

# Claim of Antitrust Conspiracy Among Tomato Processors Avoids Dismissal

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The federal district court in Sacramento, California, has refused to dismiss an antitrust claim alleging that SK Foods L.P.—a now-defunct food products distributor—conspired with others to eliminate competition in the market for processed tomato products. The private action brought by competitors of SK Foods parallels a closely-watched federal probe of anticompetitive conduct in the industry.

In December 2008, the Department of Justice announced that a New Jersey sales broker who worked on behalf of SK Foods to sell processed tomato products to large corporate customers, such as Kraft Foods, and Frito-Lay, admitted to participating in a wide-ranging antitrust conspiracy in the processed foods industry. A month later, Morning Star Packing Company and other competitors of SK Foods filed an antitrust action in federal district court challenging the same conduct alleged in the government's case.

## **Federal Investigation**

Since the private action was filed, a number of former executives and employees of SK Foods and its customer companies have pleaded guilty to one or more federal felonies in connection with the alleged conduct. SK Foods' former owner, Frederick Scott Salyer, has also been charged in the antitrust conspiracy.

Earlier this year, the Justice Department announced that Salyer was indicted by a federal grand jury for conspiring to fix prices or rig bids for the sale of processed tomato products. In addition to multiple antitrust counts, the 67-page superseding indictment charged Salyer with federal racketeering violations and with obstructing the government's investigation.

## **Antitrust Injury**

Now, the private suit has cleared a significant hurdle. On November 16, the federal district court in Sacramento denied a motion to dismiss the civil antitrust claim. Two independent producers of bulk tomato paste named in the complaint along with SK Foods—Ingomar Packing Company and Los Gatos Tomato Products—moved to dismiss the antitrust claim pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that the complaining competitors failed to allege an “antitrust injury.”

The court explained that in order to have standing to bring a cause of action, the plaintiffs had to demonstrate that they suffered an antitrust injury or an injury attributable to an anticompetitive aspect of the challenged practice.

Generally, a plaintiff cannot state an antitrust injury from a conspiracy among competitors to fix prices. A plaintiff would stand to gain from the higher prices resulting from such a conspiracy.

The court concluded that the complaining competitors adequately alleged an antitrust injury resulting from the other alleged anticompetitive conduct, including bribery, bid rigging, and allocating customers. It did not follow that the complaining firms lacked standing to challenge bid rigging and customer allocation because the effect of these anticompetitive practices was to inflate prices paid by customers, in the court's view. This type of conduct, unlike price fixing, could injure both customers and competitors.

The plaintiffs alleged that SK Foods paid bribes to customers' purchasing agents to acquire bid information and shared this bid information with the other defendants, who utilized the bid information in submitting bids. Bid rigging could result in a competitor being outbid on a contract they would have otherwise been awarded, the court noted. Antitrust injury could be based on the complaining firms' purported inability to secure contracts. Thus, the antitrust claims survived dismissal.

The federal court did, however, dismiss the plaintiffs' racketeering and state unfair competition law claims.

The November 16, 2010, decision in *The Morning Star Company v. SK Foods L.P.*, No. 2:09-cv-00208-MCE-EFB, appears at **(CCH) 2010-2 Trade Cases ¶77,235**.