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Monopoly Claims Against DuPont Revived by Fourth Circuit

Jeffrey May (Wolters Kluwer) · Tuesday, March 22nd, 2011

Claims that E.I. du Pont de Nemours and Company attempted to wield, and did wield, monopoly power over the U.S. para-aramid fiber market in violation of Sec. 2 of the Sherman Act should not have been dismissed, the U.S. Court of Appeals in Richmond, Virginia, has decided.

Kolon Industries, Inc., a small seller of para-aramid fibers to U.S. consumers, plausibly pled monopolization and attempted monopolization counterclaims in a trade secrets suit brought by DuPont against its rival. Dismissal of Kolon's antitrust counterclaims (**2009-2 Trade Cases ¶76,861**, 683 F. Supp. 2d 401) was reversed.

DuPont sold over 70 percent of the para-aramid fibers (fibers used to make body armor, tires, and fiber optic cables, among other things) purchased in the United States. The smaller rival contended that DuPont violated Sec. 2 of the Sherman Act through its use of exclusive contracts with high-volume customers.

Relevant Market

The parties did not dispute the relevant product market, which was the para-aramid fiber market; however, DuPont contended that Kolon did not adequately plead a relevant geographic market.

The appellate court ruled that Kolon's geographic market limited to the United States was sufficient to withstand DuPont's motion to dismiss. Although it remained to be seen whether the proffered relevant geographic market definition would hold up upon a fact-intensive inquiry, dismissal of the counterclaim based on the geographic market definition was improper.

To support its market definition, Kolon alleged that prices were high while supply was low; some foreign manufacturers did not sell their para-aramid fibers to U.S. consumers; high technical and legal barriers to the U.S. para-aramid market existed; and DuPont dominated the market through the use of the multi-year contracts. The lower court improperly held that U.S. Supreme Court precedent required including in the relevant geographic market definition locations where product suppliers were headquartered, including the Netherlands and Korea.

Possession, Willful Maintenance of Monopoly Power

Kolon also adequately pled possession of monopoly power and willful maintenance of monopoly power. The smaller rival pointed to, among other things, numerous barriers to entry into the market; low supply; DuPont's long dominance of the market; and DuPont's market share.

Moreover, through DuPont's use of multi-year exclusive contracts, the company could have engaged in anticompetitive conduct to support monopolization and attempted monopolization claims.

Although not *per se* illegal, exclusive dealing arrangements may be an improper means of acquiring or maintaining a monopoly, the court noted. Despite DuPont's contention that the agreements required customers to buy somewhat less than all of their para-aramid fiber requirements from DuPont, it appeared unrealistic to expect consumers to seek out a mere 15 percent of their requirements for a specialized, integrated product like para-aramid fibers from a second supplier.

U.S. Views

Although not discussed in the opinion, the Department of Justice Antitrust Division and the FTC had provided their views on the relevant market issue to the appellate court in an [amicus brief](#). The government urged the court to vacate the district court's relevant geographic market determination.

The government contended that the lower court erred by holding, as a matter of law, that a relevant geographic market in an antitrust case must be defined to include not only the locations of customers but also the locations of production for all supplies of the relevant product available to those customers.

It noted that "in many cases, the geographic dimension of the market is properly defined around the locations at which the relevant product is produced." However, there are instances when "the geographic market is appropriately defined by the locations of the vulnerable customers."

The government took no position on the ultimate merits of Kolon's antitrust counterclaims or on the sufficiency of its pleadings.

The March 11, 2011, decision in *E.I. du Pont de Nemours & Co. v. Kolon Industries, Inc.*, No. 10-1275, will appear at **2011-1 Trade Cases ¶77,380**.

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