 1 and monopolization of the 6PPD market pursuant § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, KKPC, alleged that Defendants[226] conspired together to restrain trade, foreclose markets, allocate customers, reduce supply, and monopolize trade in the United States for 6PPD, a rubber chemical that Plaintiff manufactures.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted arguing that Plaintiff's claims were legally insufficient after *Twombly*.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: The court held that Plaintiff did not adequately allege that it suffered antitrust injury. None of its allegations spoke to the existence or nature of any antitrust injury actually suffered by it. The allegations identified the purpose and goals of the alleged conspiracy, and indicated that Plaintiff was a target of the conspiracy. Absent, however, was any adequate allegation of facts that would establish that Plaintiff suffered some sort of cognizable injury. The allegations that the court found to be conclusory and insufficient to support an antitrust injury included:

- Allegations that Defendants conspired to foreclose KKPC from the 6PPD market;
- Allegations that Defendants sought to impede KKPC's ability to compete in the market for 6PPD;
- Allegations that Defendants targeted KKPC for adverse ad predatory treatment;
- Allegations that Defendants agreed to refuse to deal with KKPC;
- Allegations that Defendants sought to impede KKPC's entry into the U.S. 6PPD market; and
- Allegations that Defendants sought to constrain Plaintiff's growth by a variety of methods.

The court also found lacking sufficient factual allegations as to decreased sales, profits or market share resulting from conduct violating the Sherman Act and how KKPC itself suffered any antitrust injury.

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225 *Korea Kumbo Petrochem. V. Flexsys Am. LP*, No. 07-01057, 2007 WL 2318906 (N.D. Cal. Aug. 13, 2007).

226 The named Defendants included Flexsys America LP; Flexsys N.V.; Akzo Nobel Chemical Int'l B.V.; Akzo Chemicals, Inc.

Cases

Cargill Inc. v. Budine (2007)[227]

INDUSTRY: Dairy manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff-Defendant is a manufacturer of formulated feed for dairy herds. Defendant-Plaintiff counterclaimed alleging conspiracy, attempt to, and monopolization of the beef blood meal in the Western Region of the United States by Plaintiff-Defendant.[228] Blood meal was a cost-efficient nutritional formula given to cows. Defendant-Plaintiff claimed that Plaintiff-Defendant, in a direct attempt to harm them, purchased essentially the entire beef blood meal supply in the Western United States. Thereafter Plaintiff-Defendant charged dairy farmers not using its formulae a higher price for feed incorporating beef blood meal than it offered to customers who did use their beef blood meal formulae. Defendant-Plaintiff alleged this effectively raised the prices of blood meal above the product costs for anti-competitive purposes in violation of the Sherman Act.

DEFENDANTS' MOTION: Plaintiff-Defendant moved to dismiss Defendant-Plaintiff's antitrust counterclaims for lack of antitrust standing and/or failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Defendant-Plaintiff lacked antitrust standing because they were not participants in the relevant market. Defendant-Plaintiff failed to assert sufficient facts as to the market share to satisfy the plausibility requirement set forth in *Twombly* and that other alleged actions of Plaintiff-Defendant were not inconsistent with competitive behavior. The allegations that the court held failed to satisfy *Twombly* included:

- Allegations that Cargill purchased "all" or "essentially all" or "much if not all" of the beef blood meal in the West Coast Region;
- Allegations that for anti-competitive purposes, to interfere with their ability to obtain blood meal and to drive up their product costs and make them a less desirable option for customers and other dairy farmers, Cargill purchased essentially all of the beef blood meal;
- Allegations that Defendant-Plaintiff and their customers were forced to choose between purchasing beef blood meal from Cargill or from even more costly distant sources; and
- Allegations that Cargill eliminated alternate sources in the product and geography markets and intentionally and artificially inflated beef blood meal costs in so doing.

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227 *Cargill Inc. v. Budine*, No. 07-349, 2007 WL 2506451 (E.D. Cal. Aug. 30, 2007).

228 The named Plaintiff-Defendants included Cargill Inc. and CAN Technologies, Inc.

Cases

In re Ditropan XL Antitrust Litigation (2007)[229]

INDUSTRY: Pharmaceuticals

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing pursuant to § 1 and monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, American Sales Company ("ASC"), alleged that Defendant[230] Alza filed a baseless complaint to preclude competitors from producing a generic version of the drug Ditropan XL and engaged in other anti-competitive conduct to maintain a monopoly and charge supra-competitive prices for Ditropan XL. Specifically, Plaintiff alleged that Defendants as "business partners" conspired together to exclude competitors from the Ditropan market.

DEFENDANTS' MOTION: Defendants moved to dismiss the second amended class action complaint arguing that Plaintiff lacked antitrust standing. Defendants argued that ASC did not have antitrust standing to sue Defendants because it was not a direct purchaser.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held although the action arises under § 2 of the Sherman Act, there was no reasoned basis to avoid the application of the standard set forth in *Twombly*, especially because ASC's sole basis for having a direct purchaser action rests on a purported conspiracy between the Defendants. The court held that the complaint failed *Twombly* because Plaintiff failed to allege any facts that would demonstrate the existence of a conspiracy between Defendants.

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229 *In re Ditropan XL Antitrust Litig.*, No. M:06-CV-1761, 2007 WL 2978329 (N.D. Cal. Oct. 11, 2007).

230 The named Defendants included Alza Corp.; Ortho-McNeil Pharmaceutical, Inc.; and Johnson & Johnson, Inc., the parent company of the other two Defendants.

Cases

Int'l Norcent Tech. v. K. Philips Electronics (2007)[231]

INDUSTRY: DVD player manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, International Norcent Technology, in its second amended complaint against Defendants alleged that Philips joined with 9 other producers of DVD players ("the Group") to develop a technical standard for DVDs which violated § 1 of the Sherman Act. The standard was written to ensure that each member of the Group owned a patent or patents that met this standard. Plaintiff alleged that various members of the Group pooled their patents and formed patent licensing entities to exact royalties and licenses from competitors outside the Group. Norcent contended that the Group also implemented a DVD specification/logo licensing program that charged fees for specifications and logos that were essential for competitors to compete effectively in the market for DVD players.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that given the lack of specific factual context supporting Norcent's conclusory allegations that the Group agreed to produce only compact video disc players that complied with the standard, Norcent failed to "nudge" the claim from conceivable to plausible. Specifically, Norcent's second amended complaint failed to satisfy *Twombly* because:

- The complaint failed to allege an agreement between Defendants supported by sufficient facts;
- The complaint failed to allege which executives met to set the DVD standard;
- The complaint failed to allege that these executives agreed not to sell non-DVD video disc players;
- The complaint failed to allege any parallel conduct by the Group that would give rise to an inference that an agreement was made; and
- The complaint failed to allege that any of the members of the Group ever manufactured a competing video disc player.

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231 *Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. 07-00043, 2007 WL 4976364 (C.D. Cal. Oct. 29, 2007).

Cases

Kendall v. Visa U.S.A., Inc. (2008)[232]

INDUSTRY: Credit card issuers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs-appellants are a group of businesses who offer their customers the convenience of paying with a credit card, at a cost to the business. This cost, known as the "merchant discount fee," is usually around 3% but is negotiable. The acquiring bank may elect not to charge this fee if the merchant leaves a large amount of money in its account which the bank can lend out. The acquiring bank then delivers the credit card receipt to the issuing bank, via Visa. The issuing bank pays the acquiring bank the original amount minus a fee of around two percent, known as an interchange fee. The difference between the two fees represents the greater risk the issuing bank and Visa have that the consumer will not pay compared to the lesser risk the acquiring bank has that the issuing bank will not pay. Plaintiffs-appellants alleged that Defendants-appellees[233] conspired to set the amount of the merchant discount fee and interchange fee in violation of § 1 of the Sherman Act.

DEFENDANTS' MOTION: Defendants' motion to dismiss for failure to state a claim upon which relief could be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Ninth Circuit **AFFIRMED** and **GRANTED** Defendants' motion to dismiss.

COURT'S RATIONALE: Court held that Plaintiffs-appellants' complaint failed to plead evidentiary facts sufficient to establish a conspiracy. The complaint failed to answer the basic questions: who did what, to whom (or with whom), where, and when? The court found that the complaint failed to satisfy *Twombly* because:

- Banks did not engage in conspiracy to fix interchange fees merely by charging, adopting or following fees set by association;
- Allegation that participation on an association's board of directors was not enough by itself; and
- As to the Consortiums, appellants did not allege any facts showing the Consortiums had any direct control over the merchant discount fee the acquiring bank chose to charge or not charge the merchant.

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232 *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008).

233 The named Defendants included Visa U.S.A. Inc.; MasterCard International, Inc.; Bank of America, N.A.; Wells Fargo Bank, N.A.; U.S. Bank, N.A.; and Citigroup.

Cases

Rick-Mik Enterprises Inc. v. Equilon Enterprises, LLC (2008)[234]

INDUSTRY: Gasoline station franchises

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Gasoline station franchises of Equilon brought antitrust action against franchisor[235] alleging violation of § 1 of the Sherman Act. Defendant Equilon refines and markets substantial volumes of gasoline and other petroleum products in all or parts of 31 states, selling petroleum products to approximately 9,000 Shell and Texaco-branded retail outlets. Equilon's standard franchise agreement required its franchisees, Shell and Texaco gasoline stations, to use Equilon to process credit-card transactions. Plaintiffs alleged this constituted a tying arrangement involving purchase of franchise and credit-card processing services.

DEFENDANTS' MOTION: Defendant's motion to dismiss for failure to state a claim upon which relief can be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Ninth Circuit **AFFIRMED** and **GRANTED** Defendants' motion to dismiss.

