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If There, Then Here: How Gov't Probes Help Antitrust Plaintiffs

By **William Reiss and Dave Rochelson** (March 18, 2019, 5:18 PM EDT)

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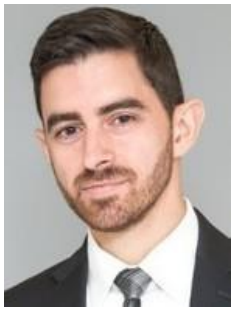

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Alas, price-fixers have gotten good at covering their tracks. With few exceptions, direct evidence of a conspiracy is likely to be in the exclusive possession of the conspirators.[1] What is a private plaintiff to do where all the telltale signs point to an unlawful conspiracy to fix prices, but the "smoking gun" has yet to be uncovered?

Fear not: An antitrust conspiracy can be plausibly alleged and ultimately proven by circumstantial evidence of an agreement. In order to allege a plausible conspiracy based on circumstantial evidence, a plaintiff must allege facts demonstrating parallel conduct as well as a nonexhaustive series of "plus factors" supporting allegations of an agreement.

One plus factor that private plaintiffs often rely upon in attempting to "nudge[] their claims across the line from conceivable to plausible"[2] is the existence of government investigations into the same or similar conduct, particularly if the investigations have led to criminal indictments or guilty pleas. One gray area in the law, however is the extent to which investigations or guilty pleas "in one market are suggestive of the plausibility of a conspiracy to commit the same illegal acts in another market" — the so-called "if there, then here" argument.[3]

In this article, we analyze several instructive cases since the U.S. Supreme Court's 2007 decision in Bell Atlantic Corp. v. Twombly — including decisions from the Auto Parts, Generic Drugs, and SRAM and Flash memory litigations — and offer some practice tips for how private plaintiffs may successfully utilize this plus factor to overcome a motion to dismiss.

Plus Factors: The Necessary Glue to Alleging a Plausible Agreement

At the pleading stage, plaintiffs may rely on circumstantial evidence to allege a plausible conspiracy. In order to do this, however, plaintiffs must first allege facts reflecting parallel conduct (e.g., facts suggesting that competitors raised prices in tandem).[4] But "conscious parallelism" alone "is not in itself unlawful."[5] Instead, the Twombly "plausibility" standard requires "enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[6] In essence, plus factors "serve as proxies for direct evidence of an agreement."[7]

While a nonexhaustive array of plus factors have been cited by courts throughout the country, plus factors typically include facts suggesting that defendants: (1) acted against their own self-interest; (2) had opportunities to conspire; (3) engaged in suspicious conduct that cannot be explained by rational business decisions; (4) had a common motive to conspire; (5) participated in a market conducive to anti-competitive conduct (e.g., that the market has high barriers to entry or inelasticity of demand); and (6) exchanged price or capacity information.[8]

A number of courts have found that allegations concerning a government investigation into the same or related conduct alleged in the complaint support the plausibility of an unlawful agreement, even if that fact would not suffice by itself. In Starr v. Sony BMG Music Entertainment, for example, the court listed seven allegations which, "taken together," rendered plaintiffs' allegations plausible, including that "defendants' price-fixing is the subject of a pending investigation by the New York state attorney general and two separate investigations by the Department of Justice."[9]

Serial decisions from the In re Municipal Derivatives Antitrust Litigation demonstrate how developments in government investigations can affect the plausibility analysis. On an initial motion to dismiss, the court found plaintiffs' citation to ongoing government investigations "do not constitute factual averments of a § 1 claim that would allow such a claim to survive a motion to dismiss," in part because the complaint did not contain information "about the progress of most of these investigations and there is no indication from any of these proceedings that wrongdoing of the kind alleged has occurred."[10]

A year later, however — and after the Second Circuit's decision in Starr — the court found the plaintiffs' second amended complaint plausibly alleged a price-fixing scheme in violation of the antitrust laws, in part because it alleged additional detail from U.S. Department of Justice and IRS investigations.[11] Notably, the second amended complaint added facts that had come to light as a result of the investigations; noted that a grand jury had returned an indictment against one of the defendants; and added allegations about several state-level investigations.

