Conspiracy to Fix Prices for Text Messaging Services Plausible

AntitrustConnect Blog
December 30, 2010

Jeffrey May (Wolters Kluwer)

Please refer to this post as: Jeffrey May, 'Conspiracy to Fix Prices for Text Messaging Services Plausible', AntitrustConnect Blog, December 30 2010, http://antitrustconnect.com/2010/12/30/conspiracy-to-fix-prices-for-text-messaging-services-plausible/

Antitrust plaintiffs asserting price fixing claims do not need a "smoking gun" to avoid dismissal of their complaint and proceed to discovery.

Yesterday, the U.S. Court of Appeals in Chicago decided that consumers plausibly alleged a conspiracy among the nation's leading wireless service providers to fix the price of text messaging services in violation of federal antitrust law. The complaint alleged a conspiracy based on parallel behavior with sufficient plausibility to satisfy the pleading standard of *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544. The appellate court, in an opinion authored by Judge Richard Posner, rejected the defending service providers' argument that, as in *Twombly*, the complaint here alleged merely that the defendants were not competing as opposed to agreeing or conspiring not to compete.

The alleged conspiracy involves Sprint/Nextel, Verizon, AT&T, and T-Mobile, who account for approximately 90 percent of U.S. text messaging services. According to the plaintiffs, beginning in 2005, the defendants began charging the same prices for text messages purchased on a per-message basis. The claims were brought on behalf of consumers who purchased text messaging services on a fee-per-message basis from these defendants. A class action suit was consolidated for pretrial proceedings in the federal district court in Chicago.

"Parallel Plus" Behavior

The plaintiff's second amended complaint alleged a mixture of parallel behaviors, details of industry structure, and industry practices that facilitated collusion, according to the appellate court. Of note was an allegation that the defendants belonged to a trade association and exchanged price information directly at association meetings. The complaint also alleged that in the face of steeply falling costs, the defendants increased their prices. Moreover, the industry's pricing structure changed rapidly from heterogeneous and complex to a uniform pricing structure. The plaintiffs alleged "parallel plus" behavior or parallel conduct that would probably not have resulted from chance or coincidence.

Lack of Smoking Gun or Direct Evidence

The defendants pointed out that there was no smoking gun or direct evidence of price fixing. Such a smoking gun would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price. While direct evidence of an agreement to fix prices was lacking, discovery might "reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability," the court explained.

Procedural Background

In December 2009, the federal district court in Chicago granted the defendants' motion to dismiss the plaintiffs' first complaint (**2010-1 Trade Cases ¶76,971**). The plaintiffs sought leave to file an amended complaint. Earlier in 2010, the district court granted the plaintiffs' motion for leave to amend (**2010-1 Trade Cases ¶77,007**), despite the defendants' contention that the complaint was inadequately pled.

Interlocutory Appeal

The appellate court took up the issue of the complaint's adequacy after the defendants asked the district judge to certify the question for interlocutory appeal under 28 U.S.C. §1292(b). The court concluded that the proposed appeal presented a "controlling question of law" as required for interlocutory appeal under §1292(b). Routine applications of well-settled legal standards to facts alleged in a complaint were not appropriate for interlocutory appeal. However, the question presented by the appeal was the sufficiency of the allegations of a complaint, which required the interpretation, and not merely the application, of the legal standard under

Twombly. The court explained that *Twombly* was a recent decision, and its scope was unsettled.

The December 29, 2010, decision, *In re: Text Messaging Antitrust Litigation*, No. 10-8037, will appear at **2010-2 Trade Cases ¶77,281**.