COURT'S RATIONALE: Court held that, in light of *Twombly*, the price-fixing claim was impermissibly vague and that franchise and processing services were not separate products for tying purposes. All that was alleged was that Equilon received kickbacks (or perhaps commissions) from banks for processing the transactions of Equilon's franchises. Court concluded such an agreement did not violate antitrust laws. The complaint failed to satisfy *Twombly* because:

- The complaint merely alleged that Equilon conspired with numerous banks, banking associations and financial institutions throughout the United States to fix, peg and stabilize the price of credit-and debit-card processing fees, or an agreement on price;
- Allegations were too vague as to conspiracy players (the co-conspirator banks or financial institutions were not mentioned);
- Allegations failed to allege the nature of the conspiracy or agreement;
- Allegations failed to identify the types of agreements entered into; and
- The Plaintiffs' discernible theories did not implicate antitrust laws.

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234 *Rick-Mik Enters. Inc. v. Equilon Enters.*, LLC, 532 F.3d 963 (9th Cir. 2008). Decided on July 11, 2008.

235 The named Defendants included Equilon Enterprises LLC d/b/a Shell Oil Products; Motiva Enterprises LLC (together with Equilon are known as Retail USA); and Shell Oil Company, the parent company to Equilon and Motiva.

Cases

Pennsylvania Ave. Funds v. Borey (2008)[236]

INDUSTRY: Securities

ANTITRUST VIOLATIONS ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATIONS: Shareholder of acquired corporation brought action alleging that Defendants, an acquiring corporation and competitor, agreed to artificially fix prices, refrain from bidding, and rig tender offer bids for acquired corporation's shares, in violation of federal antitrust laws. This action arose in the wake of a merger that extinguished WatchGuard Technologies Incorporated as a publicly-traded corporation. Plaintiff, Pennsylvania Avenue Funds, owned shares of WatchGuard and sought to represent a class of all persons who held WatchGuard stock at the time of the merger.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim for which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint failed to meet *Twombly* because:

- Price-fixing among rival bidders in a contest for corporate control was not, in general, anti-competitive;
- Plaintiff's description of the alleged relevant market as "the market for corporate control of WatchGuard and other technology companies" was fatal to its Sherman Act claim;
- Plaintiff failed to allege Defendants had market power in a $160 billion dollar market, consisting of private equity funds;
- The illusion of market power arose not from Defendants' anti-competitive conduct, but from the lack of market interest in WatchGuard.

[236] *Penn. Ave. Funds v. Borey*, 569 F. Supp. 2d 1126 (W.D. Wash. 2008).

Cases

In re SRAM Antitrust Litigation (2008)[237]

INDUSTRY: Manufacturers of static random access memory ("SRAM")

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that Defendants[238] conspired to fix and maintain artificially-high prices for SRAM. SRAM is a type of memory device, used in various types of computers, designed to interface with computers at high speeds using low battery consumption.

DEFENDANTS' MOTION: Defendants moved to dismiss arguing that the complaint failed to include any factual allegations supporting agreement between Defendants as *Twombly* required.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: The court held that Plaintiffs had sufficiently pled facts that plausibly suggested a § 1 price-fixing conspiracy. Plaintiffs' limited discovery gave them access to documents Defendant had provided to the Department of Justice, such as e-mails to support their allegations. The allegations that the court held satisfied *Twombly* included:

- Allegations that Defendants had an ongoing agreement to exchange price information and intended that these exchanges lead to price stabilization or increases, supported by:

  (1) A 1998 e-mail chain between Hitachi and Samsung for discussing monthly updates of revenue and ASP for specific products; and

  (2) An e-mail from a Hitachi employee to a Samsung employee asking, "Are you willing to exchange product roadmaps again?"

- Allegation that the same actors associated with certain Defendants that were responsible for marketing both DRAM and SRAM had already pled guilty to DRAM price-fixing conspiracies sufficiently supported an inference of a conspiracy in the SRAM industry;

- Allegation that Defendants' participation in various trade organizations gave them opportunities to exchange information or make agreements;

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237 *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896 (N.D. Cal. 2008).

238 The Court classified two classes of Defendants that sold Static Random Access Memory: (1) direct purchasers and (2) indirect purchasers. The named Defendants included: Cypress Semiconductor; Etron Technology America, Inc.; Etron Technology, Inc.; Hitachi Ltd; Hitachi America; Hynix Semiconductor, Inc.; Hynix Semiconductor America, Inc.; Integrated Silicon Solution, Inc.; Micron Semiconductor Products, Inc.; Micron Technology Inc.; Mosel Vitelic, Inc.; Mosel Vitelic Corp.; Mitsubishi Electric & Electronics USA, Inc.; NEC Electronics America, Inc.; NEC Electronics Corp.; Renesas Technology America, Inc.; Renesas Technology Corp.; Samsung Electronics Company Ltd.; Samsung Electronics America; Samsung Semi-conductor, Inc.; Toshiba Corp.; Toshiba America, Inc.; and Toshiba America Electronic Components, Inc.

Cases

- Allegation that Defendants carried out this conspiracy through in-person, telephone and email communications regarding pricing to customers and market conditions;
- Allegation that Defendants exchanged product roadmaps to limit the supply of SRAM; and
- Allegations that SRAM was particularly susceptible to price-fixing because it was a homogenous product sold primarily on the basis of price and market was highly concentrated; and there were high manufacturing and technological barriers to entry into the market.

Cases

Apple v. Psystar Corp. (2008)[239]

INDUSTRY: Manufacturers of computer operating systems

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 and unlawful tying in violation of § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Apple brought suit against Psystar for copyright and trademark violations and Psystar filed counterclaims against Apple alleging antitrust violations. Psystar alleged that Apple engaged in anti-competitive conduct to "protect its valuable monopoly in the Mac OS (operating system) market and, by extension, Apple-Labeled Computer Hardware Systems from potential threats."

DEFENDANTS' MOTION: Defendant moved to dismiss for failure to state a claim upon which relief can be granted. Apple argued that the alleged markets were neither legally nor factually plausible and that Apple was not required by law to help its competitors compete by forcing it to enter into unwanted licensing agreements with them.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Psystar failed to plead facts demonstrating a relevant market. Antitrust markets consisting of just a single branch were not *per se* prohibited and Psystar offered no facts to support the claim that Apple's OS was so unique that it suffers *no* actual or potential competitors. A price differential alone between OS producers did not signal a distinct market. Specifically, the following allegations did not sustain a "Mac OS-capable computers" market argument:

- That Apple's End User License Agreement for the Mac OS specifically prohibited customers from installing the OS on non-Apple computers;
- That Apple had erected technical barriers that prevent Mac OS from operating on non-Apple computers;
- That Apple intentionally embedded code in Mac OS that allowed the OS to recognize any non-Apple hardware system and that the Mac OS will then cease to function properly; and
- That this conduct caused harmful and anti-competitive effects in the marketplace.

The court also noted that Psystar's claim that Apple's extensive advertising campaigns constituted anti-competitive conduct was incorrect. Apple's vigorous advertising would be wasted money if there was actually no reasonable substitute for Mac OS and advertising was a sign of competition, not lack thereof.

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[239] *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190 (N.D. Cal. 2008).

Cases

Daw Indus., Inc. v. Proteor Holdings (2008)[240]

INDUSTRY: Distribution of materials containing polyolefin foam

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Defendant claimed ownership of a U.S. patent for a process of manufacturing a flexible sleeve for prosthesis or an orthopedic appliance made with polyolefin foam. Plaintiff served as the exclusive distributor of Defendant's patented product for many years, then sometime in 2007 Defendant became aware that Plaintiff was also distributing similar flexible sleeves made with polyolefin foam. Plaintiff brought suit seeking a declaration that it was not infringing Defendant's patent and alleged that Defendant had engaged in a scheme to fix prices in interstate commerce in the United States for its "Keasy" product, in violation of the United States antitrust laws.

DEFENDANTS' MOTION: Defendant moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiff failed to state a violation of antitrust laws because resale price maintenance was not a *per se* violation of the antitrust laws. Plaintiff's bald allegations were not supported by factual assertions that would allow an inference of an antitrust violation. The complaint failed to satisfy *Twombly* because:

- Plaintiff failed to make any allegations concerning standing;
- Plaintiff failed to allege how the restraint was unlawful;
- Plaintiff failed to allege the relevant market power; and
- Plaintiff failed to make any allegations that Defendant willfully failed to cite prior art to the patent office or any other fact tending to suggest Defendant knew its patent was invalid or otherwise.

[240] *Daw Indus., Inc. v. Proteor Holdings, S.A.*, No. 07-CV-1381, 2008 WL 251977 (S.D. Cal. Jan. 29, 2008).

Cases

Shames v. Hertz Corp. (2008)[241]

INDUSTRY: Airport car rentals in California

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs brought a putative class action against several passenger rental car companies and the California Travel and Tourism Commission (the "CTTC") alleging, in their second amended complaint, that the rental car Defendants facilitated by the CTTC, entered a horizontal price-fixing agreement concerning automobile rentals at certain California airports. Specifically, Plaintiffs alleged that Defendants agreed to raise prices thereby avoiding competition by passing on to consumers a 2.5% assessment fee the rental car companies had to pay to fund the CTTC.

DEFENDANTS' MOTION: Defendants moved to dismiss.

DISPOSITION: Motion **GRANTED** as it related to CTTC,[242] but rental car Defendants' motion to dismiss was **DENIED**.

COURT'S RATIONALE: Court held that the SAC cured the court's concerns about the first complaint at least as it related to the CTTC. The court held the complaint satisfied the *Twombly* standard because:

- Plaintiffs attached a written agreement between the CTTC and the rental car Defendants to set the assessment rates;
- The complaint alleged multiple documented references to an agreement to pass on the CTTC assessments;
- The complaint alleged that the CTTC meeting minutes from October 2006 stated that the rental car industry would like to start passing on the fees beginning in January 2007;
- The complaint alleged documents relating to the January 25, 2007 meeting indicated that one car rental company challenged another for not charging the pass on fees;
- The complaint alleged that average national rates fell while those at California airports rose; and
- Plaintiffs identified specific meeting dates and individuals involved in the agreement.

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241 *Shames v. Hertz Corp.*, No. 07-CV-2174 H, 2008 WL 4103985 (S.D. Cal. July 24, 2008).

242 The CTTC was able to invoke the state action immunity doctrine, as the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 350-351 (1943), noted that the Sherman Act did not intend to restrain state action.

