New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

VOLUME 249—NO. 55

FRIDAY, MARCH 22, 2013

ANTITRUST

Expert Analysis

Second Circuit Won't Revive 'Auction Rate Securities' Conspiracy Case

By **Elai Katz**

The U.S. Court of Appeals for the Second Circuit affirmed dismissal of claims that financial institutions conspired to stop buying auction rate securities and triggered the market's collapse. A district court ruled that a lawsuit alleging that private equity funds agreed to refrain from competing with one another in acquisitions of public companies could proceed to trial, after narrowing the scope of the claims.

Other antitrust developments of note included a ruling by the U.S. Court of Appeals for the Ninth Circuit that plaintiffs who bought price-fixed goods outside the state could bring claims under California antitrust law because the alleged collusion took place in the state and the European Commission's decision to prohibit Ryanair's renewed proposal to acquire rival Irish airline Aer Lingus.

Pleading Conspiracy

Buyers and issuers of auction rate securities—long-term bonds with flexible interest rates that must reset through periodic auctions and do not trade on an exchange—alleged that leading financial institutions triggered the collapse of the market in early 2008 by conspiring to stop buying auction rate securities in violation of antitrust law.

The complaint alleged that until 2008 the defendant financial institutions had frequently supported auctions using their own proprietary trading accounts to prevent failures when supply exceeded demand for a given auction rate security. These supporting bids became more important to the functioning of the market as financial conditions deteriorated in 2007. Then, according to the complaint, in February 2008, the financial institutions simultaneously refused to support the auction rate securities auctions they managed.

The plaintiffs claimed the alleged agreement constituted a boycott or concerted refusal to deal in violation of §1 of the Sherman Act and the district court dismissed the complaint on the grounds that securities regulation impliedly precluded application of the antitrust laws to the alleged conspiracy under *Credit Suisse Securities (USA) v. Billing*, 551 U.S. 264 (2007).

The Second Circuit in *Mayor and City Council of Baltimore v. Citigroup*, Nos. 10-0722, 10-0867, 2013-1 CCH Trade Cases ¶78,288 (2d Cir. March 5, 2013), affirmed the dismissal, albeit on alternate grounds. The appellate panel recapped the pleading standard set out in another 2007 Supreme Court decision, *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and reaffirmed the now-settled principle that alleging parallel conduct without more is insufficient even at the pleading stage. The Second Circuit observed that *Twombly's* "prime concern" is to distinguish cases that assert a plausible antitrust conspiracy from those that "merely presume a conspiracy from parallel action."

The appellate panel reasoned that if courts "permit antitrust plaintiffs to overcome a motion to dismiss simply by alleging parallel conduct, we risk propelling defendants into expensive antitrust discovery on the basis of acts that could just as easily turn out to have been rational business behavior." The Second Circuit panel added that when a plaintiff alleges additional "plus factors" to bolster an assertion of parallel conduct, those factors must be examined to evaluate whether they lead to an inference of conspiracy.

The court determined that the alleged withdrawal from the failing auction rate securities market "in a virtually simultaneous manner" made "perfect business sense" and did not plausibly suggest that the parallel conduct resulted from an agreement. The court noted it was to be expected that once a critical mass of auctions failed, the financial institutions would exit the market very quickly based on independent decisions informed by an awareness and anticipation of similar actions by their rivals.

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The decision follows several opinions by the Second Circuit applying *Twombly's* pleading standards to antitrust complaints, yet notably absent from the decision is any discussion of the Second Circuit's *Anderson News v. American Media* opinion (discussed in the April 19, 2012, column) and its admonition that at the pleading stage courts should not subject claims to a probability test or choose among plausible alternatives, as long as the alleged claim is plausible.

