WILMER, CUTLER & PICKERING

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The Summary Judgment Standard and Pleading Requirements for Conspiracy Claims Relying on the Doctrine of Conscious Parallelism

Last spring there was growing concern in the wake of the Seventh Circuit's decision in *In re High Fructose Corn Syrup*[1] that the courts might be adopting a more receptive attitude toward antitrust claims based on allegations of consciously parallel pricing and other behavior in highly concentrated industries. Three decisions in the last few months suggest that *High Fructose Corn Syrup* may remain an aberration and that most courts remain deeply skeptical of claims that seek to infer agreement from consciously parallel conduct without any hard evidence of conspiracy. Two of these three decisions, *Williamson Oil Co., Inc. v. Phillip Morris*[2] and *Hall v. United Air Lines, Inc.*[3] involved consciously parallel pricing behavior and arose on motions for summary judgment. Both decisions applied the well established analytical framework under which a plaintiff, to survive a defendant's motion for summary judgment, must offer evidence of so-called plus factors, that is, of facts, *in addition* to the consciously parallel behavior itself, that support an inference of unlawful conspiracy. The third decision, *Twombly v. Bell Atlantic Corp.*,[4] applies this analytical framework to allegations of agreement arising from consciously parallel conduct to dismiss the case on the pleadings. The case is of additional interest because it is one of the few conscious parallelism cases involving an alleged market allocation agreement, rather than alleged price fixing.

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1 *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7th Cir. 2002).

2 *Williamson Oil Co., Inc. v. Phillip Morris USA*, 2003 WL 22171708 (11th Cir. Sept. 22, 2003)

3 *Hall v. United Airlines, Inc.* (E.D.N.C. Oct. 30, 2003). Wilmer, Cutler & Pickering represented Lufthansa, one of the defendants in this proceeding. Lufthansa settled with plaintiffs before the District Court issued its decision on defendants' motion for summary judgment.

4 *Twombly v. Bell Atlantic Corp.*, 2003 WL 22304824 (S.D.N.Y. Oct. 8, 2003). Wilmer, Cutler & Pickering represented Qwest, one of the defendants, in this matter.

Williamson Oil Co., Inc. v. Phillip Morris and *Hall v. United Air Lines, Inc.*: the Plus Factor Analysis in Summary Judgment Motions

In *Williamson Oil*, cigarette wholesalers claimed that the defendant cigarette manufacturers had entered into a price-fixing agreement. The plaintiffs relied on evidence of a series of parallel price increases over seven years from 1993 to 2000. In *Hall*, travel agents alleged that the defendant airlines had conspired to cut, cap, or eliminate base commissions they paid to travel agents for sales of domestic and international airline tickets. The plaintiffs relied primarily on evidence of parallel reductions in commissions by the defendants.

Section 1 of the Sherman Act prohibits *concerted* action that unreasonably restrains trade. It does not reach *independent* action by individual firms. Accordingly, when plaintiffs base their Section 1 claims on circumstantial evidence, that evidence must be sufficient to support an inference that the defendants have acted in concert rather than independently. Thus, in *Matsushita* the Supreme Court laid down the principle that "to survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."[5] *Williamson Oil* and *Hall* make clear that evidence offered to meet the plus factor requirement must also satisfy the *Matsushita* standard. In other words, the plus factor offered by the plaintiffs must tend to exclude the possibility that the defendants' parallel conduct was the result of their independent business decisions. Only when a plus factor serves to exclude that possibility does it support an inference of unlawful conspiracy.

In both cases the court found that none of the evidence plaintiffs presented as plus factors excluded the possibility of independent action and, therefore, dismissed the conspiracy claims. Some general principles about which types of conduct may in fact constitute "plus factors" emerge from the two opinions:

- Mere participation in an oligopolistic market is not sufficient to infer an agreement.
- Mere opportunity to conspire -- for example, through active participation in trade associations or similar organizations -- does not, without more, support an inference of conspiracy.
- Public announcements through interviews or trade press articles regarding pricing or other business plans do not, without more, support an inference of conspiracy.

To sum up, *Williamson Oil* and *Hall* make explicit the connection between the general summary judgment standard for Section 1 claims, as laid down in *Matsushita*, and standards for judging evidence offered as plus factor in conspiracy claims relying on evidence of conscious parallelism. In drawing this connection the two decisions have made an important move toward a more unified, rigorous approach to the plus factor analysis for conscious parallelism claims at the summary judgment stage.