Cases

In re TFT-LCD (Flat Panel) Antitrust Litigation (2008)[243]

INDUSTRY: TFT-LCD manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Defendants manufacture, sell, or distribute thin film transistor liquid crystal display ("TFT-LCD") to customers in the United States. TFT-LCDs are used in various products, such as computer monitors, laptop computers, televisions, and cellular phones. Plaintiffs brought a class action against manufacturers, sellers, and distributors of TFT LCD panels and products alleging Defendants engaged in a horizontal price-fixing.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to allege enough facts to demonstrate a plausible basis for a claim to relief under Rule 8 and *Twombly*. Defendants argued:

- Consolidated complaint failed to allege evidentiary facts showing an actual agreement between Defendants to engage in a price-fixing conspiracy; and
- Plaintiffs' allegations were equally consistent with independent action and competition as they were with conspiracy in the TFT-LCD markets.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the consolidated complaints met the standard enunciated in *Twombly* because the complaint alleged parallel conduct and a number of other facts that plausibly suggested an agreement.[244] The court held that the complaint satisfied *Twombly* because:

- The complaint alleged complex and unusual pricing practices by Defendants, which could not be explained by the force of supply and demand;
- The complaint alleged that in the pre-conspiracy market, the industry faced declining TFT LCD panel prices, which industry analyst attributed to advances in technology;
- The complaint alleged that new companies entered the market, which resulted in increased competition and significant price declines;
- The complaint alleged, however, that beginning in 1996, the TFT-LCD product market has been characterized by unnatural and sustained price stability as well as certain periods of substantial increases in prices and as a compression of price ranges for TFT-LCD products, which is inconsistent with natural market forces;

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243 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M-07-1827, 2008 WL 3916309 (N.D. Cal. Aug. 25, 2008).

244 The court noted that, as drafted, the consolidated complaint lacked sufficient allegations specific to certain Defendants and, accordingly, granted certain Defendants motions to dismiss with leave for Plaintiff to amend.

Cases

- The complaint alleged that Defendants controlled prices by manipulating the capacity of various fabrication plants as well as the timing of bringing new capacity on line;
- The complaint also alleged specific instances of invitations to agree and subsequent agreements by high-ranking executives;
- The complaint alleged they offered pretextual reasons for increases/output restrictions; and
- The complaint alleged Defendants exchanged sensitive competitive information, including pricing through trade association meetings, private communications, and published data.

Cases

Alaska Airlines, Inc. v. Carey (2008)[245]

INDUSTRY: Airlines industry

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff is a major U.S. air carrier that operates a frequent flyer program to encourage travel and promote customer loyalty. Plaintiff alleged that Defendants, who operate a travel agency, with express knowledge of the rules of the Plaintiff's frequent flyer program, operated a scheme to purchase mileage rewards from Plaintiff's program members, redeem the awards, and then sell the wrongfully-purchased mileage awards to Plaintiff's customers for a profit without compensating the Plaintiff. Alaska Airlines contracted exclusively with Points.com to broker its miles on the Internet, in the secondary market for reward miles. Defendants counterclaimed that, upon finding out about Carey Travel Agency, Plaintiff refused to sell miles to Carey Travel on any terms, thereby foreclosing Defendants from the secondary market in violation of § 1 of the Sherman Act.

DEFENDANTS' MOTION: Plaintiff motioned to dismiss all of Defendants' counterclaims for failure to state a claim upon which relief could be granted.

DISPOSITION: The motions relating to the conspiracy claims were **GRANTED**, but the court **DENIED** all of the other motions.

COURT'S RATIONALE: Court held that Defendants did not plead any facts to suggest the existence of a conspiracy, so their claims relating to conspiracy to boycott were dismissed. The Plaintiff's motion to dismiss the Defendants' § 2 claims, however, were denied because the court held that it need not address the merits of whether a legitimate secondary market has been created or whether Alaska has taken steps to control this market. Court found these to be factual disputes which could not be resolved in a 12(b)(6) motion.

[245] *Alaska Airlines, Inc. v. Carey*, No. 07-5711, 2008 WL 2725796 (W.D. Wash. July 11, 2008).

Cases

Fox v. Piche (2008)[246]

INDUSTRY: Pediatric Intensive Care Unit ("PICU") of Good Samaritan Hospital in California

ANTITRUST VIOLATION(S) ALLEGED: Conspiratorial restraint of trade pursuant to § 1 and monopolization and attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff was a pediatrician who specialized in the care of critically ill children who required mechanical ventilation. Plaintiff practiced at Good Samaritan Hospital ("GSH"). In 1999, GSH instituted a rule requiring any physician seeking practice privileges at the hospital to appoint two physicians with identical privileges to serve as backups. Plaintiff declined to designate backups. He claimed as a result Defendants denied him the pediatric intensive care ("PIC") privileges needed for him to provide PIC services. This denial ultimately required him to relocate his practice to a nearby hospital. Plaintiff alleged that the rule change was part of an anti-competitive scheme designed to gain the benefit of Plaintiff's practice and to favor a competing group of physicians with whom Defendants had a relationship. Defendants were all GSH board of trustees or members or members of relevant hospital committees.

DEFENDANTS' MOTION: Defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted and moved to strike portions of the First Amended Complaint ("FAC"). Specifically, Defendants asserted that Plaintiff cannot maintain his claim because:

- Plaintiff did not adequately allege a contract, combination, or conspiracy; and
- Plaintiff did not allege the restraint affected interstate commerce.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Plaintiff did meet the new pleading standard announced in *Twombly* because:

- Plaintiff alleged in almost ten pages of his FAC facts relating to a conspiracy;
- Plaintiff alleged facts suggesting a conspiracy when his suspension occurred shortly after he spoke out against transferring PIC patients to another hospital outside the zone of the alleged conspiracy;
- Plaintiff alleged that GSH was in negotiation with physician who could not provide adequate call coverage to give said physician Plaintiff's group;
- Plaintiff also alleged facts reflecting that his claims implicated interstate commerce in that he received patients and payments for his services form sources outside California;

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246 *Fox v. Piche*, No. 08-1098, 2008 WL 4334696 (N.D. Cal. Sept. 22, 2008).

Cases

- Plaintiff alleged a relevant market in that GSH, with its unique PICU program, was a separate geographic market because children born at GSH only used the services of PICU;
- Plaintiff alleged McConnell, as NorCal PICU's owner, was the only Defendant who provided PICU services at GSH; and
- Plaintiff adequately pled the requisite market power based on Defendants' roles on their respective committees or as chief of a medical service provider.

Cases

Golden Gate Pharmacy Services, Inc. v. Pfizer, Inc. (2009)[247]

INDUSTRY: Pharmaceutical manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, retail pharmacies in California, allege that Defendants, pharmaceutical manufacturers, consummated a merger to lessen competition or to tend to create a monopoly, and has already lessened competition and tended to create a monopoly, in numerous markets and submarkets involving the manufacture and sale of pharmaceuticals and involving research, development, and innovation with respect to pharmaceuticals.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that to the extent Plaintiffs' claims were based on the merger's effects on the alleged markets for the manufacture and sale of pharmaceutical products defined by reference to a specific human disease or condition, the claims were subject to dismissal for failure to state a claim. Specifically, the court noted:

- Plaintiffs failed to allege that all prescription drugs were reasonably interchangeable by consumers for the same purposes;
- Plaintiffs failed to allege a cognizable product market;
- Plaintiffs failed to allege any facts to support a finding that all brand name prescription products, any more than generic prescription pharmaceutical products, were reasonably interchangeable for the same purposes;
- Plaintiffs failed to allege that prescription pharmaceutical products being developed, whether ultimately branded or not, would be reasonably interchangeable; and
- Plaintiffs failed to allege the number of suppliers that compete in any of the subject markets.

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[247] *Golden Gate Pharm. Servs., Inc. v. Pfizer, Inc.*, No. 09-3854, 2009 WL 4723739 (N.D. Cal. Dec. 2, 2009).

Cases

In re Online DVD Rental Antitrust Litigation (2009)[248]

INDUSTRY: Online DVD Rentals

ANTITRUST VIOLATION(S) ALLEGED: Unlawful market allocation pursuant to § 1 and attempted monopolization, conspiracy to monopolize, and monopolization pursuant to § 2 of the Sherman Act.

NATURE OF ALLEGED VIOLATION(S): Plaintiffs represented a putative class of persons and entities who subscribed to Blockbuster's online DVD rental service, Blockbuster Online, during the relevant time period beginning August 19, 2005. Plaintiffs generally alleged that, as a result of an unlawful market allocation agreement entered into by Defendants, Netflix and Wal-Mart, on May 19, 2005, Blockbuster charged Plaintiffs supra-competitive subscription prices and that via this market allocation agreement, Defendants unlawfully divided and allocated the markets for DVD sales and rentals to create a two-firm online DVD rental market. Plaintiffs alleged that the actions above constituted four violations of the Sherman Act, including unlawful market allocation pursuant to § 1 and attempted monopolization, conspiracy to monopolize, and monopolization pursuant to § 2 of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted arguing that Plaintiffs lacked standing to bring their consolidated complaint.

DISPOSITION: Motion **GRANTED** with prejudice.

COURT'S RATIONALE: Court held that the facts alleged were insufficient to confer antitrust standing. Specifically, the court was not persuaded that Plaintiffs had plausibly alleged that, to the extent they suffered injury via payment of artificially raised prices to Blockbuster, such injury was proximately caused by Defendants' actions in entering into the allegedly unlawful marketing agreement. In short, without such allegations, Plaintiffs could not establish that their injury was sufficiently direct to pass muster under the applicable standing test and *Twombly*. The court found their injury was simply too remote. The court also noted:

- The allegations did not suggest, let alone establish, that Blockbuster's price increase in August 2005 was directly attributable to any unlawful agreement or conduct undertaken by Netflix or Wal-Mart specifically;
- Plaintiffs failed to allege that Netflix increased its *own* 3-out subscription price in conjunction with or in response to the allegedly unlawful market allocation agreement; and
- Since the purportedly supra-competitive $17.99 subscription fee was allegedly set prior to the unlawful market allocation agreement, it thus strained credulity, without more, to infer that Netflix unlawfully raised its price to $17.99 or maintained it in response to the anti-competitive conduct

[248] *In re Online DVD Rental Antitrust Litig.*, No. M. 09-2029, 2009 WL 4572070 (N.D. Cal. Dec. 1, 2009).