The court explained that, "[a]lthough pending government investigations may not, standing alone, satisfy an antitrust plaintiff's pleading burden, government investigations may be used to bolster the plausibility of § 1 claims."[12] In another decision in a related case, the court suggested that there is a spectrum of such allegations: "It follows logically that the persuasive weight accorded to allegations contained in outstanding criminal indictments should fall somewhere in between a government investigation and a guilty plea."[13]

Pleading a "Linkage" to a Different Geographic Market

The oft-cited decision in In re Elevator Antitrust Litigation analyzed whether allegations of defendants' anti-competitive conduct in one market provide support for allegations in a second market.[14]

There, the plaintiffs' complaint cited investigations in Europe to support the plausibility of an alleged conspiracy to fix prices and rig bids, which adversely affected competition in the United States.[15] But the Second Circuit found that the European investigations did not support the plausibility of the allegations because the plaintiffs had not sufficiently alleged any "linkage" between the U.S. and European markets.[16] The court suggested that plaintiffs could have demonstrated the necessary linkage by alleging that defendants marketed their products worldwide or monitored prices in Europe, such that the relevant geographic market might be global.[17]

Courts have distinguished the Elevators decision where plaintiffs alleged an adequate "linkage" between the markets, where the investigations have led to punishments against the conspirators, or where the defendants have reacted to the investigations by punishing employees themselves.

In Packaged Ice, for instance, a class of direct and indirect purchasers alleged that producers of packaged ice engaged in a nationwide conspiracy to allocate customers and markets.[18] The complaints included allegations concerning a DOJ investigation into the nationwide conspiracy alleged in the complaint,[19] as well as guilty pleas entered into by certain defendants and their employees concerning anti-competitive conduct in Michigan.[20]

After the DOJ executed a search warrant, one defendant initiated an internal investigation and suspended a key executive.[21] The court found that the DOJ investigation and the suspension of the executive "bolster the plausibility analysis and heighten the Court's expectation that 'discovery will reveal evidence of illegal agreement.'"[22] The guilty pleas also supported the plausibility of a nationwide conspiracy, even though they addressed conduct only in Michigan.

Distinguishing the Second Circuit decision in Elevators, the court found that plaintiffs were "not reaching across the ocean to unproven allegations in an unknown market."[23] To the contrary, the court explained that an "if there, then here" argument will be persuasive where two factors are present.

First, a parallel government investigation in a separate geographic market will be probative where "there is a significant overlap in identity of interest of the alleged co-conspirators in both markets."[24] In Packaged Ice, plaintiffs had alleged that the same executives who pled guilty to the conduct in Michigan had "nationwide" responsibilities.[25]

Second, the claims must be "based upon the same anticompetitive conduct."[26] The court concluded that the misconduct alleged in plaintiffs' complaints was identical to the conduct that was subject to the DOJ investigation and guilty pleas.[27]

In so holding, the Packaged Ice court found defendants' reliance on In re Parcel Tanker Shipping Services Antitrust Litigation was unavailing.[28] There, the court declined to credit plaintiffs' allegations concerning defendants' guilty pleas — in which defendants admitted to unlawfully conspiring to raise prices — because the plaintiffs alleged an entirely separate conspiracy by defendants to lower prices.[29] Conversely, in Packaged Ice, the guilty pleas were consistent with the conspiracy alleged.[30]

Similarly, in In re Foreign Exchange Benchmark Rates Antitrust Litigation, the plaintiffs alleged that government authorities from nine countries around the world, including the United States, were investigating claims that defendants manipulated and fixed prices in the currency markets.[31] The court rejected defendants' argument that the fact of these investigations did not bolster the plausibility of plaintiffs' conspiracy allegations because, as defendants put it, the government investigations were merely "pending."[32] Instead, the court took judicial notice that investigations in at least three jurisdictions had already led to penalties against six defendants for "the very conduct alleged in the Complaint."[33]

The sheer volume of the investigations was also probative: The plaintiffs had identified investigations "in seemingly every significant financial market in the world."[34] Critically, the plaintiffs cited "facts from the investigations," not merely "the fact of the investigations," which "support[ed] the inference of a conspiracy."[35] Even as to those defendants who had not been penalized as a result of the government investigations, the court found that plaintiffs had met their pleading burden based on allegations that

defendants reacted to the announcement of the investigations by firing or suspending some of their FX traders.[36]

Pleading a "Linkage" to a Different Product Market

As with allegations concerning the existence of a government investigation or guilty plea in a different geographic market, courts have typically required a linkage between investigations and guilty pleas in different product markets before crediting such allegations. This "linkage" can take the form of overlapping pricing responsibility among relevant employees, opportunities to conspire at trade association meetings, or the industrywide nature of investigations.

