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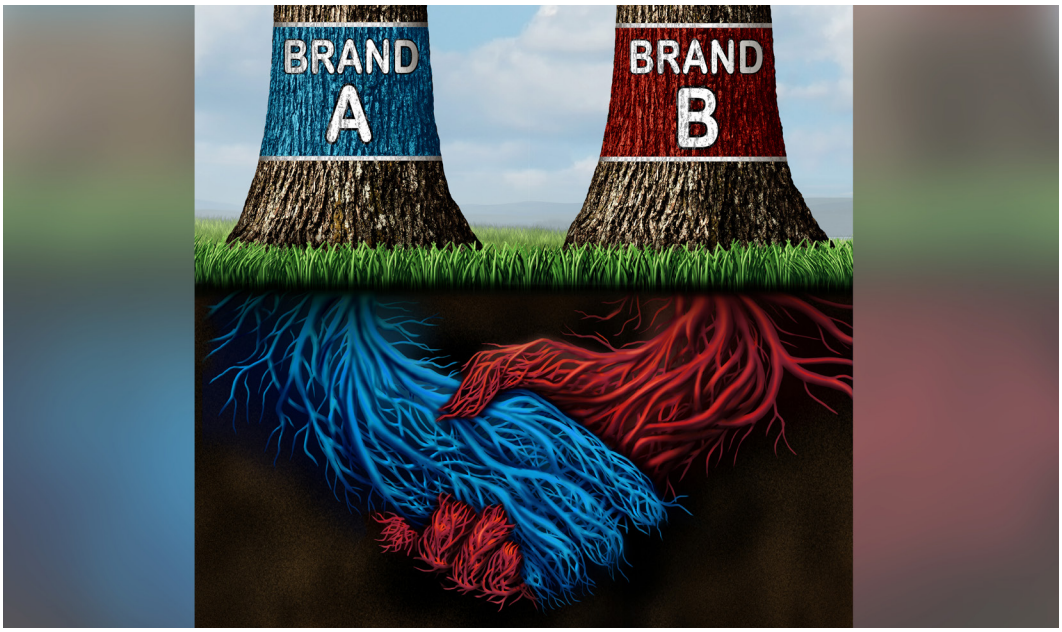

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When Is Evidence of a Foreign Cartel Proof of a U.S. Price-Fixing Conspiracy?

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THE THIRD CIRCUIT HELD THAT IN ANTITRUST CASES INVOLVING CONCENTRATED MARKETS, COURTS MUST CAREFULLY CONSIDER THE NATURE OF THE INDUSTRY AND WHETHER THE ACTIONS OF DEFENDANTS CAN BE EQUALLY ATTRIBUTED TO INDEPENDENT CONDUCT AS TO A CONSPIRACY. MERELY CITING A CONSPIRACY IN A FOREIGN JURISDICTION ALSO IS NOT ENOUGH TO ESTABLISH EVIDENCE OF A CONSPIRACY IN THE U.S., THE COURT HELD.

In *In re Chocolate Confectionary Antitrust Litigation*,[1] the Third Circuit has clarified the significant evidentiary burden that plaintiffs bear when alleging price-fixing conspiracies in concentrated markets. Even though plaintiffs produced admissible evidence that "higher prices during the period of the alleged conspiracy [could not] be fully explained by causes consistent with active competition," the court determined that ambiguous business documents and proof of a foreign cartel were insufficient to infer the existence of price fixing. The Chocolate court focused on the nature of concentrated or oligopolistic markets, which are characterized by a natural and lawful interdependence among competitors, and the fact that evidence must be more carefully scrutinized because of that interdependence.[2]

In addition, the Third Circuit explained for the first time "how courts should view evidence of a contemporaneous antitrust conspiracy in a foreign market when that evidence is offered to prove the existence of an antitrust conspiracy in the U.S. market."[3] Summarizing plaintiffs' evidence, the court concluded that "[e]vidence of a disconnected foreign conspiracy, limited possession of advance pricing information, mere opportunities to conspire without suspect meetings or conversations about pricing, conduct that is consistent with pre-conspiracy conduct, and a weak showing of pretext do not support a reasonable inference of a conspiracy." *Id*. The decision emphasizes that plaintiffs cannot survive summary judgment by presenting ambiguous evidence that is equally explained by defendants' independent conduct.