Cases

alleged by Plaintiffs or, by extension, that Blockbuster's own price increase to match Netflix's $17.99 price in August 2005 was itself an anti-competitive price hike in response to the unlawful agreement.

Cases

In re Cal. Title Ins. Antitrust Litigation (2009)[249]

INDUSTRY: Title Insurance Companies in the State of California

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff brought a second amended class action complaint on behalf of themselves and all persons who purchased title insurance relating to the purchasing or refinancing of a residential property located in California directly from the Defendants, their subsidiaries, agents and/or affiliates, from no later than March 19, 2004, through December 31, 2007. Plaintiffs alleged that Defendants, groups of title insurance companies, had conspired to fix title insurance prices in New York, Pennsylvania, Ohio, and New Jersey through their participation in rate-setting organizations in those states.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that looking at the allegations as a whole the plus factors identified by the Plaintiffs did not nudge their claims across the line from conceivable to plausible. The court noted:

- Participation in the California Land Title Association ("CLTA") may have provided Defendants the opportunity to discuss setting rates in California, but opportunity, without more, was not a plausible basis to suggest a conspiracy;
- Plaintiffs failed to allege any factual allegations about communications between the Defendants that could be construed as invitations to conspire or responsive actions by the other Defendants;
- Plaintiffs failed to allege any factual allegations that linked the timing of the rate-setting organization and CLTA meetings to the release of information regarding the prices at which title insurance premiums were set in California;
- Plaintiffs failed to allege any factual allegations suggesting an unusual, unprecedented change in behavior following the agreement to enter into a conspiracy; and
- Plaintiff failed to allege any factual allegations that Defendants had admitted to conspiring in one market, which might allow the court to infer a conspiracy in another market;

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[249] *In re Cal. Title Ins. Antitrust Litig.*, No. 08-01341, 2009 WL 3756686 (N.D. Cal. Nov. 6, 2009).

Cases

Perinatal Medical Group, Inc. v. Children's Hospital (2009)[250]

INDUSTRY: Neonatal medical services

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to restrain trade pursuant to § 1 and conspiracy to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a professional medical corporation that has provided services in Fresno, California since 1980, brought suit against Defendant Perinatal Medical Group, a hospital non-profit corporation that serves pediatric patients from 35 cities and maintains a regional neonatal intensive care unit ("NICU"), and against Defendant Specialty Medical, a professional medical corporation of approximately 70 specialty physicians who practice in the area. In 2008, Defendant Hospital approached Plaintiff's former shareholders and solicited them to either leave Plaintiff to join Defendant Specialty Medical, or to form a separate medical group or it would not renew Plaintiff's contract. Plaintiff's refusal to agree to Defendant Hospital's terms made it practically impossible for Plaintiff's patients to receive services from Defendants NICU. Plaintiff alleged that Defendants conspired to restrain and monopolize the provision of Hospital's NICU and specialty physician services in the region.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED** in part and **DENIED** in part.

COURT'S RATIONALE: With regards to Plaintiffs § 1 claim, the court held that it could not assume any facts necessary to the Plaintiff's claim that it failed to allege. The court particularly noted that:

- Plaintiff failed to sufficiently allege that the two Defendants were separate entities; and
- Plaintiff failed to allege in what manner Hospital and Specialty Medical had divergent economic interests, or what goals Specialty Medical pursued other than those of the hospital.

As it related to Plaintiff's § 2 monopoly claim, the court noted that Defendant's argument that it was a single entity did not fail on that ground. Thus, Defendants' motion should be denied at this stage.

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250 *Perinatal Med. Group, Inc. v. Children's Hosp. Cent. Cal.*, No. 09-1273, 2009 WL 3756367 (E.D. Cal. Nov. 6, 2009).

Cases

Facebook, Inc. v. Power Ventures, Inc. (2009)[251]

INDUSTRY: Online Social Networking Website

ANTITRUST VIOLATION(S) ALLEGED: §§ 1 & 2 Sherman Act violations

NATURE OF ALLEGED VIOLATION(S): Plaintiff, the developer and operator of a popular social networking site, alleged that Defendants operated an Internet service that collected user information from Plaintiff's website in violation of the CAN-SPAM Act. Defendant filed an answer and counter-complaint alleging violations by Facebook of §§ 1 & 2 of the Sherman Act.

DEFENDANTS' MOTION: Plaintiff/counterclaim Defendant moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: The court held that Power's answer and counter-complaint contained a 7½ page introduction and background narrative untethered to any specific claim. Court noted the claims themselves each consisted of a conclusory recitation of the applicable legal standard and a general reference to all allegations of all prior paragraphs as though fully set forth herein. Thus, as structured the complaint failed to survive Defendant's motion to dismiss.

[251] *Facebook, Inc. v. Power Ventures, Inc.*, No. 08-5780, 2009 WL 3429568 (N.D. Cal. Oct. 22, 2009).

Cases

Person v. Google, Inc. (2009)[252]

INDUSTRY: Online Search Engine Service Provider

ANTITRUST VIOLATION(S) ALLEGED: Monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, *pro se*, filed complaint against operator of Internet search engine for allegedly monopolizing, or attempting to monopolize, the search advertising market in violation of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: The United States Court of Appeals for the Ninth Circuit **AFFIRMED** district court's dismissal that **GRANTED** Defendant's motion.

COURT'S RATIONALE: Person failed to plead facts sufficient to raise the allegations in his complaint that Google engaged in exclusionary, anti-competitive, or predatory behavior beyond a speculative level.

[252] *Person v. Google, Inc.*, No. 07-16367, 2009 WL 3059092 (9th Cir. Sept. 24, 2009).

Cases

Perry v. Rado (2009)[253]

INDUSTRY: Physician Medical Services

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to restrain trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Dr. John C. Perry and Teddy Bear Obstetrics & Gynecology P.S. brought action against other physicians and their professional medical association, alleging that Dr. Perry's credentials at medical center were improperly revoked as a result of a conspiracy in restraint of trade in violation of § 1 of the Sherman Act.

DEFENDANTS' MOTION: Defendant's motion to dismiss for failure to state a claim upon which relief could be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Ninth Circuit **AFFIRMED** and **GRANTED** Defendant's motion to dismiss.

COURT'S RATIONALE: The court held that the complaint failed to plead sufficient facts to make it plausible that the Defendants' termination of Perry's privileges at Kadlec Medical Center constituted an injury to competition in the market-at-large. The court further noted the district court concluded correctly that they did not allege an injury to competition and so any amendment to the complaint would be futile.

[253] *Perry v. Rado*, No. 07-35684, 2009 WL 2562739 (9th Cir. Aug. 20, 2009).

Cases

In re Hawaiian & Guamanian Cabotage Antitrust Litigation (2009)[254]

INDUSTRY: Freight shippers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, purchasers of shipping services between the continental United States and Hawaii, Guam, or both, alleged that Defendants, providers of such shipping services, violated § 1 of the Sherman Act by colluding to simultaneously increase fuel surcharges, by sharing vessel capacity, and by conspiring not to enter into extra-tariff rate agreements with customers.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: The court held that the consolidated complaint pled nothing more than parallel conduct and a bare assertion of a conspiracy. The court noted that:

- Plaintiffs allegations were based on information exchanges through trade associations and the like; evidence of antitrust behavior in a different ocean trade revealed by a Department of Justice ("DOJ") investigation; and parallel activities in a concentrated market.
- Plaintiffs merely alleged that Matson and Horizon belonged to organizations via which they had an opportunity to meet, but offered no particulars concerning the locations or dates of any meetings, and although they named certain members of MCTF, they did not identify any individuals who might have been involved in any illicit communications;
- Plaintiffs made no attempt to compare the timing of trade association meetings and fuel surcharge increases;
- Fact that DOJ had announced that it had begun an investigation into the possibility of anti-competitive practices in the shipping trade between continental United States and Puerto Rico and that six months later four individuals pleaded guilty to antitrust charges relating to the Puerto Rico trade was insufficient because Plaintiffs alleged that only one of these individuals had any involvement with Horizon's Hawaii or Guam routes;
- Although Plaintiffs quoted press reports relaying the DOJ's belief that more indictments would follow, they failed to provide a link between the two market;
- Plaintiff failed to allege that any Defendants were involved in the water trade between Puerto Rico and the United States mainland;

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254 *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250 (W.D. Wash. 2009).

Cases

- The cases on which Plaintiffs primarily relied did not support a different view because those cases involved Defendants with overlapping involvement in different markets, a factual scenario that Plaintiffs in this case did not plead;
- Plaintiffs failed to identify any specific communications or contracts; and
- Plaintiffs failed to link the lockstep fuel surcharge fluctuations to anything other than the type of parallel conduct generally present in a homogenous market.

Cases

Lubic v. Fidelity National Financial, Inc. (2009)[255]

INDUSTRY: Title Insurance

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff alleged that Defendants, a group of major title insurance sellers from around the country, conspired to fix title insurance prices in New York, Pennsylvania, Ohio, and New Jersey when the Defendants involved in their respective states' voluntary title insurance associations that file rates with the applicable state insurance authority.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: The court held that by the standards of *Twombly*, *Iqbal*, and their progeny, the complaint failed to nudge the claim into the realm of plausibility. The complaint was bereft of any factual allegations which established the plausibility of a conspiracy within the state, *i.e.*, conspiratorial conduct pertaining to the setting of title insurance rates in the state of Washington. The court also noted that:

- Plaintiffs failed to allege that any of the Defendants admitted to acting improperly in the course of conducting business in these rate-setting organizations;
- Plaintiffs failed to include factual allegations that directly established the existence of a conspiracy in other states, much less the state of Washington;
- In a concentrated market such as that Plaintiffs allege in Washington, uniformity was not unexpected—price uniformity is normal in a market with few sellers and homogeneous products; and
- Plaintiffs' attempt to infer the existence of a conspiracy from parallel conduct in other states was exactly the "evil" that *Twombly* was intended to curtail.

