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Antitrust Alert

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Sixth Circuit Spoils Milk Processor's Win by Reinstating Class Action Alleging Conspiracy to Restrict Milk Supply

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The Sixth Circuit recently revived an antitrust class action alleging a conspiracy between a processed milk bottler, a raw milk supplier and a raw milk processor to restrict milk supply in violation of Section 1 of the Sherman Act. *Food Lion, LLC v. Dean Foods Co.*, No. 12-5457 (6th Cir. Jan. 3, 2014) (*In re Southeastern Milk Antitrust Litig.*). The Court of Appeals ruled that the lower court erred when it found that the Plaintiff class of milk retailers could not establish the relevant geographic antitrust market or proof of their injuries and thus granted summary judgment for Defendants. The case is remanded to the district court for further proceedings.

The 28-page opinion is interesting in several dimensions. As discussed below, unlike the district court, the Sixth Circuit decided to engage in a "quick look" analysis instead of considering summary judgment against a rule of reason standard. The quick look approach had implications for two other issues — whether any of Plaintiffs' claims could survive summary judgment on the question of a geographic market, which the district court found Plaintiffs had failed to establish; and how to treat Plaintiffs' expert testimony on geographic markets and antitrust injury, which the district court had excluded.

The case has its roots in the 2001 creation of Dean Foods through the merger of Dean Foods Company with Suiza Foods Corporation (Suiza), the two largest processed milk bottlers at the time. Approved by the Department of Justice, the merger was subject to the divestment of certain milk processing plants to Dairy Farmers of America (DFA), Suiza's primary supplier of raw milk, followed shortly thereafter by the transfer of those processing plants to National Dairy Holdings (NDH), a newly formed partnership and the largest competitor to the new Dean Foods. As described by the Sixth Circuit, DFA served as the keystone to the alleged conspiracy as it retained a 50% ownership in NDH and obtained a contractual commitment from Dean Foods for the opportunity to act as the supplier of raw milk to the merged entity.

Summing up Plaintiffs' case, the Sixth Circuit noted that "[a]lthough DFA's ownership stake provides an obvious incentive to fully support NDH's fledgling enterprise, DFA's raw milk supply agreements with the merged company create fertile soil for the development of a conflict of interest."

The Sixth Circuit's Decision

To successfully bring a Section 1 claim, a plaintiff must establish that defendant's actions constitute an unreasonable restraint of trade that caused the plaintiff to experience an antitrust injury. Whether a restraint is "unreasonable" is typically determined by either the *per se* rule — reserved for agreements that are "so inherently anticompetitive" — or the rule of reason analysis. Under the rule of reason, a plaintiff must establish that the restraint produced anticompetitive effects within relevant product and geographic markets. Applying the rule of reason approach, the district court granted summary judgment for Defendants, finding that Plaintiffs failed to establish i) that the restraint on trade was unreasonable, largely because the lower court excluded Plaintiffs' expert

testimony on relevant markets, and ii) the requisite element of injury.

Application of the Quick Look Approach

For the purpose of summary judgment, the Sixth Circuit decided to use a quick look approach, which it characterized as a third method "arising from the blurring of the line between *per se* and rule of reason." *See Cal. Dental Ass'n v. FTC,* 526 U.S. 756, 769-70 (1999) (holding that the quick look approach is appropriate for situations in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"). Importantly, the Sixth Circuit decided that in a quick look context a plaintiff is not required to establish a relevant market when "the anticompetitive nature of an agreement is so blatant." Instead, the burden is shifted to the defendant to justify the agreement on procompetitive grounds.

At the summary judgment stage with the facts viewed in favor of the non-moving party, the Sixth Circuit found that Plaintiffs met their burden under a quick look analysis, relieving them of the need to establish a relevant market. Citing Dean Foods' contract to buy raw milk from DFA in exchange for DFA hampering NDH's ability to compete, Plaintiffs had sufficiently alleged conduct with "obviously adverse, anticompetitive effects," thus shifting the burden to Defendants to present the procompetitive benefits of their agreement.

Admissibility of Expert Testimony on Geographic Market

Although Plaintiffs do not need to establish the relevant market under the quick look approach to defeat summary judgment, the full rule of reason analysis may still be applicable on remand, in which case the admissibility of Plaintiffs' expert testimony would again be at issue. The district court excluded the expert's testimony regarding geographic markets for being based on an unreliable method. Reviewing for abuse of discretion, the Sixth Circuit found that the district court's decision to exclude the expert's testimony was based on an incomplete review of the facts and the application of incorrect legal standards. Contrary to the district court's understanding, the expert had appropriately defined the markets differently for the monopoly claims (not at issue on appeal) and the conspiracy claims. Further, the expert's report extensively cited facts from government studies, academic publications and the record in support of its identified relevant market.

Admissibility of Expert Testimony on Antitrust Injury

Regardless of whether a *per* se, full rule of reason, or quick look approach is taken, antitrust plaintiffs cannot survive motions for summary judgment on a Section 1 claim without adequately alleging an antitrust injury. The Sixth Circuit found that the district court erred in excluding Plaintiffs' expert testimony regarding injury on the basis that its econometric analysis attributed price increases to the merger itself rather than to the alleged anticompetitive conduct. In contrast, the Sixth Circuit determined that Plaintiffs' econometric model showed that i) Plaintiffs purchased processed milk from Defendants, ii) post-merger Plaintiffs were charged 7.9% more than could be justified by an econometric analysis, and iii) Dean Foods and NDH conspired to avoid competing vigorously. As this is the kind of injury that the Sherman Act was designed to prevent, the district court erred in granting summary judgment for Defendants on the basis of the lack of antitrust injury.

Antitrust cases often turn on the definition of the relevant geographic market, and plaintiffs' cases often fail on that ground. *See, e.g.*, *Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass'n*, 524 F.3d 726, 733 (6th Cir. 2008); *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir. 1992). If the concept that a quick look lowers the summary judgment bar for plaintiffs catches on, we will likely see more antitrust plaintiffs advocate with increasing vigor that their cases belong in the quick look category.

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