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Antitrust "market allocation" claims against nation's two biggest grocery wholesalers survive summary judgment

JULY 28, 2014| PUBLICATIONS

In *In re: Wholesale Grocery Products Antitrust Litigation*, No. 13-1297 (May 21, 2014), the Eighth Circuit allowed an antitrust case brought by a small town, family owned grocery store in Iowa, D&G, Inc.,[1] to continue against the nation's two largest wholesale distributors, SuperValu, Inc. and C&S Wholesale Grocers, Inc., finding disputed facts prevented summary judgment.

Prior to 2002, SuperValu was C&S's biggest competitor in New England. SuperValu was the dominate wholesaler in the Midwest, where C&S traditionally did not compete. In June 2002, C&S acquired a distribution center in Ohio and set its sights on the rest of the Midwest. Less than a year later, a third wholesaler, Fleming, who was SuperValu's main competitor in the Midwest, filed bankruptcy. SuperValue submitted a bid to purchase Fleming's Midwest assets, while C&S sought to acquire all of Fleming's assets nationwide, which, if successful, would make C&S SuperValu's biggest competitor in the Midwest. This threat alone apparently caused SuperValu's stock to tumble.

At the same time they were both eyeing Fleming, SuperValu and C&S entered negotiations of their own. In May 2003, C&S offered to acquire SuperValu's entire operation in New England. In July 2003, C&S and Fleming reached a final agreement, allowing C&S to designate a third party to acquire Fleming's Midwestern assets. In September 2003, SuperValue and C&S finalized an agreement in which SuperValu would receive Fleming's Midwestern assets and C&S would receive all of SuperValu's New England assets. The agreement also contained reciprocal non-compete provisions, which is where the deal gets interesting: C&S agreed not to sell to Fleming's former Midwestern customers for 5 years, without SuperValu's approval, and SuperValu agreed not to sell to any of its former New England customers for two years and not to solicit their business for five years.

In the district court, D&G moved for partial summary judgment, arguing the wholesalers committed a *per se* antitrust violation. The district court, focusing solely on the express terms of the wholesalers' non-compete agreement, denied D&G's motion because it was not a pure, horizontal division of customers or geographic territories simply because the non-compete did not prevent the wholesalers from competing in each other's markets.[2]

On appeal, the Eight Circuit framed the issue more broadly: What are the terms of the allegedly anticompetitive agreement? The Eighth Circuit, skeptical that if in fact the wholesalers intended to enter an anticompetitive agreement that they would reduce such illegal terms to writing, explained they would more likely seal their true anticompetitive agreement with a "knowing nod and wink." Noting this was not a simple breach of contract case, the Eighth Circuit explained that the plaintiff was not limited by the parol evidence rule and could use extrinsic evidence to persuade a jury what the wholesalers actually agreed upon, not just what was reflected by the written terms.

According to the Eighth Circuit, the parties generally agreed that the terms of the non-compete provisions were limited to *former* customers in the regions legally permitting each party to compete for the business of each other's *new and existing* customers. Here's the problem. The plaintiff, D&G, presented evidence that SuperValu and C&S did not in fact compete with each other in the Midwest or New England and did not intend to when they consummated their agreement, notwithstanding the plain language of the non-compete provisions. Included in this evidence were emails between key representatives of both wholesalers that seemed to suggest the intent of the agreement was to exclude such competition.

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Ultimately, the Eighth Circuit found there was enough evidence to potentially persuade a reasonable jury that what the wholesalers actually agreed to was a naked division of territory and customers.

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[1] D&G also seeks class certification to represent a class of similarly situated customers of the two wholesaler defendants.

[2] Inexplicably, the district court granted the wholesalers' summary judgment based on a finding that D&G had not defined the relevant market – an argument the wholesalers failed to raise, which was reversed by the Eighth Circuit.