In SRAM, for instance, the court found that guilty pleas related to a different product, DRAM, "support an inference of a conspiracy in the SRAM industry," because plaintiffs alleged that "the same actors associated with certain Defendants were responsible for marketing both SRAM and DRAM."[37]

In the generic drugs context, several courts have concluded that government investigations or guilty pleas relating to one drug can bolster allegations related to a different drug. In In re Propranolol Antitrust Litigation, the court rejected defendants' claim that the prior guilty pleas of two executives to fixing prices for other drugs, glyburide and doxycycline, were "immaterial" as to Propranolol.[38] Instead, distinguishing Elevators, the court found that plaintiffs alleged a sufficient "linkage" between Propranolol and the other drugs, based on the fact that the senior executives who pled guilty to fixing prices of glyburide and doxycycline "were plausibly responsible for setting prices of Propranolol" and were alleged to have fixed the Propranolol price at the same time as they (admittedly) fixed the prices of glyburide and doxycycline.[39]

Those same two guilty pleas also supported the plausibility of allegations as to half a dozen other generic drugs at issue in In re Generic Pharmaceuticals Pricing Antitrust Litigation.[40] There, the court did not require plaintiffs to allege that the same people who pleaded guilty to fixing prices of glyburide and doxycycline also fixed the prices for the other drugs at issue — in fact, none of the defendant companies even manufactured all of the drugs at issue.[41] Nor was it necessary for plaintiffs to allege that the guilty pleas implicated the other defendants.[42]

Instead, the plaintiffs "plausibly allege[d] a web of connections" — namely, that defendants "participated in overlapping trade industry groups and events" — that was "sufficient to plead that the government investigations and the ... guilty pleas are not 'entirely separate' from ... claims pertaining" to other drugs.[43] The court agreed with plaintiffs' contention that it could consider the investigations and guilty pleas "without regard to whether they specifically address the relevant pharmaceutical products because the allegations are probative of broadly anticompetitive conduct in the generic pharmaceutical industry."[44]

Similarly, multiple decisions in the long-running Auto Parts Antitrust Litigation have cited the industrywide nature of the related government investigations and guilty pleas to support allegations of a conspiracy as to a specific automotive part. In a case addressing a vehicle component called a "Fuel Sender," for example, the court found that because the government's investigation into a conspiracy to fix prices and rig bids of Fuel Senders "grew out of a broader investigation into the auto parts industry generally ... [c]onduct beyond that specific to the Fuel Sender investigation is relevant to support the existence of the Fuel Sender conspiracy."[45]

Similarly, the court determined that one defendant's guilty plea as to a separate automotive component

part bolstered the plausibility of plaintiffs' allegations concerning that defendant's participation in the Fuel Sender conspiracy, notwithstanding the fact that the defendant did not plead guilty to that conspiracy.[46]

Practice Tips

Plaintiffs seeking to bolster their complaints by citing government investigations or guilty pleas concerning different markets should consider the following practice tips.

Include as Much Detail as Possible About the Investigations

Of course, it is not uncommon for private plaintiffs to file suit shortly after the DOJ or other government authority announces an investigation into anti-competitive conduct. In many instances, however, government regulators will announce an investigation without providing much in the way of detail (because the investigation may have only begun, because the government wishes to keep it confidential, or otherwise). Some courts have found the simple existence of a pending investigation does add to the plausibility of the allegations.[47] But, to the extent available, a complaint should include detail regarding facts that the investigation has uncovered.[48]

To the Extent Possible, Plead a "Linkage" Between the Market Under Investigation and the Market That Is the Subject of the Complaint

