News from the Antitrust, UCL and Privacy Section

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7th Circuit Affirms Summary Judgment for Defendants in Containerboard Price-Fixing Case

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On December 7, 2018, the 7th Circuit affirmed an order granting summary judgment for two oligopolist-manufacturers accused of price-fixing in violation of the Sherman Act. The court observed at the outset that oligopolies pose particular "problems" for antitrust law, because firms in oligopolistic markets lack sufficient power to face Sherman Act § 2 scrutiny, and they can tacitly collude to raise prices – that is, without an actual agreement – enabling them to earn supracompetitive profits. In this matter, the court held that the "bountiful circumstantial evidence" plaintiffs developed did not cross the "fine line" from lawful conscious parallelism to an unlawful conspiracy to fix prices. The 7th Circuit's decision (as did the district court's decision) closely examines several types of evidence developed by plaintiffs, and provides useful guidance for both plaintiffs and defendants in price-fixing cases, particularly those involving oligopolistic industries. *Kleen Prods. LLC v. Georgia-Pacific LLC*, No. 17-2808, 2018 U.S. App. LEXIS 34469 (7th Cir. Dec. 7, 2018).

Background

Direct purchasers of containerboard ("Purchasers") alleged that several manufacturers conspired to increase prices and reduce output from 2004-2010. The 7th Circuit affirmed the district court's decision certifying a nationwide class of purchasers. *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919 (7th Cir. 2016). The class consisted of "All persons that purchased Containerboard Products directly from any of the Defendants or their subsidiaries or affiliates for use or delivery in the United States from at least as early as February 15, 2004 through November 8, 2010." *Id.* at 922. Most of the defendants settled with the Purchasers, but Georgia-Pacific LLC and WestRock CP, LLC decided to litigate.

Containerboard is the familiar material used to make corrugated boxes. It is manufactured in large, costly mills that are hard to duplicate given costs of construction and compliance with environmental laws. Georgia-Pacific and WestRock are among the

handful of manufacturers that dominate the industry. Demand for containerboard is relatively inelastic because available substitutes are inferior.

From February 2004 to November 2010 prices for containerboard rose dramatically. The defendants attempted to institute price increases on 15 different occasions with traditional "follow-the-leader" price increases within weeks, days or even hours. The increases were sustained nine times. At the same time prices were increasing, containerboard production capacity fell in North America—the plaintiffs' expert concluded that defendants reduced their production capacity at twice the rate of non-defendants.

During this period, the defendants were in regular communication by phone and at trade association meetings every few days. The record did not reflect the content of these communications, but there was at least some discussion of timing and pricing as a result of interfirm trading of containerboard. Some emails in the record suggest that at times some defendants had advance knowledge of other companies' proposed price increases. Other statements support the inference that a coordinated plan was in place. As to George-Pacific and WestRock, the evidence included the following:

- A WestRock vice-president made remarks in an email that could easily be construed as an undertaking to follow-the-leader.
- A different WestRock vice-president complained that the company "ha[d] no choice but to support [a price increase] initiative" and that WestRock "ha[d] done [its] part."
- At one point, a company employee wrote that the "only way to get paid is to have a 1994-95 situation where the tide rises for all boats" (perhaps referring to the container-board industry's earlier antitrust cases).
  WestRock's CEO was reported to have said that the company had a restructuring plan to "cut supply enough at [WestRock] to force price increases throughout the industry."
- Georgia-Pacific's president gave a speech during the period in question urging the industry to resist customer requests for price breaks. *7.

Legal Framework

The court recited the familiar standard that "at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently." *9-10 (citing *Bell Atlantic Corp. v. Twombly*, 550
U.S. 544 (2007)). "The Purchasers needed evidence that would allow a trier of fact to

nudge the ball over the 50-yard line and rationally to say that the existence of an agreement is more likely than not. Put more directly, they must put on the table "*some* evidence which, if believed, would support a finding of concerted behavior." *9-10 (citing *Toys "R" Us Inc. v. FTC, 221 F.3d 928, 935 (7th Cir. 2000)*). "Viewing the evidence and reasonable inferences in the Purchasers' favor, we ask whether they have produced any evidence that would rule out the hypothesis that the defendants were engaged in self- interested but lawful oligopolistic behavior during the relevant period. ..... We conclude that nothing in this record would permit a trier of fact to conclude that the defendants were colluding, rather than behaving in their independent self-interest." *11-12.

Analysis

The court explained that structural characteristics of oligopolies such as the containerboard industry make it easier to form a cartel *or* to follow a leader independently: "a small number of manufacturers, vertical integration, inelastic demand, a standardized commodity product, and high barriers to entry." *12. The court said that "[b]ecause of the competing inferences that can be drawn from this market structure, the district court properly found that the economic evidence did not tend to exclude the possibility of independent action." *13-14.

