Second Circuit Weighs in on Several Benchmark Manipulation Cases

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The United States Court of Appeals for the Second Circuit recently issued decisions in three long-running benchmark manipulation cases, both affirming and vacating district court orders on matters relating to adequate pleading of the existence of an agreement under Section 1 of the Sherman Act, personal jurisdiction, and antitrust standing.

- In *In re Treasury Securities Auction Antitrust Litigation*,[1] plaintiff pension and retirement funds alleged that large banks that are "primary dealers" in the market for U.S. Treasury securities violated Section 1 of the Sherman Act[2] by conspiring to (i) rig Treasury auctions by sharing sensitive, proprietary information and placing collusive bids, and (ii) boycott the emergence of direct trading between buy-side investors. The Second Circuit affirmed the district court's judgment dismissing the claims because plaintiffs' allegations failed to "plausibly show a conspiracy with respect to the auctions or alleged secondary-market boycotts."
- In *In re: Mexican Government Bonds Antitrust Litigation*,[4] plaintiff investors who purchased Mexican government bonds alleged that several large banks that sold bonds through broker-dealers fixed the prices for those bonds in violation of Section 1 of the Sherman Act. The Second Circuit vacated the district court's dismissal of the case for lack of personal jurisdiction, holding that defendants

sold billions of dollars of bonds through their agents in New York and therefore had the requisite minimum contacts with the state.[5]

- In *In re Platinum and Palladium Antitrust Litigation*,[6] plaintiff participants in the physical and derivatives markets for platinum and palladium alleged that defendant metal companies and banks violated Section 1 of the Sherman Act by manipulating the benchmark prices for the metals by collusively trading on the futures market to depress prices while simultaneously holding short positions. The Second Circuit reversed in part the district court's dismissal of plaintiffs' antitrust claims for lack of antitrust standing, finding that plaintiffs that traded in the derivatives markets were the most efficient enforcers of the antitrust laws for that injury, and affirmed the district court's conclusion that the plaintiffs that participated in the physical market did not have antitrust standing. The Second Circuit also affirmed the district court's holding as to personal jurisdiction over the foreign defendants under a conspiracy theory of personal jurisdiction.[7]

I. In re Treasury Securities Auction Antitrust Litigation

A. Background

Plaintiffs' claims related to the U.S. Treasury securities market. Treasuries are debt securities that are issued by the U.S. Treasury Department in auctions at scheduled intervals.[8] Defendants are "primary dealers," which are banks that place bids with the Treasury Department at these auctions.[9] Treasuries are also traded in a secondary market, both between dealers (such as the defendants) and between a dealer and an investor (such as plaintiffs).[10]

Plaintiffs alleged that defendants enjoyed an improper advantage at Treasury auctions from the inside information they shared with one another.[11] Specifically, plaintiffs contended that defendants routinely traded competitively sensitive or confidential information, such as customer orders, in advance of auctions.[12] This inside information sharing allegedly enabled defendants to build a "collective pool of knowledge" to help them predict prices and demand for upcoming auctions and as a result place optimal bids.[13]

Plaintiffs relied on statements from an executive working at a subsidiary of a defendant, chat transcripts, and statistical modeling to plead their allegations in their complaint.

Plaintiffs also alleged that certain defendants colluded to boycott existing or new electronic trading platforms that sought to allow investors to trade Treasuries directly with each other.[14] In other words, defendants' alleged intent was to avoid being disintermediated from secondary-market transactions. According to the complaint, the result of this collusive boycott was artificially increased transaction costs for plaintiffs.[15]

The Second Circuit affirmed the district court's judgment dismissing the claims, holding that plaintiffs failed to plausibly allege that defendants engaged in a conspiracy either to rig Treasury auctions or to conduct a boycott on the secondary market.[16]

B. Second Circuit's Analysis

1. Auction Allegations

The Second Circuit agreed with the district court that plaintiffs failed to "plausibly plead either direct or indirect evidence of an agreement" in the Treasury auction allegations.[17] The Second Circuit assessed each of the three categories of evidence relied on by plaintiffs to plead the alleged conspiracy: (i) allegations from an executive working at a subsidiary of a defendant; (ii) chat transcripts; (iii) and statistical modeling.