The Second Circuit's decision in Elevators is frequently cited by defendants for the proposition that absent a linkage between the investigation or guilty plea and the conspiracy alleged, facts concerning a guilty plea or government investigation should not be credited. It may be possible to demonstrate the requisite "linkage" by alleging: (1) that conspirators subject to the government investigation marketed their products or monitored prices in the market at issue in the complaint;[49] (2) that executives targeted by the government investigation had pricing responsibility within the market that is the subject of the complaint;[50] (3) specific examples of defendants' "opportunities to conspire";[51] and/or (4) the industrywide nature of the investigations.[52] If the investigations have resulted in punishments, that may obviate the need to demonstrate such a linkage.[53]

Describe Defendant Reactions to the Investigations

In addition to those entities that have been specifically implicated in government investigations, plaintiffs may seek to name defendants that did not plead guilty or were not subject to a penalty. For these defendants, a recitation of remedial actions taken following the public announcement of a government investigation or guilty plea — such as firing relevant employees[54] or ceasing parallel conduct[55] — may help push the allegations against those conspirators over the line from possible to plausible.[56] Alternatively, "guilty pleas by co-defendants, market conditions conducive for antitrust conspiracy, and specific examples of [the defendant's] involvement in the conspiracy," taken together, can suffice.[57]

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Disclosure: The authors represent a class of end-payor plaintiffs in the Auto Parts litigation.
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[1] Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012).

[2] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[3] In re Packaged Ice Antitrust Litig., 723 F. Supp. 2d 987, 1011 (E.D. Mich. 2010).

[4] Twombly, 550 U.S. at 553.

[5] Id. at 553–54.

[6] Id. at 556.

[7] In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004).

[8] See Plus Factors and Agreement in Antitrust Law, W. Kovacic et al., 110 Mich. L. Rev. 393 (2011); Gelboim v. Bank of Am. Corp., 823 F.3d 759, 781 (2d Cir. 2016).

[9] Starr v. Sony BMG Music Entertainment, 592 F.3d 314, 324 (2d. Cir. 2010). See also In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d 623, 632 (E.D. Pa. 2010) (citing Starr and finding that "the existence of a parallel criminal investigation" made the complaint more plausible because it was "demonstrat[ed] that the government believes a crime may have occurred"); In re Packaged Seafood Prods. Antitrust Litig., No. 15-MD-2670 JLS (MDD), 2017 U.S. Dist. LEXIS 1279, at *82 (S.D. Cal. Jan. 3, 2017) (citing Starr and recognizing that pending Department of Justice ("DOJ") investigation makes claims more plausible because "at least several individuals within the governmental chain of command thought certain facts warranted further inquiry into a potential criminal conspiracy").

[10] Hinds Cty. v. Wachovia Bank N.A., 620 F. Supp. 2d 499, 514 (S.D.N.Y. 2009) ("Hinds County I"). See also In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp.2d 896, 903 (N.D. Cal 2008) (finding that government investigation did "not support Plaintiffs' antitrust conspiracy claims" because "[i]t is unknown whether the investigation will result in indictments or nothing at all.") (emphasis added) (quoting In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007)).

[11] Hinds Cty. v. Wachovia Bank N.A., 700 F. Supp. 2d 378, 389 (S.D.N.Y. 2010) ("Hinds County II").

[12] Id. at 394 (emphasis added).

[13] W. Va. ex rel. McGraw v. Bank of Am., N.A. (In re Mun. Derivatives Antitrust Litig.), 790 F. Supp. 2d 106, 115 (S.D.N.Y. 2011). See also Alaska Elec. Pension Fund v. Bank of Am. Corp., 175 F. Supp. 3d 44, 55 (S.D.N.Y. 2016) (finding that pending investigations supported plausibility of complaint where plaintiffs alleged that the investigations "actually turned up 'evidence of criminal behavior'" and that "Defendants abruptly and simultaneously ceased engaging in parallel conduct when they were served with subpoenas").

[14] 502 F.3d 47, 52 (2d Cir. 2007) ("Elevators").

[15] Id.; see also In re Elevator Antitrust Litig., No. 04 CV 1178 (TPG), 2006 U.S. Dist. LEXIS 34517, at *21 (S.D.N.Y. May 26, 2006).

[16] 502 F.3d at 52.

