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Third Circuit Holds Rule of Reason Appropriate for Review of Hybrid Horizontal and Vertical Conspiracy

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On August 28, the U.S. Court of Appeals for the Third Circuit denied Winn-Dixie's appeal for a new trial in its lawsuit against the Eastern Mushroom Marketing Cooperative (EMMC). The supermarket chain alleged that EMMC, its individual mushroom farmer members, and certain downstream distributors conspired to fix the price of common white and brown mushrooms between 2001 and 2008. The Third Circuit held that the district court properly applied the rule of reason, rather than the quick look test, because the alleged price-fixing involved interconnected horizontal and vertical components among growers and distributors.[1] Under that more searching rule of reason standard, the Third Circuit found that the evidence was sufficient to sustain the verdict.

Background

In 2005, the U.S. Department of Justice (DOJ) entered into a consent judgment against EMMC after its investigation into EMMC's supply control program, under which EMMC acquired mushroom farms and sold them with deed restrictions that precluded future use as a farm.[2] Private plaintiffs filed several follow-on class actions and one non-class action against EMMC, its members, and its downstream distributors between 2005 and 2006, alleging Sherman Act violations related to both the supply control program and EMMC's minimum pricing policy. Pursuant to the minimum pricing policy, EMMC would circulate lists of minimum prices at which its members' downstream distributors should go to market.

The private cases were consolidated in the Eastern District of Pennsylvania.[3] Winn-Dixie filed a complaint in the case at issue in 2015. Following a 14-day trial in January 2022, the jury returned a favorable verdict for the defendants, finding that an overarching conspiracy existed to artificially increase mushroom prices and that EMMC participated in the conspiracy, but that Winn-Dixie had not proven the participation of individual growers and distributors, or that the conspiracy caused anticompetitive effects. Following that verdict, Winn-Dixie moved for a new trial and judgment notwithstanding the verdict. The district court denied that motion, and Winn-Dixie appealed. On appeal, Winn-Dixie asserted that it was entitled to a new trial because, among other issues, the district court erroneously examined the defendants' conduct under rule of reason, and the verdict was against the "overwhelming" weight of the evidence.

Rule of Reason Framework

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The Third Circuit determined that the rule of reason framework was the proper mode of inquiry for EMMC's arrangement. The court was guided by the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (*Leegin*), which overruled its per se condemnation of vertical price restraints. The Third Circuit also analyzed its own opinions in *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.* (*Toledo*) and *In Re Insurance Brokerage Antitrust Litigation* (*Insurance Brokerage*) — both of which discuss the implications of *Leegin* in cases involving hybrid conspiracies with both horizontal and vertical elements.[4]

The court held that because the conspiracy was a hybrid scheme involving myriad organizational structures with varying degrees of vertical integration and the downstream distributors did not act with a "unity of interest" with respect to each other or EMMC, the rule of reason standard was appropriate. Under *Leegin* and *Toledo,* this conclusion remains true, the Third Circuit explained, even if each grower-distributor relationship was formed to facilitate an upstream grower cartel. The court distinguished the application of the quick look test in *Insurance Brokerage* because Winn-Dixie had not shown horizontal spokes and nothing akin to a unilateral vertical conduit. It concluded by noting that it had not "amassed considerable experience" with the alleged arrangement, and that its own conclusion that the rule of reason was appropriate was confirmed by the jury's determination that the defendants' scheme did not, in fact, cause anticompetitive harm.

Sufficiency of Evidence

Winn-Dixie argued that the overwhelming weight of the evidence supported a finding of a substantial anticompetitive effect, because EMMC's market power was clear, given its 90% market share. The Third Circuit, however, explained that many factors are relevant when determining whether an entity has market power, not just market share. The jury had before it evidence of EMMC's steadily declining market share since 2001 and various structural obstacles to supracompetitive pricing, which indicated a lack of durable market power.[5] The court also noted Winn-Dixie's underwhelming evidence of conspiratorial success and trial testimony undercutting the statements of some EMMC representatives who had touted the cooperative's success.

Because there was more than sufficient evidence for the jury to make the findings it did, the Third Circuit found that the district court did not err in denying Winn-Dixie's motion for a new trial on sufficiency grounds.

Immunity Under Capper-Volstead

The Third Circuit's decision also provides some comfort to the independent farmers participating in agricultural cooperatives. The Capper-Volstead Act provides agricultural cooperatives a limited exemption from the antitrust laws for otherwise independent growers who are members of a cooperative to collectively market their products.

The district court had ruled that the Capper-Volstead Act does not shield EMMC because of its ambiguous relationships with distributors. For instance, EMMC member Bella Mushroom Farms recommended that its distributor Buona Foods sell produce to customers at the cooperative's minimum pricing and that an overlap in ownership does not mean the entities are under common ownership or control, and therefore are incapable of conspiring to fix prices.

The Third Circuit affirmed that the jury could rationally conclude that the cooperative participated in a conspiracy without finding that its members did; comparing EMMC to a trade association, the court noted that a business that

belongs to a trade association does not violate antitrust laws simply because the trade association does.

Conclusion

By adopting the rule of reason framework in *Winn-Dixie*, the Third Circuit cements this approach's application in assessing hybrid schemes involving various organizational structures with varying degrees of vertical integration. Further, by affirming the finding that EMMC lacked market power, despite its 90% market share, the court also affirmed the multifaceted inquiry appropriate in rule of reason cases. These developments underscore that the relevant standard is often case-dispositive in antitrust litigation and may prove useful to antitrust defendants seeking to push back against the antitrust enforcement agencies' requests to expand application of the *per se* rule.

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[1] *Winn-Dixie Stores Inc. et al. v. Eastern Mushroom Marketing Cooperative et al.,* case number 22-2289, at 14.

[2] *In re Mushroom Direct Purchaser Antitrust Litig.,* 655 F.3d 158, 161–62 (3d Cir. 2011).

[3] *Supra* note 1, at 6.

[4] *See Leegin Creative Leather Prods., Inc. v. PSKS,* Inc., 551 U.S. 877 (2007); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.,* 530 F.3d 204 (3d Cir. 2008); *In re Ins. Brokerage Antitrust Litig.,* 618 F.3d 300 (3d Cir. 2010).

[5] *Id.* at 18.

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