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Strike Three: Plaintiffs Again Fail to Allege Facts of Collusion in Oligopoly Market

Rather than being "plus factors", allegations of interdependent industry structure simply demonstrate that the challenged conduct of defendant title insurers was as consistent with competition as with collusion. *In re California Title Insurance Antitrust Litigation*, 2009 U.S. Dist. LEXIS 103407 (N.D. Cal., November 6, 2009). Plaintiffs brought an action against major title insurers and their subsidiaries for engaging in conduct that allegedly violated Section 1 of the Sherman Act, Section 16720 of the California Business and Professions Code, and Section 17200 of the California Unfair Competition Provision in the Business and Professions Code.

Plaintiffs alleged that the defendants conspired to fix title insurance prices in New York, Pennsylvania, Ohio and New Jersey through participation in various title insurance rate-setting organizations in those states. Plaintiffs also alleged that the defendants engaged in a course of conduct involving illegal kickbacks and commissions, which had the effect of maintaining supra-competitive profits in the sale of title insurance. On May 21, 2009, Judge Jeffrey S. White granted defendants' motion to dismiss the first amended complaint, but granted leave to amend.

On November 6, in a not for publication opinion, Judge White found that the second amended complaint was also deficient under the standards set forth in the recent United States Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, 550 US 544, 555 (2007).

Pursuant to *Twombly*, plaintiffs must not merely allege conduct that is *conceivable*, but must allege "enough facts to state a claim to relief that is *plausible* on its face." (*Id.* at 570, *emphasis added.*) A claim has "facial plausibility" when plaintiffs plead factual content that allows the court to draw the reasonable inference that the defendants' conduct is the product of unlawful collusion. However, borrowing pages from the now seminal decisions in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 US 752 (1984), the district court held that the second amended complaint had stopped short of bridging the gap between *possibility* and *plausibility* of entitlement to relief. *See Twombly*, at 556-57.

In order to "nudge their claims across the line from conceivable to plausible" (*Twombly* at 570), the plaintiffs added industry structure "plus factors". To support their claims that the defendants agreed to fix prices within California, plaintiffs added allegations regarding the defendants'

participation in the California Land Title Association and the American Land Title Association. The district court noted that participation by competitors in the same trade organizations is insufficient to establish a conspiracy, citing *In re Citric Acid Lit.*, 996 F.Supp. 951, 958-959 (N.D. Cal. 1998), *aff'd*, 191 F.3d 1090, 1103 (9th Cir. 1999). The court noted that summary judgment on such a complaint is appropriate, as no inference of conspiracy could be raised from mere participation in the same trade associations. While trade association participation may provide *opportunity* to discuss rate and output decisions, "… *opportunity* without more, is not a plausible basis to suggest a conspiracy." *Twombly*, at 555. (emphasis original) The second amended complaint also included allegations that title insurance premiums in California had remained stable for a number of years. Plaintiffs also alleged that the title insurance market is highly concentrated, and that prices have remained stable, although costs have declined. Finally, as a "plus factor" the plaintiffs alleged that title insurance policies are homogeneous.

Where the plaintiffs "came a cropper" is that the "plus factors" alleged to differentiate the allegations from the deficient first amended complaint, by themselves, are indicia of non-collusive behavior within a lawful oligopoly industry. The question can then be asked "what part of oligopolistic interdependence don't the plaintiffs understand"? *See, e.g.*, Darryl Snider and Irving Scher, "*Conscious Parallelism or Conspiracy*"?, II ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 1143 (2008); George A. Hay, "*Oligopoly, Shared Monopoly and Antitrust Law*", 67 CORNELL L. REV. 439 (1982); George J. Stigler, "*A Theory of Oligopoly,*" 72 J. Pol. Econ. 4 (1964).

All, however, is not lost for the plaintiffs. The district court noted that the allegations were sufficient to state a California Business & Professions Code Section 17200 claim for alleged illegal secret rebates, kickbacks and commissions. These allegations could ring the "illegal prong" of 17200, as such conduct could be a violation of the California Insurance Section 12404. Back to the proverbial drawing board.

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