[17] Id. See also In re Fla. Cement & Concrete Antitrust Litig., 746 F. Supp. 2d 1291, 1316 (S.D. Fla. 2010) (citing Elevators and finding that plaintiffs had failed to "allege any connection between the international investigations and Defendants' conduct alleged" in the complaint); In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig., 997 F. Supp. 2d 526, 540 (N.D. Tex. 2014) (citing Elevators and finding that the European investigations that plaintiffs cited "involve European laws, which may prohibit conduct that is lawful under §1"); Blood Reagents, 756 F. Supp. 2d at 632 (citing Elevators and finding that discussion of "unrelated corporate improprieties in Europe" were "insufficiently linked" to the allegation of a domestic conspiracy).

[18] 723 F. Supp. 2d at 996.

[19] Id. at 996.

[20] Id. at 999.

[21] Id. at 998–99.

[22] Id. at 1009 (quoting Twombly, 550 U.S. at 556).

[23] 723 F. Supp. 2d at 1010.

[24] Id.

[25] Id. at 1011.

[26] Id.

[27] Id.

[28] Id. at 1010–11.

[29] 541 F. Supp. 2d 487, 492 (D. Conn. 2008)).

[30] 723 F. Supp. 2d at 1011. But see In re Iowa Ready-Mix Concrete Antitrust Litig., 768 F. Supp. 2d 961, 975 (N.D. Iowa 2011) (finding that guilty pleas to bilateral conspiracies did not support inference of a wider conspiracy).

[31] 74 F. Supp. 3d 581, 588–89 (S.D.N.Y. 2015).

[32] Id. at 592.

[33] Id.

[34] Id.

[35] Id.

[36] Id. at 593.

[37] 580 F. Supp. 2d at 903. See also In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1149 (N.D. Cal. 2009) (finding that the DRAM and SRAM investigations supported the plausibility of a conspiracy to fix prices for a third kind of memory, flash, given the relevant employees' "overlapping involvement in controlling DRAM and flash memory pricing").

[38] 249 F. Supp. 3d 712, 717, 723 (S.D.N.Y. 2017).

[39] Id. at 723–24.

[40] 338 F. Supp. 3d 404 (E.D. Pa. 2018).

[41] Id. at 424.

[42] Id. at 452.

[43] Id. at 453.

[44] Id. at 452.

[45] 29 F. Supp. 3d 982, 995 (E.D. Mich. 2014).

[46] See id. at 993, 995; see also In re Auto. Parts Antitrust Litig., No. 12-md-02311, 2015 U.S. Dist. LEXIS 52631, at *56 (E.D. Mich. Apr. 22, 2015) (applying the similar analysis to a different defendant); In re Auto. Parts Antitrust Litig., No. 12-MD-02311, 2015 U.S. Dist. LEXIS 192007, at *28 (E.D. Mich. Sep. 8, 2015) (finding that "guilty pleas by co-defendants, market conditions conducive for antitrust conspiracy, and specific examples of [the defendant's] involvement in the conspiracy," taken together, can make allegations plausible).

[47] Starr, 592 F.3d at 324; Blood Reagents, 756 F. Supp. 2d at 632; Packaged Seafood, 2017 U.S. Dist. LEXIS 1279, at *82.

[48] See Hinds County I, 620 F. Supp. 2d at 514; Hinds County II, 700 F. Supp. 2d at 389; Forex, 74 F. Supp. 3d at 592 (contrasting "facts from the investigation" and "the fact of the investigation").

[49] Elevators, 502 F.3d at 52.

[50] Propranolol, 249 F. Supp. 3d at 723–24; SRAM, 580 F. Supp. 2d at 903; Packaged Ice, 723 F. Supp. 2d at 1010.

[51] Generic Drugs, 338 F. Supp. 3d at 452.

[52] Id.; Auto Parts, 29 F. Supp. 3d at 995.

[53] Forex, 74 F. Supp. 3d at 592.

[54] See Forex, 74 F. Supp. 3d at 593.

[55] See Alaska Elec. Pension Fund, 175 F. Supp. 3d at 55.

[56] See also Packaged Ice, 723 F. Supp. 2d at 998–99, 1009.

[57] Auto Parts, 2015 U.S. Dist. LEXIS 192007, at *28.