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Antitrust

Conspiracy Claims Survive in Milk Litigation; $140 Million Settlement Reached With Dean

Counts alleging conspiracies to monopolize, monopsonize, and restrain trade are the only survivors of summary judgment after a federal court in Tennessee dismissed several counts in a multidistrict litigation against the milk industry July 12 (*In re: Southeastern Milk Antitrust Litig.*, E.D. Tenn., No. 2:08-MD-1000, 7/12/11).

Although the court did not entirely dispose of the case, Judge J. Ronnie Greer of the U.S. District Court of the Eastern District of Tennessee did raise the bar for plaintiffs whose claims will be subject to a rule of reason analysis rather than the per se analysis they sought.

In a separate development, the plaintiffs and defendant Dean Foods Co., a dairy product processor and distributor, sought preliminary approval for a $140 million settlement July 12.

The plaintiff dairy farmers in this class action allege that the defendant milk processors, marketers, and distributors violated Sections 1 and 2 of the Sherman Act by unlawfully conspiring and refusing to compete for the purchase of raw Grade A milk processed in the Southeastern United States, as well as attempting to stifle competition from cooperatives and Grade A milk bottlers. The defendants include Dairy Farmers of America Inc. (DFA), National Dairy Holdings LP (NDH), Dairy Marketing Services LLC (DMS), Southern Marketing Agency Inc. (SMA), and Dean Foods.

The dairy farmers also allege that the defendants monopolized and monopsonized raw Grade A milk and milk marketing services in the Southeast, and engaged in other unlawful activities designed to fix, stabilize and depress the prices paid for milk purchased from dairy farmers.

The dairy farmers filed the lawsuit in 2007 and the court granted class certification in September 2010 (11 CLASS 844, 9/24/10).

Rule of Reason Analysis Will Apply. The court rejected the plaintiffs' characterization of the claims as a horizontal, per se illegal conspiracy.

The defendants include processors of raw milk, membership cooperatives, common marketing agencies, and individuals, the court noted. ''This diverse group of actors are not just horizontal competitors but a collection of actors in the milk industry whose roles run the gamut of activities from gathering and marketing of raw milk from the farm to processing and marketing of processed milk at the retail level,'' the court said. ''This does not appear on its face to be a horizontal conspiracy . . . ,'' the court said.

The court said that the claims would be subject to a rule of reason analysis rather than a per se analysis, which is reserved for a limited category of activities that always tend to restrict competition.

The overt acts alleged by the plaintiffs, such as the use of exclusive supply agreements, most favored nation pricing, agreements to require farmers to join MSA, outsourcing agreements, and the simultaneous decision of Dean and NDH to terminate non-DFA suppliers, ''do not always or almost always tend to restrict competition or decrease output, do not always have an adverse impact on the market, and are not, in and of themselves, illegal.''

Before reaching the merits of an antitrust claim, the plaintiffs must establish the relevant geographic market where the anticompetitive acts allegedly occurred. Although the court noted its doubts about the plaintiffs' ability to establish a relevant geographic market, the court said the plaintiffs raised genuine issues of material fact for a jury to consider.

Monopoly and Monopsony Claims Dismissed. The court dismissed the counts of monopolization, monopsonization, and attempted monopolization and monopsonization.

The plaintiffs' monopolization claim failed because the plaintiffs could not establish that defendant DFA possessed or had a dangerous probability of acquiring monopoly power in the relevant market. The court rejected the plaintiffs' attempt to aggregate the market shares of various companies. In the Sixth Circuit, the relevant inquiry is whether there is a single actor exercising unilateral market power, the court said. The court found that the plaintiffs could not establish that Dean possessed monopsony power for similar reasons.

