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Plaintiffs' Allegations of Plywood Price-Fixing Conspiracy Found Insufficient to State a Claim Under *Twombly*

On August 10, 2009, a federal district court in Mississippi granted defendants' motion to dismiss plaintiffs' claims alleging that defendants conspired to fix the prices of plywood in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. *Bailey Lumber & Supply Co. v. Georgia-Pacific Corp.*, No. 1:08-CV-1394 (S.D. Miss. Aug. 10, 2009).

Plaintiffs were direct purchasers of plywood and oriented strand board ("OSB") who opted out of a nationwide class action alleging an OSB price-fixing conspiracy by defendant manufacturers. Plaintiffs in their opt-out case brought claims against defendants for both plywood and OSB purchases from defendants.

Relevant Claims

Defendants limited their motion to dismiss to attack only plaintiffs' claims for price fixing with respect to plywood, arguing that the plywood claims could be examined separately because plywood and OSB were separate products with their own markets. The court agreed, finding that plaintiffs' allegations showed that although plywood and OSB were related products, they were nonetheless separate. The court noted that the two products had separate mills, were used in separate ways, and each defendant had different market shares for plywood and OSB. Further, plaintiffs' allegations that cartels had been formed for various other wood products acknowledged that they were subject to separate legal action.

The court also found that the statute of limitations with respect to plaintiffs' plywood claims had not been tolled during the pendency of the OSB class action because the plywood claims were separate and thus not "embraced" within the OSB class action. Therefore the court would only examine the allegations for a plywood-related injurious act occurring on or after November 12, 2004.

Sufficiency of Plaintiffs' Complaint Under *Twombly*

The Court explained that while a complaint attacked by a motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a

cause of action will not do. *Id.* at*2 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive, factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

The Court found numerous flaws with plaintiffs' complaint. First, plaintiffs did not allege that defendant Louisiana-Pacific had any share of the plywood market, while the two other defendants, Weyerhaeser and Georgia-Pacific, had 40% share of the plywood market. The court determined that any conspiracy would have to be carried out by Weyerhaeser and Georgia-Pacific and, with only 40% market share, the court found it doubtful they could effectively control supply and therefore prices. If Weyerhaeser and Georgia agreed to reduce their output of plywood, manufacturers making up the other 60% of the market could choose to increase their output and gain market share.

Second, the court found a complete lack of allegations regarding Weyerhauser's involvement in the conspiracy. In the absence of such allegations, the court found that Weyerhauser's closing of two plywood mills could have been done for independent business reasons. Lastly, Louisiana Pacific, the alleged "ringleader", sold its remaining plywood mills to Georgia-Pacific in 2002, making the incentive much less for Louisiana Pacific to coordinate a conspiracy to decrease the supply of a product it no longer manufactured. Taken together, the court found plaintiffs' allegations of a plywood price-fixing conspiracy insufficient to state a claim under *Twombly*. The court granted defendants' motion to dismiss but also granted plaintiffs leave to amend their complaint.

Authored By:
John S. Whittaker
(415) 774-2938
JWhittaker@sheppardmullin.com