Executive Allegations. The Second Circuit focused on plaintiffs' failure to plead facts showing the executive could have known about a conspiracy and the unpersuasive nature of the communications the executive allegedly witnessed. Specifically, the Second Circuit found that:

- Plaintiffs failed to plead that the executive was in a position to know whether a conspiracy existed. The Second Circuit focused on the fact that the executive worked at a subsidiary of one of the defendants, not the defendant itself—a distinction plaintiffs emphasized in the complaint—and thus was "removed from the specifics of the alleged improper information sharing."[18]
- The "secondhand information or chatter" the executive relayed was "far from the sort of smoking gun that courts look for when assessing whether there is direct evidence of an agreement."[19]
- The executive's account, as a whole, "depicts traders merely sharing market color—far from the sort of actionable information that traders could use to game Treasury auctions."[20]

Chat Transcripts. The Second Circuit also concluded that the chat transcripts did not support the conspiracy allegations in the complaint. The communications involved traders from only three of the ten defendants and no chats occurred between defendants (only between a defendant and a non-defendant primary dealer). Given this, the Second Circuit held that the transcripts "undermine[] any inference that [these defendants] reached an unlawful agreement" and "cannot plausibly demonstrate that a conspiracy to systematically tilt Treasury auctions existed among the [defendants]."[21] The Second Circuit also held that "not once" do the transcripts show an agreement to coordinate Treasury bids and that "the conversations largely consist of market chatter, such as the traders' views on upcoming auctions and the market more generally, as well as completed transactions."[22]

Statistical Modeling. Lastly, the Second Circuit found that plaintiffs' statistical models were "fundamentally flawed" because they did not relate specifically to the defendants or the time periods alleged in the complaint. The Second Circuit explained that the modeling does "not focus on the ten [defendants] in particular. Instead, the data concern all the twenty-plus primary dealers, or the Treasury securities themselves,"[23] and that "the data mostly consist of averages spanning roughly ten years—from eight years before to two years after the conspiracy allegedly broke up."[24] Because the models did not focus on the defendants and were insufficiently detailed to show rapid shifts in behavior, the Second Circuit held that they could not be used to show parallel conduct with respect to the alleged conspiracy.[25]

2. Boycott Allegations

The Second Circuit also rejected plaintiffs' allegations of a boycott conspiracy for reasons similar to the flaws in the auction allegations. More particularly, the panel found that the pleaded facts were not tied to the allegations against the defendants with enough specificity and that there were rational, non-conspiratorial explanations for the alleged conduct. The Second Circuit observed that:

- "Many of the allegations long predate and are not plausibly connected to allegations within the class period";[26]
- "Rational economic self-interest provides a ready explanation" for defendants' actions;[27]
- "Allegations of threats, warnings, intimidation or pressure from one or more of the [defendants] reflect economically rational self-interest";[28] and
- Plaintiffs pleadings failed to "sufficiently specify which (if any) [defendants] futhered the alleged conspiracy or how they did so and are otherwise vague or ill-defined."[29]

II. In re: Mexican Government Bonds Antitrust Litigation

A. Background

Plaintiffs' claims relate to the over-the-counter market for Mexican government bonds.[30] The bonds are initially issued through auctions run by the Mexican government in which only certain approved entities can participate.[31] Defendants are the Mexico-based subsidiaries of several multinational banks that were approved to participate in these auctions. Defendants sold their Mexican government bonds to U.S. investors through their affiliated non-party broker-dealers in New York in the over-the-counter market.[32] Plaintiffs are U.S. investors that purchased the bonds from these non-party broker-dealers.[33]

Plaintiffs allege that defendants shared pricing information and conspired to fix prices during the auctions.[34] Additionally, plaintiffs claim that defendants collectively

agreed to fix the prices quoted to customers and that, as a result of this price-fixing conspiracy, the prices plaintiffs paid for the bonds were inflated.[35]

The district court dismissed the complaint for lack of personal jurisdiction, holding that the plaintiffs' claims arose from defendants' price-fixing conduct, which "occurred in Mexico alone."[36]

B. Second Circuit's Analysis

The Second Circuit vacated the district court's dismissal, finding that defendants had the requisite minimum contacts with the forum—New York—to establish personal jurisdiction there. The Second Circuit considered two factors: first, whether defendants' contacts showed that they deliberately "reached out beyond" their home; and second, whether plaintiffs' claims related to the defendants' contacts with the forum.[37]

1. Defendants' Contacts with the Forum

The Second Circuit evaluated whether the use of affiliated brokers in New York to execute the transactions at issue could insulate defendants from personal jurisdiction. The Second Circuit held that defendants' knowledge of, control over, and benefit from the brokers' conduct was sufficient to establish personal jurisdiction in New York:

- *Knowledge*. Defendants were fully aware of every trade the brokers conducted with investors. For example, when U.S. customers contacted a broker in New York, the broker "would route the customer request to a Defendant's [bond] trading desk."[38]
- *Control*. Defendants provided "trade ideas" for their brokers to attract customers and set the price for every trade executed by the brokers.[39]
- *Benefit*. For almost all transactions, defendants were the only ones to benefit.[40]

As a result of this analysis, the Second Circuit concluded that, for jurisdictional purposes, the brokers were defendants' agents and did not function independently, but rather as extensions of the defendants. Thus, the agents' contacts with the forum could be "imputed" to defendants for purposes of the personal jurisdiction analysis.[41]

2. Relevance of Plaintiffs' Claims to Defendants' Contacts with the Forum

The Second Circuit further considered whether the plaintiffs' claims arose from or were related to the defendants' contacts with the forum. The Second Circuit rejected defendants' theory that jurisdiction exists only at the physical location where the price-fixing allegedly occurred (in this case, Mexico).[42] Unlike in prior cases, such as *Charles Schwab Corp. v. Bank of America Corp. (Schwab I)*,[43] where the wrongdoing (i.e., the alleged benchmark manipulation) and the sale of the related financial instrument were separate activities, here the alleged wrongdoing (i.e., the price-fixing conspiracy) related to the product itself, namely the bonds sold to plaintiffs by the price-fixers' agents.[44] This means that the price-fixing conspiracy directly affected the amount paid for the bonds by plaintiffs at the point of sale, making the alleged wrongdoing an intrinsic part of the

transaction. Thus, "there is little need to police the line between the alleged wrongdoing and sales."[45]

In addition, unlike *Schwab I*, where plaintiffs sued in their own home forum (but not that of the defendants), here the selected forum was New York. The Second Circuit found that defendants, "through their brokers, arranged sales of bonds *from* the forum."[46] Thus, in *Schwab I*, plaintiffs' forum selection imposed a potential burden on the defendants,[47] whereas here, plaintiffs sued defendants in New York, the very location where defendants conducted their sales operations. Because the defendants elected to take advantage of New York's market and legal framework, the court found that they could not reasonably argue that jurisdiction should be limited to where the price-fixing occurred.[48]

Finally, because the court already determined that the acts of the non-party broker-dealers were attributable to defendants, the fact that the bonds were sold by broker-dealers, not the defendants, does not change the result that there existed a nexus between defendants' New York contacts and the alleged price-fixing claims in Mexico.[49]

III. In re Platinum and Palladium Antitrust Litigation

A. Background

Plaintiffs' claims in this case relate to trading platinum and palladium in a physical market and in the market for futures contracts on the New York Mercantile Exchange ("NYMEX").[50] Plaintiff KPFF Investment, Inc. ("KPFF") sold physical platinum and palladium.[51] The other plaintiffs ("Exchange Plaintiffs") sold NYMEX platinum or palladium futures contracts.

Defendants were significant investors in physical platinum and palladium and futures contracts. Between 2008 and 2014, defendants engaged in a twice-daily auction to establish a market spot price for platinum and palladium. This spot price served as a benchmark for both physical contracts and NYMEX futures contracts.

Plaintiffs allege that defendants conspired to manipulate and depress this auction-based benchmark spot price. The defendants allegedly benefitted from these lower spot prices by participating in the physical market for platinum and palladium and by holding short positions on NYMEX futures contracts. The district court dismissed the case for lack of antitrust standing. Plaintiffs appealed, and defendants cross-appealed.

B. Second Circuit's Analysis

1. Antitrust Standing

The Second Circuit's analysis of antitrust standing in this case followed its analysis in *Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC (Schwab II)*.[52] The *Schwab II* court held that "to establish antitrust standing, a plaintiff must show (1) antitrust injury . . . and (2) that he is a proper plaintiff in light of four efficient enforcer factors."[53] These four efficient enforcer factors are:

- The directness or indirectness of the asserted injury;
- The existence of more direct victims or the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement;
- The extent to which the claim is highly speculative; and
- The importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.[54]

The Second Circuit began by addressing each factor for both the physical market for platinum and palladium in which KPFF participated and the NYMEX market for platinum and palladium futures in which the Exchange Plaintiffs participated.

