AntitrustConnect Blog

Third Circuit Sets Out Specialized Standard for Summary Judgment in Antitrust Cases Involving Parallel Conduct by Oligopolists

Jeffrey May (Wolters Kluwer) · Thursday, October 12th, 2017

In my last post to AntitrustConnect, I wrote about the difficulties that antitrust plaintiffs face in getting to trial with claims based on circumstantial evidence. I discussed a decision of the federal district court in Chicago in a long-running class action against paper companies for conspiring to raise prices for containerboard provides an example of the challenge. The court granted summary judgment in favor of the defendants, holding that 15 price increase announcements and numerous supply reductions by paper companies over six and a half years did not raise a reasonable inference of a conspiracy to fix prices.

Now, the U.S. Court of Appeals in Philadelphia has weighed in on summary judgment in another case involving parallel conduct by the oligopolists. Last week, a divided Third Circuit affirmed summary judgment in favor of DuPont on claims that it conspired with other titanium dioxide suppliers to fix prices. Valspar, a large-scale purchaser of titanium dioxide, based its price fixing claim primarily on 31 parallel price increase announcements issued by the small group of suppliers over a 10-year period. The company had sought to recover overcharges of approximately $176 million. The could held that Valspar failed to meet the specialized evidentiary standard to survive summary judgment in a case alleging price fixing among oligopolists. A dissent contended that the majority's standard created an "unworkable burden."

The appellate court noted that the market for titanium dioxide was an oligopoly and that oligopolies posed a special problem under Sec. 1 of the Sherman Act. That is because rational, independent actions taken by oligopolists can be nearly indistinguishable from horizontal price fixing, the court explained. Thus, the court applied specialized evidentiary standards at summary judgment for such an oligopoly case, limiting permissible inferences from ambiguous evidence. Valspar was expected to provide inferences that showed that the alleged conspiracy was "more likely than not."

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In addition to proof of parallel behavior, Valspar had to identify so-called plus factors, such as (1) evidence of a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy. The appellate court focused on "evidence implying a traditional conspiracy" over the other two factors. After considering the parallel pricing evidence, the court then moved to evidence under the plus factors, and the record as a whole.

Evidence. Valspar presented evidence of: parallel price movement, internal e-mails showing an awareness of this parallel price movement, competitor participation in a trade association and statistics sharing program, inter-firm sales at below market prices, and use of industry consultants. However, Valspar did not offer any single form of evidence that would have gotten it close to showing that a conspiracy was more likely than not, in the court's view.

First, the court noted that the public parallel price increase announcements were consistent with industry practice and did not raise an inference of conspiracy. While Valspar offered evidence of motive to conspire and actions against self-interest, these plus factors could not win its case. Reiterating that a third plus factor—traditional non-economic evidence of a conspiracy—was the most important, the court concluded that the lower court correctly found that that Valspar failed to raise an inference of conspiracy. In addition to the references to a data sharing program offered by the Titanium Dioxide Manufacturers Association (TDMA), TDMA meetings, and the purported use of consultants as conduits to funnel information, Valspar pointed to e-mails sent by the various competitors. While the e-mails showed that the competitors were aware of the phenomenon of conscious parallelism and implemented pricing strategies in response to it, "[t]o forbid firms in an oligopoly from considering conscious parallelism in its internal pricing decisions would be to require a firm to do the impossible." Lastly, a handful of inter-competitor sales at below market prices appeared to be "just as consistent with non-collusive activity as with conspiracy" as the district court found.

District of Maryland litigation. Valspar had opted out of a class action in the U.S. District Court for the District of Maryland. That case eventually settled after the court denied summary judgment. Valspar unsuccessfully argued that "principles of comity and the doctrine of stare decisis should have given the Delaware court greater pause before reaching a decision in conflict with the Maryland Action." The appellate court concluded that in light of Third Circuit precedent, the Delaware federal district court did not err.

In a footnote, at the end of the majority opinion, the court got to the heart of the matter, responding to Valspar's contention that Third Circuit case law forecloses the possibility that a plaintiff can defeat summary judgment with only circumstantial evidence in the Sherman Act, Sec. 1 oligopoly context. The Third Circuit requires that the circumstantial evidence "be non-economic evidence of an actual agreement between the conspirators, and not just a restatement of the interdependent economic conduct that [the court] must accept in an oligopolistic marketplace." Valspar did not provide such circumstantial non-economic evidence sufficient to support the inference of a conspiracy, in the court's view.

Dissent. A dissenting opinion suggested that the majority required an antitrust plaintiff to offer a "smoking gun." Viewing all of the evidence as a whole, the dissent concluded that summary judgment was not proper in the case. The majority's decision could easily be read to require direct evidence of an agreement in an oligopoly/antitrust case, in the dissent's view.
The majority responded that the dissent's interpretation of the *Matsushita* summary judgment

standard was reasonable, but contrary to Third Circuit jurisprudence.

Like the dissent, the American Antitrust Institute (AAI) had called for a less restrictive approach to evaluating circumstantial evidence of price fixing in oligopoly markets. The AAI filed a brief as amicus curiae in support of Valspar.

The Third Circuit's decision in *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, No. 16-1345, was released on October 2, 2017.

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