Background

Two groups of plaintiffs alleged that the leading manufacturers of chocolate in the U.S., Hershey, Nestlé USA, and Mars, conspired to raise prices on chocolate candy products multiple times between 2002 and 2007. The U.S. chocolate market is highly concentrated, with the three defendants controlling 75 percent of the market. Given the nature of the market, parallel price increases were not uncommon before the alleged conspiracy. Plaintiffs alleged, however, that the price increases between 2002 and 2007 were the product of an illegal agreement and not, as the defendants claimed, the result of rising manufacturing costs.

As evidence of the conspiracy, plaintiffs pointed to (1) identical price increase announcements, (2) evidence showing that defendants obtained advance information on each other's planned price increases, (3) several "opportunities to conspire" during which defendants allegedly had the chance to exchange sensitive information and agree on pricing, and (4) evidence of a price-fixing conspiracy among Canadian chocolate manufacturers, including affiliates of the defendants. This included evidence of the Canadian Competition Bureau's investigation of the Canadian chocolate manufacturers, which resulted in Hershey Canada pleading guilty to price fixing and paying a $4 million

fine, and indictments for Nestlé USA's and Mars's Canadian affiliates. Plaintiffs claimed that it was reasonable to infer a U.S. conspiracy from the evidence of the Canadian conspiracy and that the Canadian conspiracy "actuated," or facilitated, the U.S. conspiracy.

The district court granted summary judgment for defendants, ruling that plaintiffs were unable to show that defendants had acted against their independent self-interest and that there was insufficient evidence of a traditional price-fixing conspiracy. In sum, plaintiffs' evidence was as consistent with lawful competition as with an illegal conspiracy, and the evidence of the separate Canadian conspiracy did not suggest otherwise.

Third Circuit Decision

The Third Circuit affirmed the district court's ruling. The Third Circuit began its analysis with the U.S. Supreme Court's instruction that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."[4] The court further explained that particular caution must be given in cases alleging price fixing in oligopolistic markets because in concentrated markets, a single firm's change in pricing will have a noticeable impact on the market on its competitors. The court noted, "oligopolists may maintain supracompetitive prices through rational, interdependent decision-making, as opposed to unlawful concerted action, if [they] independently conclude that the industry as a whole would be better off by raising prices."[5] In other words, in an oligopoly, parallel pricing may "be a necessary fact of life" as opposed to evidence of an illegal agreement.[6]

The court explained that a plaintiff in a price-fixing case cannot create an inference of conspiracy merely by showing defendants have "consciously parallel" pricing practices. Rather, "[t]o move the ball across the goal line," a plaintiff needs to demonstrate the presence of certain plus factors, which include (1) motive to enter the conspiracy, (2) actions against self-interest, and (3) evidence implying a traditional conspiracy.[7] That said, in a case alleging parallel price increases, the first two factors are less important as they largely restate the concept of interdependence.

Given the industry characteristics, the court focused extensively on whether plaintiffs had presented sufficient evidence of a traditional conspiracy, primarily whether a contemporaneous price-fixing conspiracy in Canada could serve as sufficient evidence of a U.S. conspiracy. This argument was essentially threefold. First, plaintiffs asserted that it was reasonable to infer a domestic conspiracy "based on the fact that the Canadian market is a similar adjacent market involving the same participants."[8] Second, they asserted that a jury should be permitted to weigh evidence of the Canadian conspiracy in

assessing the credibility of defendants' explanations for the U.S. price increases. Third, they asserted that the Canadian conspiracy "actuated" or facilitated the U.S. conspiracy.

The court reviewed other circuits, ultimately agreeing with the Second and Eleventh Circuits that "[a] conspiracy elsewhere, without more, generally does not tend to prove a domestic conspiracy."[9] The court reasoned that "[t]o hold otherwise would sanction . . . the fallacy that 'if it happened there, it could have happened here'—to prove a domestic conspiracy using evidence of a foreign conspiracy."[10] Plaintiffs needed to show that the markets were "linked or tied in some way," whether through evidence that the same employees were involved in both alleged conspiracies, or through evidence of other overlapping characteristics that would permit an inference of conspiracy.