Private Equity Buyouts

In *Dahl v. Bain Capital Partners*, 07-Civ-12388 (D. Mass. March 13, 2013), former shareholders of public companies that were taken private alleged that private equity firms and an investment bank conspired to allocate the market for the acquisition of public companies by way of leveraged buyouts (LBOs) in order to dampen competition and avoid paying higher prices to shareholders. The district court denied the defendants' motions for summary judgment after narrowing the claims and dismissing the investment bank defendant, JP Morgan Chase & Co., from the suit. The court clarified that to survive summary judgment plaintiffs must show evidence that is not only consistent with conspiracy, but also tends to exclude the possibility of independent action.

The court noted that much of the alleged conduct did not support the assertion of an overarching conspiracy: For one, joint bidding and forming consortiums at auctions are common and appropriate practices in the industry. In addition, the invitation of a losing bidder to join a consortium does not, on its own, suggest the existence of an overarching conspiracy to avoid competition for the acquisition of public companies. Furthermore, the court stated that an occasional acknowledgement that joint bidding reduces competition and communications among defendants, in an industry with many legitimate, close relationships, do not indicate an industry-wide conspiracy. And, the court added, private equity funds could have instituted policies of not competing with the same ferocity as in the past to avoid inviting retaliation from other funds independently, without any collusion.

However, the court determined that the case may proceed on the theory of an alleged overarching agreement not to "jump" announced proprietary deals—that is, a pact not to submit a superior offer during a "go shop" period after the announcement of an acquisition that was not the result of an auction process. The court noted that taken together, statements like "no one in private equity ever jumps an announced deal" and the fact that none of the relevant deals at issue in the suit were "jumped," among other things, tended to exclude the possibility of independent action.

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The court also allowed a narrowly tailored claim that there was an agreement to cease competing to acquire HCA to proceed to trial. The court stated that an email exchange among executives at one fund suggested assent to another fund's request that the industry "step down" on HCA.

The court granted JP Morgan's motion for summary judgment because the evidence did not establish that it was in the business of bidding to acquire public companies or otherwise indicate participation in an overarching conspiracy.

In the decision, the court criticized plaintiffs for their reluctance to narrow their claims of an overarching market-wide conspiracy, which made the case "unnecessarily complex and nearly warranted its dismissal," and permitted the defendants to renew their summary judgment motions to address the more limited claims.

Application of State Law

The Ninth Circuit ruled that applying California antitrust law to indirect purchasers' claims that they bought price-fixed goods outside the state was not unconstitutional because the conspiratorial conduct was sufficiently connected to California and not "slight and casual."

Plaintiffs AT&T and other sellers of cellular phones alleged that they paid artificially inflated prices for mobile handsets because the defendants fixed the prices of liquid crystal display (LCD) panels contained in handsets. The plaintiffs brought claims under California's Cartwright Act and sought recovery for overcharges. The district court dismissed the suit since the plaintiffs purchased the handsets outside of California and the Due Process clause of the U.S. Constitution prohibits invoking a state's laws unless the "occurrence or transaction giving rise to the litigation" took place in the state.

The Ninth Circuit reversed on the grounds that due process prevents application of a state's substantive law only when there is no significant contact or aggregation of contacts with the state. The appellate court stated that alleged agreements and conspiracies, not just the sale of goods, are relevant occurrences or transactions for determining contacts in a price fixing case.

AT&T Mobility v. AU Optronics, No. 11-16188, 2013-1 CCH Trade Cases ¶78,262 (9th Cir. Feb. 14, 2013)

Airline Merger

The European Commission blocked Ryanair's proposed acquisition of Aer Lingus because combination of the two leading airlines operating from Ireland would harm consumers by giving the merged firm a monopoly or dominant position on 46 routes where the airlines currently compete.

The commission rejected Ryanair's proposed remedies to remove competitive concerns. First, Ryanair proposed divestiture to Flybe, a regional discount airline, of 43 routes where Aer Lingus and Ryanair overlap, for a minimum of three years. The commission determined that this divestiture would not sufficiently restore competition because Flybe lacked the experience, business model, and resources to develop itself into a viable competitive force with operations lasting beyond the three-year period.