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255 *Lubic v. Fidelity Nat'l Fin., Inc.*, No. 08-0401, 2009 WL 2160777 (W.D. Wash. July 20, 2009).

Cases

Stearns v. Select Comfort Retail Corp. (2009)[256]

INDUSTRY: Mattress manufacturers and distributors

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff filed a putative class action complaint, on behalf of all persons similarly situated who purchased a Sleep Number bed sold be Defendant Select Comfort Retail complaint, alleging she had found mold on a Sleep Number bed she purchased in 2000 and that Defendants, Select Comfort, Sleep Train, Inc., and Bed Bath & Beyond, allegedly agreed to conceal the alleged defect or in the alternative she alleged Defendants engaged in a conspiracy to restrain competition by gaining an unfair advantage because the beds in fact were defective as compared to the products offered by competitors.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Plaintiffs' attempt to wedge an antitrust claim into a case grounded on alleged common-law tort and breach of contract claims must be dismissed without leave to amend because Plaintiffs failed to allege a cognizable antitrust injury.

256 *Stearns v. Select Comfort Retail Corp.*, No. 08-2746, 2009 WL 1635931 (N.D. Cal. June 5, 2009).

Cases

TYR Sport Inc v. Warnaco Swimwear Inc. (2009)[257]

INDUSTRY: High-end swimwear manufacturers

ANTITRUST VIOLATION(S) ALLEGED: §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): TYR and Defendant who db/a/ Speedo both design and manufacture high-end swimwear and accessories sold to competitive swimmers. The United States Olympic Committee recognizes USA Swimming as the national governing body of the sport of swimming per the Ted Stevens Amateur Sports Act. Schubert was the head coach of the Olympic swim team and a spokesman for Defendant. TYR alleged a combination between Speedo and USA Swimming that made USA Swimming a *de facto* sales agent for Speedo. TYR specifically alleged that in exchange for payments from Speedo, USA Swimming agreed to act as a promoter for Speedo, and to make false statements that Speedo's products were superior and that its rivals' products were inferior.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted. Speedo contended that the federal antitrust claims should be dismissed because TYR failed to: (1) plead facts necessary to define a relevant market; (2) show that Speedo had done anything to foreclose competition in any relevant market; (3) establish that it met the stringent test in the Ninth Circuit for establishing antitrust liability based on a Defendant's advertising and promotional statements; and (4) show that it had suffered injury in fact and an antitrust injury.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that TYR properly pled that the disparaging statements were provably false and that Schubert essentially told the national team Speedo LZR could be the difference between making the Olympic team or staying home. The court also noted:

- TYR's definition of the market as high-end competitive swimwear coupled with the allegation that purchasers in the market were competitive swimmers in the professional, collegiate, high school, and club ranks was sufficient to state a relevant product market;
- The complaint specifically alleged that industry participants such as Adidas and Arena, recognized that United States as a distinct geographic market for competitive swimming;
- The complaint alleged that those competitors recently exited the U.S. market;
- The complaint alleged an anti-competitive combination or conspiracy between a market participant and an ostensibly neutral party; and

[257] *TYR Sport Inc. v. Warnaco Swimwear Inc.*, No. 08-00529, 2009 WL 1769444, (C.D. Cal. May 27, 2009).

Cases

- The complaint listed explicit statements by Schubert, the head coach of USA Swimming's Olympic team, that went beyond criticism and threatened athletes who chose to wear the Plaintiff's product.

Cases

EchoStar Satellite, LLC v. Viewtech, Inc. (2009)[258]

INDUSTRY: Satellite Service Providers

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 and monopoly related causes pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Viewtech contracts for the manufacture of free-to-air receivers in Korea, and imports and sells the receivers to authorized distributors and dealers located throughout the U.S. and Canada. EchoStar, which operates under the trade name DISH Network, provides a variety of video, audio, and data services to consumers throughout the U.S. via a direct broadcast satellite system. EchoStar filed suit alleging that Viewtech unlawfully designed, developed, and distributed devices and other technology intended to facilitate the illegal and unauthorized reception of EchoStar's programming. Viewtech subsequently filed an amended counterclaim complaint against EchoStar asserting, *inter alia*, six causes of action for violations of §§ 1 & 2 of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted because Viewtech's antitrust allegations were insufficient to adequately allege an agreement.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Viewtech's § 1 claims must be dismissed with leave to amend because complaint failed to allege the existence of an agreement and also held that Viewtech's § 2 claims must be dismissed without leave to amend because complaint established that EchoStar did not have market power. The court noted:

- Plaintiffs failed to identify a single distributor that has acquiesced to EchoStar's demand and stopped distributing Viewtech's products;
- Plaintiffs failed to establish an agreement, even an implicit one, between EchoStar and any distributors;
- Because complaint alleged on its face that DirectTV, a major competitor of EchoStar, held individually in excess of 40% of the market, the complaint's monopoly-related causes of action must fail; and
- Plaintiff failed to allege that EchoStar had any market power to support a claim for predatory pricing.

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258 *EchoStar Satellite v. Viewtech, Inc.*, No. 07-CV-1273, 2009 WL 1668712 (S.D. Cal. May 27, 2009).

Cases

In re Cal. Title Ins. Antitrust Litigation (2009)[259]

INDUSTRY: Title Insurance Companies in the State of California

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff brought a second amended class action complaint on behalf of themselves and all persons who purchased title insurance relating to the purchasing or refinancing of a residential property located in California directly from the Defendants, their subsidiaries, agents and/or affiliates, from no later than March 19, 2004 through December 31, 2007. Plaintiffs alleged that Defendants, groups of title insurance companies, conspired to fix title insurance prices in New York, Pennsylvania, Ohio, and New Jersey through their participation in rate-setting organizations in those states.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted because Plaintiffs failed to allege facts that showed the Defendants agreed to fix title insurance rates in California.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that looking at the allegations as a whole the plus factors identified by the Plaintiffs did not nudge their claims across the line from conceivable to plausible. The court also noted:

- It did not follow automatically that because they may have set rates collectively in those states with rate setting organizations, the Defendants acted collectively to fix prices in California;
- Plaintiffs did not set forth factual allegations about whether the rate setting organizations merely gave the Defendants the opportunity to obtain information about each other's rates or whether the rate setting organizations held formal meetings;
- Plaintiffs failed to set forth facts about where or when those meetings took place, or whether the Defendants communicated with one another in advance of or after the meetings;
- Plaintiffs failed to allege facts setting forth, at a basic level, which Defendants may have attended meetings of the rate setting organizations, the types of employees that may have attended such meetings or whether those employees reported back to their parent organizations;
- Plaintiffs failed to allege facts setting forth a temporal link between the release of rates in rate-setting organizations in other states and the release of rates in California; and

[259] *In re Cal. Title Ins. Antitrust Litig.*, No. 08-01341, 2009 WL 1458025 (N.D. Cal. May 21, 2009).

Cases

- Plaintiffs failed to set forth facts regarding the Defendants' pricing behavior prior to the alleged conspiracy, although Plaintiffs alleged that pricing in California had remained stable since at least 1998.

Cases

Wanachek Mink Ranch v. Alaska Brokerage Int'l (2009)[260]

INDUSTRY: Mink Ranching

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, mink ranchers filed this class action on behalf of all persons who sold unprocessed animal furs at auction in the U.S. directly to Defendants or their co-conspirators, predecessors, or controlled subsidiaries between June 1, 2000 and June 1, 2004. Plaintiffs alleged that Defendants[261] conspired to keep fur prices at an artificially low level, in violation of § 1 of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the allegations in the amended complaint were sufficient to meet the *Twombly* pleading requirements for antitrust complaints. The court noted that:

- Plaintiffs adequately established Defendants' market power by alleging that the Defendants were among the small number of fur brokers and dealers who dominated the fur auctions, known in the industry as the big takers;
- Plaintiffs adequately stated the time and place (American Legends fur auctions in Seattle between 2000 and 2004) as well as the persons involved (all named Defendants);
- Plaintiffs alleged that Defendants allocated certain lots among themselves and agreed not to bid on certain lots;
- Plaintiffs alleged that Defendants agreed to distribute pelts acquired by one Defendant at auction to other Defendants;
- Plaintiffs alleged that Defendants agreed to bid and pay, and did bid and pay, artificially low prices for the furs sold by Plaintiffs and other members of the class;
- Plaintiffs alleged that Defendants in 2004 threatened, facilitated, and perpetrated a group boycott of a planned new auction bidding system at American Legend in Seattle, Washington, that according to a press report, was aimed at thwarting broker/buyer bidding cartels; and

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260 *Wanachek Mink Ranch v. Alaska Brokerage Int'l, Inc.*, No. C06-089, 2009 WL 1342676 (W.D. Wash. May 5, 2009).

261 Two of the named Defendants in the complaint, Alaska Brokerage International, Inc. and David Karsch, were indicted by the state of Washington and entered pleas of nolo contendere and guilty, respectively, to the charge of conspiracy to restrain trade in violation of the Sherman Act. *Id*. at *1.

Cases

- Because Plaintiffs alleged that *all* Defendants took the alleged actions above, it was not necessary to name them individually.

Cases

In re Flash Memory Antitrust Litigation (2009)[262]

INDUSTRY: Flash memory manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff brought a class action alleging that Defendants engaged in a horizontal price-fixing conspiracy between various manufacturers, sellers and distributors of flash memory in violation of § 1 of the Sherman Act. Flash memory is a type of electronic memory chip that has become commonplace in a variety of electronic products, such as USB drives, digital cameras, iPhones and similar products. Apparent price-fixing in the memory market caught the attention of the U.S. Department of Justice which launched an investigation.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED** in relevant part.

