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Case Study: Anderson News V. American Media

Law360, New York (April 12, 2012, 1:29 PM ET) -- In Anderson News LLC v. American Media Inc., Docket No. 10-4591-cv (2d Cir. April 3, 2012), the Second Circuit tackled, yet again, the meaning of the "plausibility" standard for Federal Rule of Civil Procedure 12(b)(6) motions to dismiss antitrust claims. Judge Amalya L. Kearse's opinion for the three-judge panel offers perhaps the clearest, most thorough explication of the plausibility standard for antitrust cases since it was first employed by the U.S. Supreme Court in Bell Atlantic Corp. v. Twombly.[1] Nevertheless, substantial questions remain.

The district court in Anderson News had dismissed the complaint, denied Anderson's motion for reconsideration, and denied leave to file an amended complaint on the ground that "the alleged conspiracy was facially implausible."[2] Thus, the Second Circuit was squarely presented with the question of what precisely the plausibility inquiry entails. The Second Circuit held that Anderson's allegations of conspiracy were plausible, and reversed the district court's dismissal.

Anderson News, a wholesaler of single-copy magazines to retail outlets such as newsstands, bookstores and mass merchandisers for resale to consumers, alleged a conspiracy among national magazine publishers, distribution service companies, and wholesalers competing with the plaintiff to exclude the plaintiff and another wholesaler from the market for single-copy magazine distribution.[3] In short, Anderson News alleged a classic group boycott, per se unlawful.

Anderson's alleged motivation for the group boycott was retaliation for Anderson and another wholesaler's (Source Interlink Distribution) imposing, in early- and mid-January 2009, respectively, a 7-cent-per-magazine distribution surcharge on publishers for magazines that Anderson and Source distributed to retailers but were not sold to consumers, necessitating Anderson and Source to handle retrieval/destruction of the overstock.[4] In support of its allegations of conspiracy, Anderson alleged substantial factual material. This included, as characterized by the Second Circuit:

- on at least two occasions in late January 2009, two of the four distribution service companies "invited Anderson to join their effort to eliminate Source," with Anderson receiving regional exclusivity, presumably in what would have been Source's areas of business, in exchange for dropping the 7-cent surcharge;[5]

- the distribution service companies, on behalf of all five publishers, "refused to enter into any legitimate substantive negotiations with Anderson after Anderson announced the surcharge;[6]

- "in late January 2009, defendants met or communicated with each other — in various

combinations ... and agreed that each of them would reject Anderson's proposed Surcharge, would refuse any other accommodation, and would stop supplying Anderson with magazines";[7] and

- at a Feb. 2, 2009, dinner meeting, the CEO of one of the distribution service companies, Time Warner Retail Sales & Marketing Inc., told Source's CEO why Source and Anderson were being terminated and therefore the two remaining wholesalers, defendant Hudson News Distributors LLC and former defendant The News Group LP, would "control this space" and be able to impose any additional costs on magazine retailers.[8]

Anderson thus made detailed factual allegations as to the who/what/when/where/why/how of the alleged conspiracy.[9]
Notwithstanding these detailed factual allegations, the district court dismissed Anderson's complaint because the court found Anderson's allegations economically implausible:

> The ultimate goal of this alleged conspiracy was to eliminate both Anderson and non-party Source, two of the four largest magazine wholesalers. ... This goal is not plausible. Publishers and national distributors have an economic self-interest in more wholesalers, not fewer; more wholesalers yields greater competition, which is good for suppliers. Destroying Anderson and Source ... would give Hudson and News Group ... 90% of the market share. ... This is too much market power to yield to wholesalers.[10]

The district court also found certain of defendants' alleged statements to be "vague," and that defendants' decision to stop doing business with Anderson was "'in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market,'" i.e., a desire not to pay Anderson's and Source's 7-cent surcharges.[11] The district court found that "[u]nilateral parallel conduct is completely plausible in this context."[12]

The Second Circuit began it's analysis by noting that, even after Twombly and Iqbal,[13] the Federal Rules of Civil Procedure require only notice pleading, i.e., "factual allegations that are sufficient to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'"[14]

Merely "[c]onclusory allegations of 'participation' in a 'conspiracy' have long been held insufficient to state a claim."[15] In Twombly, the plaintiffs' only nonconclusory allegation of conspiracy was that the defendants had refused to compete in each other's territory, which the Supreme Court held insufficient to give them notice of how to defend the claim, e.g., which of the defendants' employees were involved, how had they refused to compete, when did the conduct occur and for how long, etc.[16]

Of course, while the Supreme Court in Twombly could have stopped there, it stated its now (in)famous holding that the alleged facts must also give rise to a "plausible" claim. The

Twombly court did not, however, explicate what it means for a claim to be "plausible," other than to state that it need not be "probable." (Presumably, the court meant "more likely than not"; in statistics, an outcome is "probable" so long as it has a nonzero probability of occurring.)

In Iqbal, the court offered: "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."[17] But pleading factual content and drawing reasonable inferences from that content have been part of notice pleading for decades. The question of what the term "plausibility" adds to the analysis has plagued federal courts since Twombly first used it.[18] Exacerbating the problem is the Supreme Court's statement in Iqbal that "determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense."[19]

The Second Circuit in Anderson News enunciated the following standard:

> [T]o present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment, see, e.g., Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 597-98 (1986). ...
>
> Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible. The choice between or among plausible inferences or scenarios is one for the fact finder. ...
>
> A court ruling on [a Rule 12(b)(6)] motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.[20]

In short, if there are two plausible interpretations of the alleged facts, then the complaint cannot be dismissed.
The Second Circuit held that the wealth of detailed factual allegations supporting the alleged group boycott of Anderson News and Source made Anderson's allegation of conspiracy plausible, and that the district court erred in dismissing Anderson's complaint because, in the district court's view, the defendants' explanation of the facts was more plausible.[21]

The Second Circuit also held that it was error for the district court to rely on its perception

that certain defendants' alleged statements were vague and/or "not inculpatory."[22] The district court thus resolved disputed questions of fact, which is impermissible on a Rule 12(b)(6) motion to dismiss.[23]

Whatever the meaning of Iqbal's command for a reviewing court to "draw on its experience and common sense," it is clear from Anderson News that that does not extend to assessing disputed facts. But does it extend to assessing disputed issues of economics?