i. Analysis of Participants in the Physical Market for Platinum and Palladium

First Factor: Directness of Injury. The Second Circuit held that plaintiff KPFF's injury was indirect for the purposes of the first efficient enforcer factor. It explained that "the decision to incorporate or reference the benchmark price in the transactions into which KPFF entered—and by which KPFF was allegedly harmed—was an independent decision."[55] Additionally, because KPFF did not transact with any of the defendants, defendants derived no benefit from KPFF's transactions. Those transactions "were entirely separate from the purpose of the alleged conspiracy and took place merely because of [the benchmark's] unlimited public availability as a reference point for innumerable transactions."[56]

Second Factor: More Direct Victims. Turning to the second efficient enforcer factor, the Second Circuit found that there were more direct victims than the plaintiff. It held that the existence of platinum and palladium sellers who directly transacted with defendants "diminishes the justification for allowing a more remote party to perform the office of a private attorney general."[57]

Third Factor: Speculative Nature of the Claim. The Second Circuit found that this factor favored plaintiff KPFF and distinguished the case from *Schwab II*, where the benchmark was just one of many factors influencing the at-issue bonds' prices, and where isolating the impact of the alleged manipulation would have required "the court to speculate about how the third-party sellers would have factored a non-suppressed [benchmark] into the transaction."[58] In this case, by contrast, the benchmark prices for platinum and palladium were derived from the same kind of transactions that incorporated the benchmark prices.

Fourth Factor: Risk of Duplicative Recoveries. Finally, the Second Circuit found that the fourth factor favored KPFF, reasoning that whoever purchased palladium or platinum from KPFF benefited from the lowered price, and thus those purchasers would not sue defendants or cause any complex problems of apportionment.[59]

Balancing these factors, the Second Circuit found the first and second efficient enforcer factors were decisive, holding that plaintiff KPFF was not an efficient enforcer and therefore did not have antitrust standing.[60]

ii. Analysis of Participants in the NYMEX Market for Platinum and Palladium Futures

First Factor: Directness of Injury. The Second Circuit found that the Exchange Plaintiffs suffered a direct injury because "[f]utures trading is a zero-sum game" where "every contract has a long and a short" and "every gain can be matched with a corresponding loss."[61] In sum, "the defendants manipulated the futures market to profit from futures contracts transactions, while the Exchange Plaintiffs simultaneously lost money through futures contracts transactions in the same market. The Exchange Plaintiffs were harmed at the first step." 62 Disagreeing with the district court, the Second Circuit found that the directness of the injury was independent of defendants' market share on the exchange even if it may inform the amount of damages the Exchange Plaintiffs can seek.[63]

Second Factor: More Direct Victims. The Second Circuit concluded that "[t]here are no more direct victims than the Exchange Plaintiffs," and that "[i]f the Exchange Plaintiffs do not have antitrust standing, the defendants' alleged conspiracy . . . would go undetected or unremedied."[64]

Third Factor: Speculative Nature of the Claim. The Second Circuit determined that damages would not be highly speculative, finding that "[a] damages calculation for a market manipulation scheme, though it may require expert testimony, is hardly beyond the ken of federal courts."[65] Unlike in *Schwab II*, where the benchmark's price effect on securities was indirect and complex, the Exchange Plaintiffs alleged that the defendants directly manipulated the NYMEX futures market, which in turn directly affected the prices at which the plaintiffs sold their futures contracts.

Fourth Factor: Risk of Duplicative Recoveries. The Second Circuit found no risk of duplicative recoveries or complex apportionment of damages because there was no intermediary who could sue for the defendants' anticompetitive conduct in the exchange markets.[66]

In sum, the Second Circuit found that all four efficient enforcer factors favored the Exchange Plaintiffs and reversed the district court's finding that the Exchange Plaintiffs were not efficient enforcers of the antitrust laws.

2. Personal Jurisdiction

The Second Circuit upheld the district court's assertion of personal jurisdiction over foreign defendants BASF Metals and ICBC. The court applied a "conspiracy jurisdiction" theory, where the actions of a conspirator in furtherance of a conspiracy are attributed to all members, allowing personal jurisdiction over co-conspirators even if they lack direct contacts with the forum.[67] The Second Circuit analyzed whether the plaintiff

alleged "that (1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state."[68] The Second Circuit found that the plaintiffs sufficiently alleged the existence of a conspiracy and the participation of the defendants in this conspiracy. The Second Circuit also found that the plaintiff alleged overt acts in furtherance of the conspiracy that had sufficient contacts with the U.S., as they alleged that U.S. traders employed by the foreign defendants took actions necessary to coordinate members of the conspiracy. [69]

IV. Conclusion

In an era of antitrust enforcement that has focused on the financial services industry, the Second Circuit's analysis and conclusions in these three cases highlight the requirements private plaintiffs must meet at the pleading stage in order to adequately allege and maintain standing to seek damages for conspiratorial manipulation of financial benchmarks and instruments. As demonstrated by the Second Circuit in these recent decisions, it is not enough to plead facts that generally suggest wrongdoing or only generally concern the allegations or defendants in the complaint. Adequate pleadings under Second Circuit precedent require, at a minimum: (i) facts that specifically and clearly link the defendants to the alleged unlawful actions; (ii) transactions by plaintiffs with the defendants named in the complaint; and (iii) transactions that occur during the relevant time period.