COURT'S RATIONALE: Court held that the Complaint alleged "enough facts to state a claim to relief that is plausible on its face." The court noted:

- Plaintiffs alleged that Defendants specifically discussed controlling prices with regard to all memory products;
- But even if the flash memory scheme focused more on affecting output, the fact remains that the purpose of both conspiracies was to artificially control and impact the memory market in order to generate or preserve profits;
- At bottom, while these facts may not prove the existence of a conspiracy with respect to NAND flash memory, they are properly pled for the purpose of establishing the plausibility that such a conspiracy existed;
- The pleadings identify the companies and/or individuals who were directly involved in setting prices for NAND flash memory;
- In particular, the complaint alleges that many of the same employees in various companies (some of whom have pled guilty to price-fixing in the DOJ's DRAM investigation) were responsible for setting prices for different types of memory, including DRAM/SRAM and flash memory;
- In addition, the complaint alleges the time frame of such alleged conduct, along with facts pertaining to the coordination of production as a means to control pricing;

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262 *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133 (N.D. Cal. 2009).

Cases

- For example, there are allegations of specific instances where output was reduced following meetings by Defendants—that, in turn, led to "implausible" price increases;
- Similarly, the marketplace is alleged to have been conducive to coordinated pricing, as demonstrated by the existence of a concentrated market dominated by a few entities, with significant barriers to entry; and
- Courts addressing analogous pleadings have concluded that these types of conspiracy allegations are sufficient to meet the pleading standards of *Twombly*.

Cases

Doe v. Arizona Hospital and Healthcare Ass'n ("AzHHA") (2009)[263]

INDUSTRY: Nursing

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, registered nurses who work, or have worked, as temporary nurses, brought a civil lawsuit against Defendants[264] alleging that Defendants engaged in an illegal price-fixing conspiracy by using AzHHA's nursing registry program, which contracts with various agencies representing temporary nurses, as an illegal and anti-competitive buyers cartel that allowed them to wrongfully suppress the wages and compensation of temporary nursing staff and set the wages below competitive free-market levels in violation of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that for the purposes of a Rule 12(b)(6) motion to dismiss, the Plaintiffs alleged sufficient facts to state a claim for *per se* violation of the federal antitrust laws. The court noted that the complaint contained a number of allegations that raised the level of the claim above a generalized assertion, such as:

- The complaint alleged not only that Defendants have jointly set-and wrongfully suppressed-the wages and compensation of temporary nursing staff, but also that those rates were set below competitive levels and that agencies had not obtained significant transactional efficiencies or scale economies as a result of the imposition of uniform bill rates;
- Plaintiffs alleged that Defendants also fraudulently and affirmatively misled Plaintiffs into believing that their wages were true market wages rather than artificially depressed wages;
- The complaint also contained specific allegations about the means by which Defendants allegedly engaged in price-fixing, including requiring that the agencies adopt a uniform pay rate scale for per diem and travel nurses and agreeing to expel from AzHHA any hospital using participating agencies for less than 50 percent of its total per diem needs;
- Plaintiffs' allegations that they were injured when Defendants fixed the price of their wages below a competitive rate and Plaintiffs' allegations of a direct causal link between reduced bill rates and lower wages was sufficient to establish antitrust standing; and

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263 *Doe v. Arizona Hosp. & Healthcare Ass'n*, No. 07-1292, 2009 WL 1423378 (D. Ariz. Mar. 19, 2009).

264 Defendants include Arizona Hospital and Healthcare Association, its subsidiary, the AzHHA Service Corp., and certain participating hospitals.

Cases

- As to indirect purchasers, the mechanics of the nature of the relationship between the various entities involved made it difficult to assess the application of the indirect purchaser rule at this stage of the litigation.

Cases

Meyer v. Qualcomm Inc. (2009)[265]

INDUSTRY: Wireless telecommunications

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff filed a class action on behalf of all purchasers of subsidized cellular phones from AT & T and who receive cellular phone service from AT & T against Defendant Qualcomm, who commercializes technology involved in cellular communications and applications, and owns patents that are significant in the wireless communications industry. Qualcomm generates billions of dollars in revenues by licensing its patents. Various Qualcomm patents are essential to the manufacture of UMTS-compliant cell phones and other UMTS-compliant devices, and are also essential for the implementation of the UMTS standard. Plaintiff alleged that Qualcomm misrepresent that it would license its WCDMA patents, which are essential to the UMTS standard and that Qualcomm's licensing constituted a contract, combination in the form of trust or otherwise in restraint of trade or commerce in violation of § 1 of the Sherman Act.

DEFENDANTS' MOTION: Qualcomm moved to dismiss for failure to state a claim upon which relief could be granted contending that Plaintiff's theory of causation is far too attenuated to support standing.

DISPOSITION: Motions **GRANTED**.

COURT'S RATIONALE: Court held that the Complaint failed to allege the type of injury that the antitrust laws were designed to prevent and that flows from the conduct that makes defendants' acts unlawful.

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[265] *Meyer v. Qualcomm Inc.*, No. 08-CV-655, 2009 WL 539902 (S.D. Cal. Mar. 3, 2009).

Cases

In re TFT-LCD (Flat Panel) Antitrust Litigation (2009)[266]

INDUSTRY: TFT-LCD manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant § 1 of the Sherman Act[267]

NATURE OF ALLEGED VIOLATION(S): Defendants manufacture, sell, or distribute thin film transistor liquid crystal display ("TFT-LCD") to customers in the United States. TFT-LCDs are used in various products, such as computer monitors, laptop computers, televisions, and cellular phones. Plaintiffs brought a class action against manufacturers, sellers, and distributors of TFT LCD panels and products alleging Defendants engaged in a horizontal price fixing.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted because the complaints did not adequately allege each Defendant's participation in the conspiracy.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the amended consolidated complaint more than adequately alleged the involvement of each Defendant and put Defendants on notice of the claims against them. Contrary to Defendants' suggestion, neither *Twombly* nor their prior order required elaborate fact pleading.

- The complaint detailed numerous illicit conspiratorial communications between and among Defendants and facts of the guilty pleas entered by four Defendants for fixing prices of TFT-LCDs;
- The complaints contained additional specific information about the group and bilateral meetings by which the alleged price-fixing conspiracy was effectuated;
- The complaints alleged that group or crystal meetings were attended by employees at three general levels of Defendants' corporations, and contained details about the structure and content of these meetings, as well as the types of employees who attended the meetings;
- The complaints alleged that the crystal meetings were supplemented by bilateral discussions between various Defendants about past and future pricing, as well as information about shipments, and that these discussions took the form of in-person meetings, telephone calls, e-mails, and instant messages;
- The complaint also alleged which types of meetings the Defendants and co-conspirators participated in, and in some instances included more detail such as the year of a meeting and other meeting participants; and

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266 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179 (N.D. Cal. 2009).

267 This case summary focuses only on the amended consolidated complaint of direct purchasers.

Cases

- The complaints alleged a complex, multinational price-fixing conspiracy, taken as whole; they sufficiently alleged each Defendants' participation in that conspiracy, as well as present factual basis for the allegations of agency.

Cases

Macquarie Group Limited v. Pacific Corporate Group, LLC (2009)[268]

INDUSTRY: Investment management services

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, an Australian based corporation, its wholly owned subsidiary, and its executive officers brought suit against Defendant alleging Defendant unlawfully restrained trade in violation of the Sherman Act. The alleged refusal to deal stems from Plaintiffs' attempted entry into the investment management services for public pension funds market in 2005.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted arguing that Plaintiffs could not exclude the possibility that Defendant and a third party acted independently.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Plaintiffs sufficiently alleged an agreement with an unlawful object and that the agreement between the parties was evidenced by Defendant's alleged phone call to Aisling, a competitor of the Plaintiffs and Aisling's subsequent reduction of Plaintiff's investment opportunity. The court also noted:

- Plaintiffs alleged an explicit agreement, evidenced by an admission by one of the co-conspirators and supported by circumstantial proof;
- Plaintiffs alleged that Defendant allegedly pressured Aisling to reduce Plaintiffs' investment opportunity to prevent their entry into the market, which was a form of a refusal to deal;
- Plaintiffs alleged that Defendant spread rumors about Plaintiffs' inability to obtain investment opportunities; and
- Plaintiffs alleged a plausible geographic and product market—the U.S. market for investment management of public pension funds.

[268] *Macquarie Group Limited v. Pacific Corporate Group, LLC*, No. 08-CV-2113, 2009 WL 539928 (S.D. Cal. Mar. 2, 2009).

Cases

William O. Gilley Enterprises, Inc. v. Atlantic Richfield Co. (2009)[269]

INDUSTRY: Oil producers

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, wholesale purchaser and retail dealer of gasoline alleged that Defendants, major oil producers, violated § 1 of the Sherman Act by entering into a conspiracy to limit the supply of CARB gasoline and to raise prices. This particular action was stayed until a similar state action[270] with similar allegations brought by a similarly situated Plaintiff. The state superior court granted summary judgment to Defendants, concluding that there was insufficient evidence presented to allow a reasonably juror to find a conspiracy. As a result, Defendants in this case moved for summary judgment arguing collateral estoppel. The court granted summary judgment but allowed Plaintiffs further leave to amend their complaint. Plaintiffs amended alleging that 44 bilateral exchange agreements had the effect of unreasonably restraining trade. The district court held that Plaintiffs had not alleged any theory as to how any individual exchange agreement, which accounted for a small percentage of the relevant market was able to inflate the price of CARB gasoline. Plaintiffs appealed, Ninth reversed, and again the district court granted dismissal holding that Plaintiffs failed to allege that the exchange agreements, when considered individually, would be capable of producing significant anti-competitive effects.

DEFENDANTS' MOTION: Again Defendants' motion to dismiss was granted. And again, Plaintiffs appealed.

DISPOSITION: Court of Appeals for the Ninth Circuit **AFFIRMED** and **GRANTED** Defendants' motion to dismiss.

COURT'S RATIONALE: Court Plaintiff failed to plead a contract by which the persons or entities intended to harm or restrain trade. The court noted that despite the complaints length, it failed to clearly assert which individual agreement or agreements constitute in themselves a contract intended to harm or restrain trade. Lastly the court noted that aggregation did not save the second amended complaint because it still did not show that the Defendants' adjustments of CARB production were part of any agreement or conspiracy, rather than independent efforts to maximize profits.