The Second Circuit rejected the district court's rationale that the alleged conspiracy was implausible because the elimination of wholesaler competition was not in the publishers' and their distribution agents' economic interests.[24]

The Second Circuit reasoned that it was possible that the publishers and their distribution agents collectively possessed greater market power than the two remaining wholesalers, because the publishers owned the magazines that the wholesalers needed. Further, "[w]ith only two national wholesalers, each with its own allocated territory, many retailers would have no other supplier choice; wholesalers could increase their profits by raising prices to the retailers, and not seek, as Anderson and Source had, to increase charges to the publishers."[25]

Questions Unresolved by the Second Circuit

Notably, the Second Circuit was silent on whether the district court's incorrect economic reasoning violated the Federal Rules of Civil Procedure or whether it violated economics.

What if a district court, "draw[ing] on its experience and common sense" as mandated by Iqbal, finds the plaintiff's interpretation of the alleged facts implausible in light of that court's understanding of economics? Presumably, such a determination would not run afoul of the Second Circuit's command not to choose between two plausible interpretations, because the district court would find the plaintiff's implausible.

Indeed, the Second Circuit's own analysis of the economic plausibility of Anderson's claim justifies such an analysis by a district court. Twombly ambiguously states that use of "common economic experience" by a reviewing district court is proper.[26] Will the analysis reduce to a debate between the district and appellate courts as to economics? Will we begin to see economists' affidavits in support of the economic plausibility of a complaint? This may not be as crazy as it seems, given that at least two federal courts of appeals' panels have held that factual allegations in support of market definition and anticompetitive effects must satisfy Twombly's plausibility test.[27]

In sum, while the Second Circuit's opinion in Anderson News is welcome guidance on the plausibility standard, substantial questions remain unanswered, and courts will continue to grapple with them.

--By Ankur Kapoor, Constantine Cannon LLP

Ankur Kapoor is a partner in Constantine Cannon's New York office.

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

[2] Slip op., at 3.

[3] The distribution service companies were alleged not to provide physical distribution, but to broker and manage the publishers' relationships with wholesalers like the plaintiff. Slip op., at 5.

[4] Id. at 7-8.

[5] Id. at 8.

[6] Id. at 9.

[7] Id.

[8] Id. at 9-10.

[9] See also id. at 19-22 (identifying additional, specific communications among defendants alleged in plaintiff's proposed amended complaint).

[10] 732 F. Supp. 2d at 396-97.

[11] Id. at 397-99 & n.9.

[12] Id.

[13] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

[14] Slip op., at 24 (citing Twombly, 550 U.S. at 555) (alterations in original).

[15] Id.

[16] 550 U.S. at 565 & n.10; see also Anderson News, slip. op., at 31-32. The Twombly plaintiffs also alleged parallel conduct by incumbent local telephone companies to inhibit entry by competitors. Parallel conduct alone, however, does not give rise to an antitrust cause of action. Twombly, 550 U.S. at 553-54.

[17] Iqbal, 129 S. Ct. at 1949.

[18] In re Text Messaging Antitrust Litig., 630 F.3d 622, 627 (7th Cir. 2010) ("Pleading standards in federal litigation are in ferment after Twombly and Iqbal"; granting interlocutory appeal to address issue).

[19] Iqbal, 129 S. Ct. at 1940.

[20] Slip op., at 28-29.

[21] Id. at 32-37; see also Watson Carpet & Floor Covering Inc. v. Mohawk Indus. Inc., 648 F.3d 452, 454, 458 (6th Cir. 2011) (reversing dismissal where alleged agreement "plausibly explains the refusals to sell," even though the agreement need not be "the probable or exclusive explanation"); Pa. Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n, No. 09 C 5619, at *6 (N.D. Ill. 2010) (denying motion to dismiss and rejecting defendants' argument that Twombly gives courts "discretion to determine at the outset of a case whether defendants' version of events is 'much more plausible' than plaintiffs'"); but see Jacobs v. Tempur-Pedic Int'l Inc., 626 F.3d 1327, 1341-43 (11th Cir. 2010) ("Jacobs had the burden to present allegations showing why it is more plausible that TPX and its distributors — assuming they are rational actors acting in their economic self-interest — would enter into an illegal price-fixing agreement (with the attendant costs of defending against the resulting investigation) to reach the same result realized by purely rational profit-maximizing

behavior.”).

[22] Slip op., at 38-39.

[23] Id.

[24] Id. at 43-45.

[25] Id. at 44.

[26] 550 U.S. at 565 (complaint’s “sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience”); see also In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 326 (3d Cir. 2010) (“In sum, Twombly makes clear that a claim of conspiracy predicated on parallel conduct should be dismissed if ‘common economic experience,’ or the facts alleged in the complaint itself, show that independent self-interest is an ‘obvious alternative explanation’ for defendants' common behavior.”).

[27] Jacobs v. Tempur-Pedic Int’l Inc., 626 F.3d 1327, 1338-40 (11th Cir. 2010); Wampler v. Sw. Bell Tel. Co., 597 F.3d 741 (5th Cir. 2010).

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