With respect to the 15 specific price increases that the Purchasers relied upon, "[f]ollowing a competitor's price increases can be consistent with rational self-interest in oligopolies" because simply following the leader when it comes to price can be highly profitable. *14. And doing so independently is not a violation of the antitrust laws.

Some of plaintiffs' evidence did not fail because it was incapable of supporting an inference of an agreement in an oligopolistic market, but under the circumstances it was insufficient. For example, the court noted "that the Purchasers overstate how coordinated hikes actually were." *15. Non-defendants led some of the attempts to increase prices, and sometimes companies followed suit more than a month later. Critically, the court said that even increases that followed quickly did little to raise suspicions. The court also dismissed the Purchasers' allegations that defendants had prior knowledge of price increases as "nothing more than speculation." For example, the best evidence the Purchasers offered with respect to Georgia-Pacific was a comment an employee made that "the party begins" after a few manufacturers announced an increase. *15-16.

The court also dismissed the Purchasers' argument that the rising prices during the class period reflected an abrupt change in business practices. The court explained that rather

than demonstrating a shift in firm behavior, the Purchasers had demonstrated only changed market conditions, which may have included emerging from the 2008 recession. Also, the manufacturers had attempted to raise prices before the beginning of the class period, which cut against an inference of a conspiracy starting at that time. The court said a further strike against the Purchaser's case was that only nine of 15 attempted increases worked; this meant a failure rate of 40%. Although 60% succeeded, the court said "that at best this leaves matters in equipoise." *17-18. Moreover, there was a conspicuous absence of any disciplinary measures taken against cheaters.

The court then turned to the Purchaser's theory of coordinated reductions in output through mill closures and machine slowdowns. It parsed what kinds of output reductions are more and less probative of an illegal agreement to restrict supply. Conduct that is easily reversed may be consistent with self-interested decision-making." *18-19. Slowing production is not the same as selling mills or equipment, which can constitute "perilous leading" because it cannot be easily reversed. "Firms take significant risks by reducing their output in an inflexible manner, unless there is an enforceable agreement in place to ensure that competitors will follow suit. .... Because perilous leading makes 'little economic sense' absent coordination, evidence of less-reversible supply restrictions supports an inference of conspiracy." *19-20. Here, Georgia-Pacific purchased a new mill, and it explained underutilization as part of its "run-to-demand strategy." *20. "Far from perilous, had Georgia-Pacific's efforts not paid off, it could have increased its output quickly. Georgia-Pacific's supply behavior does not point towards its having a role in any conspiracy." *21.

The court also discounted the evidence Purchasers developed on contacts among defendants' executives by telephone and at trade association meetings. "The Purchasers have no evidence of illicit price-fixing or output restriction deals during their calls or meetings." *22. And the court was not persuaded by the argument that the frequency of contacts supported the inference of a conspiracy because of the frequency of trading among the firms. "The Purchasers' speculation about the content of the frequent interfirm contacts is not enough to create a jury issue." *23.

The court noted that incriminating remarks by employees can support an inference of a conspiracy. As to Georgia-Pacific, Purchasers pointed to a speech in which "Georgia-Pacific's CEO supposedly suggested that the industry should "say 'no' on deals" that, though competitive, are not profitable." *24. The court was not impressed:"[T]hat is hardly an earthshattering insight, " *24. "[T]he Purchasers' noneconomic evidence—even

when viewed with the parallel conduct—does not exclude the possibility that Georgia-Pacific acted in a self-interested but permissible way." *24.

The court devoted a separate discussion to WestRock because any antitrust liability it might have for conduct before 2010 was eliminated due to a bankruptcy proceeding in which WestRock received a discharge. In reviewing the evidence, the court highlighted what it called "the most compelling evidence of collusion" as to WestRock—its supply restrictions. During the class period, the company closed seven of its mills and took other steps to reduce capacity. WestRock said the closures were due to a 2003 restructuring to get rid of inefficient plants, was part of a green marketing plan, and was when it was under the oversight of the bankruptcy court, a creditors' committee, and financial advisors. Even so, the court said this did not overcome the inference of conspiracy because its "perilous leading", in which it permanently closed several plants but stayed in the containerboard business, albeit with permanently reduced capacity, risked significant losses. In addition, company emails gave support to the inference of a conspiracy and executives made inculpatory remarks. Although some of this evidence gave the court "pause," these events took place pre-discharge and therefore were not probative of whether WestRock joined (or rejoined) a conspiracy following its discharge.

Conclusion

The court concluded by explaining that the result in the case was driven by Section 1's limitation "to anticompetitive agreements and the Supreme Court's cautions against interfering with individual firm behavior in ways that could inadvertently distort incentives to compete." *30. Because the evidence did "not tend to exclude the possibility that [defendants] engaged only in tacit collusion," the 7th Circuit affirmed. *31.