Twombly v. Bell Atlantic Corp.: The Plus Factor Analysis in Motions to Dismiss

In *Twombly*, the plaintiffs, purchasers of local telephone or high speed Internet services in the United States, alleged that the four remaining former regional Bell operating companies (BellSouth, Qwest, SBC, and Verizon) had entered into a national conspiracy to prevent potential competitors from entering into their respective markets and to allocate geographical markets for local telephone and high speed Internet services. Before 1996, local phone companies had exclusive control over their respective territories. This resulted partly from the industry structure that the 1982 consent decree between the United States and AT&T established and partly from state regulations that restricted competition in local telephone markets. However, the Telecommunications Act of 1996

[5] *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (internal citations omitted).

opened markets to competition, by preempting state-imposed barriers to entry and by requiring incumbent local exchange carriers ("ILECs") to facilitate competitors' entry into their local telephone markets in return for the opportunity to compete in long-distance markets. Because Congress feared that for most competing local exchange carriers ("CLECs") building their own telecommunications infrastructure would be prohibitively expensive, the Act obligates ILECs to provide access to elements of their networks at low, regulated rates. The plaintiffs made two principal conspiracy allegations. First, they claimed that the defendants had agreed to violate the obligation, imposed by the 1996 Act, to provide new entrants nondiscriminatory access to their networks. Second, the plaintiffs alleged that the defendants had agreed not to compete in each other's territories. For both claims, they relied on a theory of conscious parallelism.

The district court, in an opinion by Judge Gerard Lynch, concluded that permitting a Section 1 complaint to rest on a conclusory allegation of parallel conduct would undermine two fundamental purposes of notice pleading: (1) that pleadings state a claim on which relief may be granted, and (2) that they give defendants adequate notice of the plaintiffs' theory of the case. According to the court, conscious parallelism raises a distinctive problem because the plaintiffs are necessarily seeking to state a cause of action by alleging that defendants have engaged in conduct that is, in itself, legal. After all, parallel behavior often results from individual firms' *independent* business decisions and their conduct converges merely because they have, for instance, similar cost structures, similar economic interests, and similar information about the market. This fact has two implications for complaints relying on a theory of conscious parallelism. First, to allow plaintiffs to proceed to the discovery stage by simply alleging that defendants have engaged in conduct that is in itself legal would circumvent Section 1's conspiracy requirement and, thus, come into conflict with Federal Rule of Civil Procedure 8's requirement that complaints state a claim on which relief can be granted. Second, because parallel behavior may well constitute legal, legitimate business conduct, a conclusory allegation of conscious parallelism does not give defendants notice of plaintiffs' theory of what makes the conduct in question illegal. In the case of conscious parallelism, the factual and economic theory of conspiracy is simply not evident from a conclusory allegation of conspiracy and, therefore, there is no way to defend against it.

In evaluating whether the complaint satisfied the plus factor requirement, the judge applied the basic principle, also employed by *Williamson* and *Hall*, that the facts alleged must tend to exclude the possibility that the defendants have acted independently. Under this standard, the court found unpersuasive the plaintiffs' theory that defendant incumbent local exchange carriers had conspired to prevent CLECs from entering their respective territories. Since independent economic interest fully explained the ILEC's behavior, their parallel conduct did not justify an inference of conspiracy.

Similarly, the court rejected the theory that the defendants had agreed not to compete in each other's territories because it relied on unfounded assumptions about the economics of the ILEC and CLEC businesses. The ILECs' decision not to enter each other's territories was fully explainable as being in the individual economic interest of each ILEC. Therefore, no agreement could be inferred.

Twombly applied the same basic analytical framework as the courts did in *Williamson* and *Hall* and demonstrates the pleading requirements for conspiracy claims relying on a theory of conscious parallelism, just as *Williamson* and *Hall* demonstrate the evidentiary standard for summary judgment motions of such claims. An allegation that defendants have engaged in parallel conduct is not sufficient to survive a motion to dismiss. Rather, plaintiffs have either to allege facts showing a traditional, express agreement among the defendants or to plead "plus factors." Furthermore, a mere statement that defendants' actions are against their own economic self-interest does not suffice. Rather, such statements must actually be consistent with basic facts about the market and the economic interests of its players and must tend to exclude the possibility that the defendant acted independently.

Conclusion

In the wake of the large number of high-visibility government cartel cases and FTC decisions such as *Three Tenors,*[6] we can expect a continued increase in private litigation alleging concerted anticompetitive conduct. The three recent decisions discussed in this bulletin concerning the pleading requirements and summary judgment standards for conspiracy claims demonstrate that defendants will be able to defend against groundless Section 1 claims based on theories of conscious parallelism and other circumstantial evidence.

Please contact us if you would like further information on these developments or would like information about any other issue of U.S. or foreign antitrust or competition law.

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[6] *In the Matter of Polygram Holding, Inc., et al.,* 2003 WL 21770765 (F.T.C. July 24, 2003).