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269 *William O. Gilley Enters. Inc. v. Atl. Richfield Co.*, 588 F.3d 659 (9th Cir. 2009).

270 *See Aguilar v. Atl. Richfield Co.*, 24 P.3d 493 (Cal. 2001).

Cases

Singh v. Memorial Medical Center, Inc. (2008)[271]

INDUSTRY: Radiologist in New Mexico

ANTITRUST VIOLATIONS ALLEGED: Conspiracy to boycott pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATIONS: Radiologist and his New Mexico professional corporation and Texas physician association filed an amended complaint against a New Mexico hospital and various individuals under the Sherman Act alleging that the Defendants[272] conspired to restrain competition and inhibit trade in the radiology market of southern New Mexico and western Texas.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint did not allege a violation of § 1 of the Sherman Act under the standard enunciated by the Supreme Court in *Twombly*. Specifically the complaint failed *Twombly* because:

- Plaintiffs failed to meet the requirements of a *per se* violation of the Sherman Act;
- Plaintiffs failed to allege a horizontal conspiracy;
- Plaintiffs failed to allege any direct and specific effect on the wider relevant market;
- Plaintiffs failed to allege any anti-competitive effect Defendants' behavior had on the market;
- Plaintiffs failed to allege an antitrust injury; and
- Plaintiffs' alleged market encompassed at least eight other such hospitals, thus Plaintiff too narrowly defined the relevant market.

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271 *Singh v. Memorial Med. Ctr., Inc.*, 536 F. Supp. 2d 1244 (D.N.M. 2008).

272 The named Defendants included Lifepoint Hospitals, Memorial Medical Center, Nathan Williams, Bruce San Filippo, Dennis Myers, Ravi Gorav, Thomas Jackson, Paul Herzog and Geoffrey Jones.

Cases

Native American Distributing v. Senca-Cayuga Tobacco Co. (2008)[273]

INDUSTRY: Tobacco distributors/manufacturers

ANTITRUST VIOLATION(S) ALLEGED: None. Plaintiffs argued to the district court that their civil conspiracy claim arose under the Sherman Act and acknowledged that their complaint did not recite the Sherman Act by statute number.

NATURE OF ALLEGED VIOLATION(S): The Seneca-Cayuga Tribe of Oklahoma ("SCTO") is a federally-recognized Indian tribe that has been given the right to organize and act through both a government entity organized under a constitution and a corporate entity organized under a corporate charter. In accordance with their corporate charter and their bylaws, SCTO incorporated an enterprise known as Seneca-Cayuga Tobacco Company ("SCTC"). The Business Committee of the SCTC manufactured, sold, and distributed tobacco products; and in 2001, SCTC engaged Plaintiff to distribute its products. In 2005, Plaintiff filed suit alleging Defendants engaged in market manipulation and other illegal competitive practices while acting as officers of SCTC.

DEFENDANTS' MOTION: Plaintiff appealed the lowers court's granting of Defendants' motion to dismiss pursuant to Rule 12(b)(1) and that the doctrine of tribal sovereign immunity shielded Defendants' from this suit. Plaintiff alleged that individual Defendants were not protected under sovereign immunity.

DISPOSITION: United States Court of Appeals, Tenth Circuit **AFFIRMED** and **GRANTED** Defendants' motion to dismiss pursuant to Rule 12(b)(6).

COURT'S RATIONALE: Court held that there were simply nothing more than conclusory allegations that a civil conspiracy existed, and this is not enough to satisfy the requirement of "concerted action" stated in *Twombly*. After dismissing the claims against SCTC pursuant to the doctrine of sovereign immunity, the court found that only the civil conspiracy claims against the individuals remained. Although Plaintiff was unclear about which statutory authority governed their action, the Plaintiff's suit would not survive a motion to dismiss because:

- Plaintiff failed to allege any facts suggesting an agreement existed; and
- Plaintiff failed to allege that Defendants acted in concert or conspired with the SCTC.

[273] *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008).

Cases

FLSmidth v. Jeffco (2008)[274]

INDUSTRY: Manufacturer of compressors

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy or agreement to restrain trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): FLSmidth filed a lawsuit against Jeffco for trademark infringement. Jeffco answered and filed numerous counterclaims. Jeffco claimed that FLSmidth's lawsuit against them constituted a restraint of trade and that Plaintiffs' true motivation for filing was to prohibit Jeffco from competing in the marketplace.

DEFENDANTS' MOTION: In defense to the counterclaim, FLSmidth moved to dismiss alleging that Plaintiffs failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Jeffco's claim was deficient because:

- Claim did not allege facts to identify which entities engaged in a conspiracy or even that a restraint of trade occurred because the alleged conspirators were only identified as "the Plaintiffs";
- The companies that Jeffco claimed engaged in a conspiracy were a parent company and its wholly owned subsidiary, which were not legally capable of entering into a § 1 conspiracy; and
- Claim did not allege FLSmidth's activities had an anti-competitive effect on the marketplace, only that FLSmidth's actions harmed Jeffco.

[274] *FLSmidth A/S v. Jeffco LLC*, No. 08-CV-0215, 2008 WL 4426992 (N.D. Okla. Sept. 25, 2008).

Cases

Thermal Technologies v. UPS (2008)[275]

INDUSTRY: Parcel delivery service

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying and monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs claimed that UPS was unlawfully tying two markets: the product market for ground shipment of packages within the U.S. and the product market for insurance for ground shipments within the U.S. As a result of the unlawful tying, members of the putative class claimed they were forced to obtain an insurance product that they did not want or would have preferred to obtain from a source other than UPS. Plaintiffs posited that in a competitive market devoid of Defendant's forced tie, UPS would not be able to unlawfully force consumers to overpay for these services, leading to lower prices for consumers.

DEFENDANTS' MOTION: UPS moved to dismiss alleging that Plaintiffs failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that UPS' Terms and Conditions lawfully imposed a limitation on the carrier's liability for goods damaged in shipment. The tariff merely constituted an agreement that allocated risk of loss between the shipper and carrier. Based upon its review of the plain language of the UPS tariff and the history of carriers' liability case law (presented in Defendant's motion), the court did not find that the agreement created a separate contract of insurance.

The following allegations by the Plaintiffs did not adequately support their § 2 claim:

- That the putative class had used UPS for ground shipment within the U.S. for parcels valued up to $100;
- That it had been forced to pay a bundled price for shipment including a sale of insurance coverage by UPS for the shipment; and
- That UPS exploited its 70% market share to force customers to obtain insurance coverage regardless of whether the customer desires insurance coverage at all.

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275 *Thermal Techs., Inc. v. UPS, Inc.*, No. 08-CV-102, 2008 WL 4426992 (N.D. Okla. Nov. 5, 2008).

Cases

Champagne Metals v. Ken-Mac Metals (2008)[276]

INDUSTRY: Aluminum distributors

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, an aluminum distributor, filed suit against Defendants[277] alleging they violated § 1 of the Sherman Act by engaging in a horizontal group boycott. Plaintiff claimed that Defendants, established distributors, conspired to attempt to keep him out of their established market by threatening to move their collective business from mills that sold aluminum to Defendants, if those mills did business with Plaintiff.

DEFENDANTS' MOTION: Defendants renewed their motion for summary judgment.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: The court held that Plaintiff had met its burden by establishing by a preponderance of the evidence that an antitrust conspiracy was formed by the Defendants and the mills. The court found that in combination different pieces of evidence sufficed to establish the predicate conspiracy. The allegations the court held sufficient included:

- Allegation that certain mills had agreed to recognize Plaintiff and that actual orders had been placed, and credit approval was assured, then mills pulled out unexpectedly;
- Allegation that refusal to fill Plaintiff's metal orders was against one of the mill Defendant's economic interests because Plaintiff was the largest supplier to the $1 billion horse trailer market and exposed the company to potential litigation;
- Allegation that other mills soon began refusing to sell Plaintiff when they had done so previously; and
- The court found that the record contained persuasive evidence of continued pressure imposed by the service centers on the various mills to compel them not to recognize Plaintiff.

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276 *Champagne Metals v. Ken-Mac Metals, Inc.*, No. 02-0528, 2008 WL 5205204 (W.D. Okla. Dec. 11, 2008).

277 The named Defendants included Ken-Mac Metals, Inc.; Samuel, Son & Co.; Samuel Specialty Metals, Inc.; Earle M. Jorgensen Co.; and Ryerson Tull, Inc.

Cases

Philips Electronics N. America Corp. v. BC Technical, Inc. (2009)[278]

INDUSTRY: Software manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): BC Technical asserted claims under § 2 of the Sherman Act alleging that Philips created a tying arrangement between two distinct products alleged to be firmware codes burnt into PROMs placed on pre-populated circuit boards and the service maintenance and repair of Philips' devices through the replacement of individual PROMs on such circuit boards in the alleged tied market.

DEFENDANTS' MOTION: Defendant sought leave to file an amended answer and counterclaim for violations of the antitrust laws of the United States. Plaintiff opposed.

DISPOSITION: Motion for leave to amend **DENIED** and district court **AFFIRMED** the ruling of the Magistrate judge.

COURT'S RATIONALE: Court held that where the allegations of the proposed amended counterclaim would not survive a motion to dismiss under FRCP 12(b)(6), the claim would be futile and here amendment was futile because:

- BC Technical failed to provide sufficient facts to state a plausible claim;
- Failed to provide facts to support its conclusory allegations that Philips had sufficient economic power in the tying market;
- Failed to include a factually supported definition or description of what the relevant product or geographic market was;
- Failed to provide any detail or factual support that it was plausible that Philips had market power within a relevant market; and
- There were no facts about the volume of commerce involved or what amount of commerce is allegedly affected.

[278] *Philips Electronics N. Am. Corp. v. BC Tech., Inc.*, No. 2:08-CV-639, 2009 WL 2381333 (D. Utah Aug. 3, 2009).

