CLASS ACTION BLOG

Second Circuit Rules Investor Had Article III Standing, But Failed to State Claims

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Total Gas & Power North America, Inc. (Total Gas) is a company engaged in natural gas commodity and derivative trading at regional hubs in the western United States. A trader at the West Desk of Total Gas reported market manipulation in four commodities markets to the Federal Energy Regulatory Commission (FERC) and the Commodities Future Trading Commission (CFTC). Both agencies concluded Total Gas had engaged in a multi-year strategy to repeatedly manipulate the price of natural gas commodities. The CFTC settled with Total Gas while FERC's enforcement action continued. Investors who traded natural gas derivatives filed a class action against Total Gas, alleging monopolization and manipulation of natural gas trading in violation of the Commodity Exchange Act (CEA) and antitrust laws. The District Court dismissed the Plaintiffs' suit on grounds that they did not have Article III standing or failed to state a claim under either the CEA or antitrust laws because they failed to plead injury. The 2nd Circuit held that the Plaintiffs had Article III standing, but they failed to do more than establish their injury was conceivable and thus failed to state a claim upon which relief could be sought under the CEA or antitrust laws.

Harry v. Total Gas & Power North America, Inc.

Wholesalers or speculators purchase their month's supply of natural gas from regional hubs during "bidweek," the last five business days of the month. Traders then report the details of these transactions to trade publications, which calculate monthly price indices based on the weighted average of each hub's prices. These indices are then used as reference points in pricing for the following month. Natural gas derivative contracts are valued on the basis of the price of natural gas bought from a particular hub at a particular time. Conversely, Henry Hub, a major hub in Louisiana, calculates its price using averages only of those trades that take place during the last thirty minutes of the middle day of bidweek. Henry Hub's prices serve as the basis for natural gas futures and options contracts traded on major national exchanges.

A Total Gas trader at its West Desk, reported to the FERC and CFTC, market manipulations in four commodities markets. Both Commissions confirmed this report and concluded Total Gas placed big bets that certain parts of the natural gas market would perform a certain way and then ensured that performance. It did so by purchasing large amounts of swaps it wanted to profit on and then obtained a controlling position on the natural gas at that hub. It was able to leverage its market power in the targeted hub to make the price of gas go up or down. Total Gas kept an eye on the prices at Henry Hub to determine how high or low to push the price at the targeted regional hub. However, there was no allegation that it took any action to directly manipulate trading at Henry Hub. CFTC settled with Total Gas while FERC pursued its enforcement action.

Plaintiffs are individuals and entities that traded natural gas derivatives during the period of Total Gas' manipulation. None claimed to have traded any natural gas or natural gas derivatives at the hubs at which Total Gas traded. Rather, they argued that the "shockwaves" from Total Gas' manipulation at those hubs reverberated through to trading at Henry Hub, which harmed them as they traded derivatives based on Henry Hub price indices. Plaintiffs brought their class action suit against Total Gas claiming violations of the CEA and antitrust laws, arguing that the U.S. natural gas markets should be viewed as an integrated whole; manipulation anywhere harms traders of natural gas everywhere.

Total Gas moved to dismiss for lack of standing and failure to make a claim. The Southern District of New York found Plaintiffs failed to plead facts giving rise to a plausible inference that Total Gas' actions had any effect on Henry Hub prices and thus failed to establish standing or state a claim under the CEA or antitrust laws. The Plaintiffs appealed to the 2nd Circuit.

The 2nd Circuit first looked at Article III standing, whether the Plaintiff alleged a sufficient injury to make out a "claim or controversy." Citing *Ross v. Bank of America*, 524 F.3d 217 (2d Cir. 2008), the court noted the standard for constitutional standing is lower than the standard for stating a substantive cause of action. To establish Article III standing, the complaint must allege (1) a concrete and particularized harm to a legally protected interest (called "injury-in-fact"), (2) a traceable connection between the injury and the defendant's conduct, and (3) a non-speculative likelihood that the injury can be remedied by the court. Only the first point, injury-in-fact, was at issue in this case.

The court relied on *Bhatia v. Piedrahita*, 756 F.3d 211 (2d Cir. 2014), when explaining that injury-in-fact is a much lower standard than stating a valid cause of action. Standing requirements are satisfied by the plaintiff alleging facts demonstrating that the plaintiff had a "legally protected interest in a manner that is concrete and particularized" and that the defendant "invaded that interest." Only where the allegation of injury is so implausible that it has no merit will the court determine there is no standing.

Here, Plaintiffs argued that prices at U.S. natural gas hubs are so interconnected that manipulation at any of the hubs amounts to manipulation of all of them, including the one on which the prices of their derivative contracts were based (Henry Hub); accordingly they had standing. The 2nd Circuit agreed, noting that even though they did not believe the pleadings made the interconnection plausible, it was enough for standing purposes that the pleadings placed it within the "realm of possibility."

Next, the court looked to the claims under the CEA and antitrust laws. The court noted that pleading a cause of action required a showing that the pleader is entitled to relief. The allegation must be *plausible*, not merely within the realm of possibility. Plausibility requires pleading an actual injury caused by a defendant's violation of the law, in addition to the elements of whatever violation the plaintiff alleges.

Under the CEA, the Plaintiffs failed to provide facts sufficient to allege a plausible claim because they did not allege they were directly injured by Total Gas. Rather, Plaintiffs traded derivatives based on Henry Hub, but Total Gas did not trade natural gas derivatives based on Henry Hub.

Similarly, under antitrust laws, the questions the court considered were whether the Plaintiffs suffered an injury that antitrust laws were intended to prevent and which made defendant's acts unlawful. Again the court determined the Plaintiffs did not present evidence that they were injured by Total Gas because they did not show that they traded at artificial prices, manipulated by Total Gas. The court concluded that although Plaintiffs pled enough facts to make their claim of injury colorable, thereby establishing standing, they failed to plead facts sufficient to make it plausible. That latter failure meant they fail to state a claim.

The *Harry v. Total Gas* opinion is important for clarifying the different standards for alleging standing and alleging a substantive claim. The court noted repeatedly that though a plaintiff may meet the standing requirement, a plaintiff must also meet the higher pleading standard for stating a claim in order to defeat a motion to dismiss.