Further, allegations regarding antitrust injury from the conspiracy must be direct. Injury from an independent decision to rely on a manipulated benchmark does not show antitrust standing. But where the exchange is the counterparty to all transactions, injury on one side of the exchange can be considered a direct consequence of anticompetitive conduct on the other side, even if the two sides do not directly transact.

Finally, defendants should take note of the personal jurisdiction issues addressed by the Second Circuit in the *Mexican Bonds* and *Platinum and Palladium* decisions. The Court held that a defendant's agent's contacts with the forum may be sufficient to subject a defendant to personal jurisdiction in *Mexican Bonds* and reaffirmed the concept of conspiracy jurisdiction in *Platinum and Palladium*.

The views expressed are those of the authors and do not necessarily reflect those of Fried, Frank, Harris, Shriver & Jacobson LLP or Analysis Group.

Endnotes

1 92 F.4th 381 (2d Cir. 2024).

2 15 U.S.C. § 1. Plaintiffs also made unjust enrichment claims, which were also dismissed.

3 92 F.4th at 403.

4 92 F.4th 450 (2d Cir. 2024).

5 92 F.4th at 461.

6 61 F.4th 242 (2d Cir. 2023).

7 The Second Circuit also vacated the district court's dismissal of plaintiffs' claims under the Commodity Exchange Act. An analysis of the court's findings on this element is beyond the scope of this article.

8 92 F.4th at 389.

9 *Id.* at 390.

10 *Id.*

11 *Id.* at 393.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 402.

16 *Id.* at 390.

17 *Id.* at 396.

18 *Id.*

19 *Id.*

20 *Id.* at 397.

21 *Id.* at 397-98.

22 *Id.* at 398.

23 *Id.* at 399.

24 *Id.* at 400.

25 *Id.* at 401.

26 *Id.* at 403.

27 *Id.*

28 *Id.*

29 *Id.*

30 92 F.4th at 453.

31 *Id.* at 454.

32 *Id.* at 455.

33 *Id.*

34 *Id.* at 456.

35 *Id.* at 457.

36 *In re Mexican Gov't Bonds Antitrust Litig.*, No. 18-CV-2830 (JPO), 2020 WL 7046837, at *3 (S.D.N.Y. Nov. 30, 2020).

37 92 F.4th at 456.

38 *Id.* at 458.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 460.

43 883 F.3d 68 (2d Cir. 2018). *Schwab I* was about alleged manipulation of LIBOR, an interest-rate benchmark calculated by collecting information from the London branches of several multinational banks. Those branches allegedly conspired to manipulate the rate by reporting false information. *Id.* at 78. The Court ruled that in-forum sales "do not alone create personal jurisdiction for claims premised solely on Defendants' false LIBOR submissions in London." *Id.* at 83.

44 92 F.4th at 460.

45 *Id.*

46 *Id.*

47 *Id.* In *Schwab I*, the court found that the forum state's interest in protecting its consumers outweighed this burden, especially since the defendants had chosen to transact with a party in that state.

48 *Id.*

49 *Id.*

50 61 F.4th at 254.

51 *Id.* at 255.

52 22 F.4th 103 (2d Cir. 2021).

53 *Id.* at 115 (internal quotation marks omitted).

54 61 F.4th at 259.

55 *Id.* at 260.

56 *Id.* (internal quotations and citation omitted).

57 *Id.* at 261 (citation omitted).

58 *Id.* at 262 (quoting 22 F.4th at 119).

59 *Id.* at 261-262.

60 *Id.* at 260.

61 *Id.* at 263 (citation omitted).

62 *Id.*

63 *Id.* at 264.

64 *Id.* at 264-65.

65 *Id.* at 265 (quoting *Gelboim v. Bank of Am. Corp.*, 823 F.3d at 779 (2d Cir. 2016)).

66 *Id.* at 265.

67 *Id.* at 269-270.

68 *Id.* at 270 (citing *Schwab I*, 883 F.2d at 87).

69 *Id.* at 271