Cases

Total Renal Care v. Western Nephrology (2009)[279]

INDUSTRY: Medical Services

ANTITRUST VIOLATION(S) ALLEGED: Restraint on trade pursuant to § 1 of the Sherman Act and unlawful monopolization, attempted monopolization and conspiracy to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff/Counter-Defendant Total Renal Care ("TRC") is a medical provider specializing in kidney dialysis services and operation of kidney dialysis clinics. Defendant/Counterclaimant American Renal Associates ("ARA") is also in the dialysis services and clinics business and, in response to a lawsuit initiated by TRC, asserted numerous counterclaims for violation of federal antitrust laws. ARA contended that TRC had a monopoly in the market for dialysis clinics and services in Denver and that it abused its power in order to maintain its dominant position by engaging in a variety of anti-competitive acts, including "locking up" its staff by means of illegal non-compete contracts, imposing exclusive dealing contacts on equipment suppliers, and pursuing "sham" litigation.

DEFENDANTS' MOTION: Defendants moved to dismiss each counterclaim for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: The court held that the Defendant/Counterclaimant failed to properly allege the relevant market with respect to the applicable factors, which compelled the court to dismiss its monopolization, attempted monopolization and unreasonable restraint of trade claims. Specifically, the court held that:

- Without specific firm allegations with respect to product interchangeability or cross-elasticity, a relevant market cannot be properly established, making it impossible to determine whether TRC had sufficient market power to risk harming competition; and
- With respect to the conspiracy to monopolize counterclaim, the Defendant failed to assert any specific intent to monopolize shared by its alleged co-conspirators, thus compelling the dismissal of the counterclaim.

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279 *Total Renal Care, Inc. v. Western Nephrology and Metabolic Bone Disease, P.C.*, No. 08-CV-00513-CMA-KMT, 2009 WL 2596493 (D. Colo. Aug. 21, 2009).

Cases

In re Urethane Antitrust Litigation (2009)[280]

INDUSTRY: Urethane Products

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs opted out of class action and filed direct actions alleging price-fixing conspiracy during the period from 1994 to 1998 with respect to urethane chemical products in violation of the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court dismissed the price-fixing conspiracy claims on the basis that Plaintiffs did not allege sufficient facts to support antitrust liability during the relevant time period (from 1994-1998). Specifically,

- Although the Plaintiffs' allegations regarding the existence of a conspiracy satisfy the principles established by the Supreme Court's *Twombly* decision, they do so only for the time period begging in 1999; and
- The Plaintiffs' assertions before this time lack key factual details (*i.e.*, specific meeting and/or communication) and amount to nothing more than conclusory allegations that do not plausibly support the existence of a conspiracy as per the *Twombly* standard.

280 *In re Urethane Antitrust Litig.*, MDL No. 1616, Nos. 04-1616-JWL, 08-2617-JWL, 09-2026-JWL, 2009 WL 3337247 (D. Kan. Aug. 14, 2009).

Cases

Christy Sports, LLC v. Deer Valley Resort Co. (2009)[281]

INDUSTRY: Ski Equipment Rentals

ANTITRUST VIOLATION(S) ALLEGED: Attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Defendant Deer Valley Resort Co. ("DVRC") sold parcels of land within its ski resort to third parties, while reserving the right of approval over the conduct of certain businesses on the property, specifically that of ski rentals. After fifteen years of granting permission to Plaintiff to rent skis, DVRC revoked that permission, presumably in order to gain more business for its own newly-opened ski rental store, an act that Plaintiff-Appellant claims constituted an attempt to monopolize the market of ski rentals available to destination skiers in Deer Valley, in violation of federal antitrust laws.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: The court affirmed the district court's dismissal for failure to state a claim. This conclusion, according to the court, could be reached either by reference to the proper definition of a market or by reference to the absence of anti-competitive conduct. Specifically, with respect to these two lines of reasoning:

- The market established in the complaint was too narrow, and to define one small component of the overall product (*i.e.*, the overall experience of the resort itself) as the relevant market was implausible, rendering the market in the case not legally cognizable under the antirust laws; and
- The decision of a resort owner to reserve to itself the right to provide ancillary services did not constitute anti-competitive conduct, as a resort has no obligation under the antitrust laws to allow such competitive service suppliers on its property, even if prices for said services would decrease as a result. The competitive discipline came not from introducing competition with respect to each component of the experience, but from competition with other ski resorts and with respect to the entire package.

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281 *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188 (10th Cir. 2009).

Cases

Lady Deborah's, Inc. v. VT Griffin Services, Inc. (2007)[282]

INDUSTRY: Government cleaning contracts

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, Lady Deborah's, Inc. ("LDI"), a subcontractor, brought suit against VT Griffin Services, Inc., and VT Group, PLC (collectively, "VT Griffin"), who held the prime contract at Kings Bay for construction of a US Naval base. According to LDI, because VT Griffin held the prime contract at Kings Bay for construction services, it had a monopoly over which vendors would get cleaning services subcontracts. Plaintiff alleged that VT Griffin advised it to enter into an agreement with a third entity whereby that entity would perform about half of the cleaning services work under LDI's Kings Bay subcontract. LDI insisted that this vertical arrangement precluded LDI's ability to seek out a cheaper vendor, or to perform the work itself. LDI alleged that this vertically imposed restriction violated § 1 of the Sherman Act. Plaintiff also alleged that Defendants violated the Sherman Act by using its monopoly power over the King Bay contract in question to control prices and exclude competition to their detriment.

DEFENDANTS' MOTION: Defendants moved to dismiss all counts.

DISPOSITION: Motion **GRANTED** as to the antitrust violations.

COURT'S RATIONALE: Court held that LDI's antitrust claims were not legally viable. The complaint failed *Twombly* because:

- The complaint failed to allege any facts supporting its conclusory antitrust claims;
- The complaint failed to allege an injury to competition as a whole, rather than an injury to Plaintiff alone;
- The complaint failed to allege facts that showed a conspiracy to restrain trade in violation of § 1 of the Sherman Act;
- The complaint failed to define the relevant product market and geographical market adequately; and
- The complaint failed to offer any factual allegations to support a theory that VT Griffin had a monopoly over all prime contracts for the Navy.

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[282] *Lady Deborah's, Inc. v. VT Griffin Servs., Inc.*, No. 207-cv-079, 2007 WL 4468672 (S.D. Ga. Oct. 26, 2007).

Cases

Appleton v. Intergraph Corp. (2008)[283]

INDUSTRY: Government contracts

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to restrain trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Appleton, as a pro se Plaintiff, brought suit against Intergraph and others alleging nine violations of §§ 1 & 2 of the Sherman Act. Plaintiff allegedly developed a software program to alleviate the inefficiencies that existed in the Department of Defense's management of the contractors that worked for its many military program offices.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motions **GRANTED**.

COURT'S RATIONALE: The amended complaint was riddled with examples of vague and conclusory statements, and assertions that amounted to only legal conclusions. The complaint failed *Twombly* because:

- The section of the Complaint titled "Conspiracy" cited no facts constituting an agreement between one or more Defendants;
- The allegation that "two or more persons conspired against Plaintiff to shut her out of competition" was more vague than that in *Twombly*;
- The complaint provided no facts to create a reasonable expectation that an agreement would be revealed during discovery; and
- After citing key language in *Twombly*, that "allegations of parallel conduct and an agreement made at an unspecified time are not sufficient to plead a conspiracy under § 1," the court found the allegations insufficient as a matter of law.

283 *Appleton v. Intergraph Corp.*, No. 5:07-CV-179, 2008 WL 2967112 (M.D. Ga. July 30, 2008).

Cases

Pierson v. Orlando Regional Healthcare Systems, Inc. (2009)[284]

INDUSTRY: Health Services

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 and conspiracy to monopolize pursuant § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Raymond Pierson, an orthopedic surgeon, sued several entities (hospitals, hospital administrators, individual doctors, and government entities) related to Orlando Regional Healthcare Systems, Inc. ("ORHS") after some of his medical privileges were suspended as the result of peer review. Plaintiff alleged that Defendants engaged in unlawful combination and conspiracy to exclude him from practicing medicine at ORHS facilities.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to allege a cause of action.

DISPOSITION: Motion **GRANTED**

COURT'S RATIONALE: Court held that the Plaintiff lacked standing to bring antitrust claim and had not set forth an actionable antirust claim in any event, because:

- The antitrust count was not sufficiently pled, as Plaintiff seemed to confusingly allege violations of both § 1 and § 2 of the Sherman Act without regard for the very different conduct such violations require or for fair notice to Defendants;
- Plaintiff failed to define an appropriate market;
- Plaintiff failed to sufficiently allege an antitrust injury or anti-competitive effect, but rather merely an adverse effect on himself and his profitability; and
- Insofar as Plaintiff attempted to state a violation of § 2 of the Sherman Act, Plaintiff failed to sufficiently characterize the supposed monopoly that Defendants aspired to obtain.

[284] *Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, 619 F. Supp. 2d 1260 (M.D. Fla. 2009).

Cases

In re LTL Shipping Services Antitrust Litigation (2009)[285]

INDUSTRY: Freight Shipping

ANTITRUST VIOLATION(S) ALLEGED: Price-fixing conspiracy pursuant § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): In a consolidated multi-district class action, Plaintiffs, all purchasers of Defendants' freight shipping services, sued freight transportation carriers alleging that the Defendants fixed prices for fuel surcharges assessed by freight carriers engaged in less-than-truckload ("LTL") freight shipments, in violation of § 1 of the Sherman Act. Plaintiffs claimed the Defendants conspired with each other to assess the same artificially-elevated fuel surcharges to all customers and assessed the charges in a common manner.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Using the principles established by the Supreme Court's *Twombly* decision, the court determined that Plaintiffs did not adequately state a claim because:

- Plaintiffs failed to adequately plead direct evidence of a price-fixing conspiracy, such as a specific time, place or person(s) involved or that the Defendants acted in concert; and
- The facts alleged by the Plaintiffs failed to support an inference that a conspiracy was plausible, as required under *Twombly*, but instead they showed that LTL service providers had the same incentives to charge the same shipping rates due to external stimuli, and that over time they eventually did so.

[285] *In re LTL Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219 (N.D. Ga. Jan. 28, 2009).