The attempted monopoly and monopsony claims stumbled on the same theory. The Sixth Circuit held in *Smith Wholesale Co. v. Philip Morris USA Inc.*, 219 Fed. App'x. 398 (6th Cir. 2007), that for a claim of attempted monopolization under Section 2 of the Sherman Act ''a combination of market shares of more than one company is an inappropriate measure of [] market power and that market power under § 2 relates to the ability of a single seller to raise prices and restrict output.''

Conspiracy Counts Present Triable Fact Issues. The court said that after reviewing the ''vast volume'' of pleadings and documents, it has concluded that ''genuine issues of material fact do indeed exist with respect to the conspiracy allegations which require a jury to perform its traditional fact-finding role.'' The court noted that although it might be preferable for the court

to examine in detail the arguments made by all of the parties, such an approach would ''require an enormous amount of time and would increase the size of this already too long memorandum by dozens of pages.'' The court said it simply finds that there are genuine issues of material fact with respect to the conspiracy claims.

Filed-Rate Doctrine Bars 'Flooding' Theory Damages. Next, the court found that the filed-rate doctrine barred plaintiffs' claim for damages under a ''flooding'' theory. The plaintiffs claimed that the defendants flooded the Southeast with excess milk, reducing the federal minimum blend prices for milk. But the defendants countered that the damages are barred by the filed-rate doctrine, which, as a general rule, bars challenges under state law and federal antitrust laws to rates set by federal agencies.

Although the court agreed with plaintiffs at the motion to dismiss stage, after a review of the full record the court found that the filed-rate doctrine bars damages based on a flooding theory. The plaintiffs directly challenged the federal minimum blend price by recalculating the price to what they believe it should have been. ''The Court cannot imagine a more direct attack on the federal minimum blend prices,'' it said.

Individual Summary Judgment Motions Resolved. The court then turned to the summary judgment motions filed by individual defendants. The court granted the motion of former DFA Chief Financial Officer Gerald L. Bos because the plaintiffs could not show that he ''actively and knowingly'' participated in an anticompetitive scheme by exerting his influence to shape corporate intentions, which is required to show individual liability under the antitrust laws.

However the court denied the motions of James Baird, a manager at SMA, and Gary Hanman, former president and CEO of DFA.

Brandon J.B. Boulware of Rouse Hendricks German May PC in Kansas City, Mo., who represented Bos in the proceedings, told BNA, ''We are of course pleased that the court granted the summary judgment motion filed by our client. However, it's disappointing that the court allowed the case to go forward against the other defendants.''

Plaintiffs' counsel did not respond to a request for comment.

The plaintiffs' representation included Robert G. Abrams, Gregory J. Commins Jr., Joanne Lichtman and Robert J. Brookhiser of Baker & Hostetler in Washington, D.C.; Thomas C. Jessee of Jessee & Jessee in Johnson City, Tenn.; Robert J. Wozniak of Freed Kanner London & Miller LLC in Bannockburn, Ill.; and Melinda Meador Winchester of Sellers Foster & Steele PC in Knoxville, Tenn.

The defendants were represented by David J. Stanoch and Carolyn H. Feeney of Dechert LLP in Philadelphia; Paul D. Frangie and Paul H. Friedman of Dechert LLP in Washington, D.C.; William C. Bovender and Mark S. Dessauer of Hunter Smith & Davis in Kingsport, Tenn.; Jerry L. Beane and Kay Lynn Brumbaugh of Andrews Kurth LLP in Dallas; Brandon J.B. Boulware of Rouse Hendricks German May PC in Kansas City, Mo.; Edward T. Brading of Herndon Coleman Brading & McKee in Kingsport, Tenn.; H. Buckley Cole of Hall Booth Smith & Slover PC in Nashville, Tenn.; and Daniel D. Crabtree of Stinson Morrison Hecker LLP in Overland Park, Kan.

By Jessie Kokrda Kamens

The summary judgment opinion is online at http://op.bna.com/class.nsf/r?Open=jkas-8jrmgj. The proposed settlement is available at http://op.bna.com/class.nsf/r?Open=jkas-8jrmht.

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