The court rejected plaintiffs' argument that the Canadian cartel and the alleged U.S. conspiracy were connected, finding that the employees involved in the Canadian conspiracy were not involved in the alleged domestic conspiracy. For example, while Mars's and Hershey's Canadian subsidiaries reported to and received pricing approval from U.S. executives, no evidence showed that any of the U.S. executives were involved in the Canadian conspiracy and conduct, or even knew about them. *Id*. at *39. Nestlé USA's Canadian affiliate was not a subsidiary of Nestlé USA's business and the former's pricing decisions did not require the latter's approval.[11] The court also found that the Canadian manufacturers were distinct legal entities and that their wrongdoing did not speak to the conduct of the defendants.[12]

The court also found marked differences between the Canadian conspiracy and what was alleged to have occurred in the U.S. For example, the Canadian conspiracy was effectuated through a distributor, while there was no similar U.S. player. Similarly, evidence indicated that the Canadian companies' most senior executives met to exchange information and agree on prices, but the plaintiffs failed to produce any evidence of similar conduct in the U.S.[13] Additionally, the court rejected plaintiffs' "actuation theory," concluding that "[u]nless there is direct or circumstantial evidence showing that the [defendants] knew of the unlawful Canadian conspiracy, the [defendants] would have no basis to know whether the Canadian parallel [pricing actions] were the result of a conspiracy or interdependence."[14] The similar pricing outcomes in the two markets did not reflect similar conduct in the two markets.

The court similarly rejected plaintiffs' other evidence of a traditional conspiracy. Plaintiffs pointed to certain internal documents that allegedly reflected defendants' possession of each other's pricing information, for example, Hershey documents indicating that they had advance confirmation of Mars's and Nestlé USA's price increases. The court was not convinced, explaining that the mere possession of competitive intelligence is not

evidence of an agreement to fix prices.[15] Indeed, the court noted it makes common sense for a firm to obtain as much information as possible about its competitors, and that this type of evidence did not exclude the likelihood of unilateral conduct. Likewise, the court dismissed plaintiffs' evidence of opportunities to conspire and allegedly improper communications, holding, for example, that "sporadic communications among individuals without pricing authority are insufficient to create a reasonable inference of conspiracy." [16]

Viewed as a whole, the court determined that the evidence provided by the plaintiffs did not stack up to other cases where it had reversed summary judgment rulings for the defendants. Acknowledging that it held that some of the individual evidence was insufficient "without more," the court explained that all of the evidence when taken together did not provide the necessary "more" to defeat summary judgment. "In short," the court wrote," all of this evidence is as consistent with interdependence as with a conspiracy, and as such, it does not tend to exclude the possibility that the [defendants] acted lawfully."[17]

The Third Circuit's decision makes clear that while the summary judgment standard for antitrust cases is generally no different from other cases, antitrust law limits the range of permissible inferences from ambiguous evidence often liberally granted to plaintiffs. When considering this limitation, courts must carefully consider the nature of the industry and whether defendants' actions can equally be explained by independent conduct. The court also clarified that plaintiffs cannot survive summary judgment by bootstrapping conspiratorial conduct in other foreign markets. Instead, plaintiffs must establish a "palpable tie between the overseas activities and the manufacturers' pricing activities in the United States."[18]

Endnotes

1. Nos. 14-2790-14-2795, 2015 U.S. App. LEXIS 16405, at *63-*64 (3d Cir. Sept. 15, 2015).

2. *Id*. at *36 (quoting *In re Elevator Antitrust Litig*., 502 F.3d 47, 51-52 (2d Cir. 2007)).

3. *Id*. at *3.

4. Id. at *17 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).

5. *Id*. at *21.
6. *Id*.
7. *Id*. at *22.
8. *Id*. at *33.
9. *Id*. at *37
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*. at *40.
14. *Id*. at *44.
15. *Id*. at *52.
16. *Id*. at *57.
17. *Id*. at *64-*65.
18. *Id*. at *36 (quoting *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1316-17 (11th Cir. 2003)).