Second, Ryanair proposed leasing its London landing slots on three Irish routes to IAG/British Airways for a period of at least three years. The commission found this remedy inadequate because the merged entity would remain dominant on these routes and IAG would likely exit these routes or scale back operations after three years.

This is the third time since 2007 that Ryanair has tried unsuccessfully to obtain approval to acquire Aer Lingus.

"Merger: Commission prohibits Ryanair's proposed takeover of Aer Lingus," IP/13/167 (Feb. 27, 2013)

Government Settlements

The Department of Justice charged two energy companies, SGI Interests and Gunnison Energy Corporation, with entering into an unlawful noncompete agreement related to an auction for four leases to explore for natural gas in Western Colorado. According to the complaint, the companies agreed that SGI alone would bid at the U.S. Bureau of Land Management auction and subsequently assign a 50 percent license to Gunnison for any acquired leases, thereby depriving the United States of the benefit of competition.

The noncompete agreement came to the attention of the government through a qui tam action—a lawsuit brought by a private citizen against another party alleged to have defrauded the government and which entitles the plaintiff to a percentage of the government's recovery.

The district court rejected the original settlement, which required the defendant companies to pay a total of $550,000 to settle both the antitrust and qui tam actions, as against the public interest because the settlement amount was for "nothing more than the nuisance value of this litigation." The court also stated that settlement of the qui tam action "must be separate and apart" from that of the antitrust suit since they protect different interests.

The revised settlement, still subject to the court's approval, requires the defendants to pay $550,000 for the antitrust claims. The department separately settled the qui tam suit for approximately $450,000.

United States v. SG Interests I, 2012-2 CCH Trade Cases ¶78,180 (D. Colo. Dec. 12, 2012); see also Department of Justice court filings (March 6, 2013)

Private Settlements

The U.S. Court of Appeals for the Third Circuit vacated an antitrust class action settlement that included cy pres distributions because the district court lacked a factual basis to determine whether the settlement was fair to the class when it approved the settlement without considering the amount to be distributed directly to the class compared to cy pres beneficiaries.

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The cy pres doctrine permits the distribution of unclaimed settlement funds to a charitable purpose that approximates the interests pursued by the class. Direct distributions to the class are preferred over distributions to cy pres recipients because the latter imperfectly serve the purpose of distributions: to directly compensate class members for their injuries.

Consumers had brought a class action against retailers and manufacturers of baby products for resale price maintenance. The district court approved a $35 million settlement, which would distribute $14 million to counsel, $3 million to class members, and $18.5 million to cy pres recipients. An unnamed member of the class challenged the settlement on the grounds that the district court failed in its oversight responsibility by approving the distribution of funds to a third party without first fully compensating the class.

The Third Circuit concluded that the district court did not consider the degree of benefit to the class when approving the settlement of the baby product class action. First, the district court was not aware that the class would receive only $3 million while cy pres recipients would receive $18.5 million, and did not affirmatively seek this information. Second, the circuit noted that most class members would only receive $5 and suggested that the parties may want to increase the payment or lower the evidentiary bar to the higher award to ensure that the class obtains a greater direct benefit.

The Third Circuit also vacated the $14 million attorney fee award and stated that courts have discretion to decrease a fee award in a settlement with cy pres distributions to ensure that the award adequately prioritizes direct distributions to the class. The appellate court, however, refused to adopt a rule requiring courts to discount fees in settlements with cy pres distributions.

Finally, the appellate panel concluded that the notice provided to class members did not violate due process by not naming the cy pres recipients because class members were aware of cy pres distributions and those with a property interest in the unclaimed funds could appeal the selection of a cy pres recipient.

In re Baby Products Antitrust Litigation, Nos. 12-1165, 12-1166 & 12-1167, 2013-1 CCH Trade Cases ¶78,273 (3d Cir. Feb. 19, 2013)