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Second Circuit Corrects Misapplication of Twombly Plausibility Test in Boycott Case

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The federal district court in New York City should not have rejected allegations that a magazine wholesaler was driven out of business as a result of an antitrust conspiracy, the U.S. Court of Appeals in New York City decided earlier this week. On April 3, the appellate court vacated the lower court's judgment granting a motion to dismiss the wholesaler's Sherman Act Sec. 1 claim for failure to state a claim and denying leave to file an amended complaint.

According to the appellate court, the lower court misapplied the plausibility standards set by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129S. Ct.1937 (2009). The lower court should not have dismissed plausible allegations of a boycott, merely because it found a different version of events more plausible. By finding the plaintiff's view of the events implausible, or less plausible than the possibility that the defendants acted unilaterally, the lower court improperly made factual findings, it was held.

Prior to being forced into bankruptcy liquidation, Anderson News was the second largest magazine wholesaler in the United States. After ceasing operations in 2009, Anderson brought an antitrust action against five national magazine publishers and their four distribution representatives, as well two smaller wholesalers. Anderson alleged that, along with the country's largest magazine wholesaler—Source Interlink Distribution, LLC—it was the target of a boycott conspiracy.

Anderson contended that the boycott to eliminate the nation's two largest magazine wholesalers followed a move by Anderson to impose a surcharge on publishers for each magazine copy it distributed, regardless of whether the copy was sold by a retailer. The surcharge was an attempt to recover costs associated with retrieving unsold magazine copies from retailers and deposing of them. Shortly after Anderson announced the surcharge, Source announced that it too would impose a similar surcharge.

The defendants, in an effort to get Anderson to drop the surcharge, allegedly invited the wholesaler to join in the elimination of Source. Anderson contended that it declined. According to Anderson, thereafter, the defendants met or communicated with each other and agreed to reject Anderson's proposed surcharge, to refuse any other accommodation, and to stop supplying Anderson with magazines.

Anderson's allegations of conspiracy were plausible, in the appellate court's view. The appellate court explained what differentiated the complaint filed by Anderson from the complaint at issue in

Twombly.

Anderson alleged an actual agreement to eliminate Anderson and/or Source as wholesalers in the market and to divide the market between two smaller wholesalers. According to the appellate court, "the facts alleged in the [proposed amended complaint] are sufficient to suggest that the cessation of shipments to Anderson resulted . . . from a lattice-work of horizontal and vertical agreements to boycott Anderson."

The appellate court went on to say that it had "difficulties with some of the court's analytical constructs, including its application of *Twombly*'s plausibility test." The lower court's plausibility inquiry was "misdirected" when it ruled that Anderson did not state a plausible Sherman Act, Sec. 1 claim, simply because unilateral parallel conduct by the defendants was completely plausible. According to the appellate court, "although an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible." Moreover, on a Rule 12(b)(6) motion it was "not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives."

The appellate court also rejected the lower court's determinations that Anderson's conspiracy claim was implausible because the defendants had "a variety of reactions" to Anderson's announcement of the surcharge or because Anderson's surcharge was a nonnegotiable demand on the publishers. There was nothing implausible about coconspirators' starting out in disagreement as to how to deal conspiratorially with their common problem. Moreover, the presentation of a common economic offer might lend itself to independent, parallel responses, but it did not provide antitrust immunity to the publishers if they decided to get together to boycott the offeror.

One could chalk this decision, *Anderson News, L.L.C. v. American Media, Inc.*, Docket No. 10-4591-cv, up to differing views of antitrust law held by three federal appellate court judges who were appointed by Democrat presidents and a federal district court judge appointed by President George W. Bush. However, the ruling shows that the hurdles imposed on antitrust plaintiffs by *Twombly* and *Iqbal* are not insurmountable. In this case, the plaintiff told a compelling story. Whether the plaintiff will be able to survive a defense motion for summary judgment remains to be seen.

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