Seventh Circuit Identifies Difficulties in Challenging 'Lock-Step' Price Increases by Oligopolists

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In a decision pondering the adequacy of the Sherman Act to protect consumers from consciously parallel conduct among oligopolists, the U.S. Court of Appeals in Chicago upheld dismissal of a class action against containerboard manufacturers for conspiring to increase prices and reduce output between 2004 and 2010. Although the complaining direct purchasers offered bountiful circumstantial evidence of a conspiracy, they did not produce "evidence that would rule out the hypothesis that the defendants were engaged in self-interested but lawful oligopolistic behavior." Thus, summary judgment was properly granted in favor of the two remaining (non-settling) defendants in the case: Georgia-Pacific LLC and Westrock CP, LLC (formerly known as Smurfit-Stone Container Corporation).
The decision is *Kleen Products LLC v. International Paper Co., No. 17-2808*.

The appellate court considered whether the purchasers presented enough evidence to permit a trier of fact to find the agreement necessary for liability under Section 1 of the Sherman Act, as opposed to behavior in each firm's independent self-interest. The opinion touched upon the most significant evidence against Georgia-Pacific and WestRock.

First, the appellate court considered structural evidence about the containerboard

industry. There were industry features that made it easier for companies either to form a cartel or to follow the leader independently. The court determined that, because of competing inferences that could be drawn from the market structure, this evidence did not tend to exclude the possibility of independent action.

The purchasers also pointed to a series of price hikes. The court, however, noted that following a competitor's price increases could be consistent with rational self-interest in oligopolies. Further, the purchasers appeared to have overstated how coordinated these "lockstep" hikes actually were. There was a 40 percent failure rate of the manufacturers' efforts to raise prices. Thus, the price increases appeared to be just as consistent with independent action as with collusion.

Similarly, claims of coordinated reductions of output through mill closures and machine slowdowns did not require reversal. The court pointed out that Georgia-Pacific not only kept its mills open, but it also purchased a new mill. Further, underutilizing machines was the kind of flexible behavior that was consistent with rational attempts to raise prices through watchful attention to one's competitors' actions, in the court's view.

The appellate court also was not swayed by the frequent contacts that company executives had by phone and at trade association meetings. The complaining purchasers had no evidence indicating that the executives discussed illicit price fixing or output restriction deals during their calls or meetings. The court held that the purchasers' speculation about the content of the frequent interfirm contacts was not enough to create a jury issue.

WestRock's participation. The case against WestRock was complicated by its bankruptcy discharge. Just prior to the close of the class period, WestRock received a discharge in bankruptcy. Thus, at that moment, it was free of any antitrust liability incurred up to the date of discharge. Nonetheless, WestRock would have been potentially liable for the alleged conspiracy if there was evidence it rejoined the cartel post-discharge. However, the purchasers' parallel pricing evidence did not provide a hook for WestRock's liability. Moreover, WestRock's supply restrictions—although more compelling evidence of collusion—did not occur post-discharge. Further, incriminating statements of WestRock executives also were pre-discharge and, therefore, did not support the claims.

The court concluded by noting that "scholars, lawmakers, and courts have yet to

agree on a regulatory regime that can address oligopolistic behavior that leads to higher prices and reduced consumer choice, without stifling normal business activity." Citing *Twombly*, the court continued: "For now, we follow established law to the effect that 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."