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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Dairy Sellers Case Addresses Causation at Summary Judgment

By **Shepard Goldfein**

And **James A. Keyte**

On Aug. 1, 2014, a dairy-marketing cooperative, a dairy processor, and a milk bottler petitioned the Supreme Court for a writ of certiorari of *Dean Foods Co. v. Food Lion*.[1] The petitioning companies—Dean Foods Company (Dean), National Dairy Holdings, LP (NDH), and the Dairy Farmers of America, Inc. (DFA) (collectively, petitioners)—are milk wholesalers defending themselves against price-fixing allegations brought by dairy retailers. The companies initially received summary judgment on the price-fixing allegations, but the U.S. Court of Appeals for the Sixth Circuit reversed and held the case should be allowed to proceed to trial. Now, the companies seek to restore summary judgment, and specifically seek review of the question of "[w]hether…a plaintiff must produce evidence of causation to defeat a motion for summary judgment, or whether a court may instead presume causation at summary judgment and permit the case to proceed to trial based on that presumption."[2]

The companies argue that the question represents a significant conflict among the federal courts of appeals: Some courts, including the Sixth Circuit in *Dean Foods*, will presume causation at summary judgment so long as plaintiffs introduce issues of material fact relating to illegal conduct and harm; other courts require proof of a causal nexus between alleged illegal behavior and harm before they will allow claims to withstand summary judgment; and still other courts vacillate between the two approaches. The companies analogize the issue to the Supreme Court's recent decisions in *Twombly* and *Comcast*,[3] which clarified standards of proof at the pleading and class certification stages (respectively), and urge the court to shed light on another of the "critical stages of the pretrial sequence."

The plaintiffs in the underlying case, retailers of processed milk, have not yet filed a publicly available Response, but will likely dispute the companies' claims and deny that certiorari is necessary. If the Supreme Court does opt to step in, though, the resulting decision could significantly affect broad jurisprudential swaths, including issues relating to summary judgment and expert testimony.

The Underlying Litigation

In 2001, Dean Foods Company (Legacy Dean) and Suiza Foods Corporation (Suiza), the two largest processed milk bottlers in the United States, announced plans to merge into a united company, Dean. In order to secure approval of the proposed merger from the Antitrust Division of the U.S. Department of Justice, Suiza and Legacy Dean agreed to divest 11 milk bottling plants in Alabama, Florida, Indiana, Kentucky, Ohio, South Carolina, Virginia, and Utah. Those plants were transferred to NDH, a milk-bottling entity formed to compete with the newly enlarged Dean.

DFA, a dairy marketing co-operative and primary supplier and business partner of Suiza, owned a 50 percent equity interest in NDH; three individuals, two former Suiza executives and one former business partner of DFA's CEO, owned the

SHEPARD GOLDFEIN *and* JAMES KEYTE *are partners at Skadden, Arps, Slate, Meagher & Flom.* TIMOTHY GRAYSON, *an associate in the Washington, D.C., office at the firm, assisted in the preparation of this column.*

remaining 50 percent. The Justice Departrment approved the merger on Dec. 18, 2001, and the transaction closed on Dec. 21, 2001; no private party sued to challenge the combination.

In 2007, Food Lion, LLC and Fidel Breto d/b/a Family Foods, retailers of processed milk, alleged an illegal price-fixing conspiracy among Dean, DFA, and NDH. Specifically, Food Lion and Breto alleged that DFA, in order to facilitate the supplier arrangement with Dean carried over from DFA's relationship with Suiza, caused NDH to compete less vigorously with Dean and, thereby, raised the price of processed milk in violation of Section 1 of the Sherman Act. Before the close of discovery, the bottling and processing companies moved for summary judgment on the conspiracy allegation, but U.S. District Court for the Eastern District of Tennessee denied the motion.[4] The companies moved once more following discovery's conclusion.

In their supplemental motion, the merging companies argued that Food Lion and Breto had failed to establish "antitrust injury," i.e. that "the harm for which they seek recovery flows from that which makes Petitioners' conduct anticompetitive."[5] The companies focused on the testimony of Dr. Ronald Cotterill, a professor of agricultural and resource economics at the University of Connecticut, whom Food Lion and Breto employed as an expert witness. Cotterill had performed regression analyses that, according to Food Lion and Breto, proved that the alleged anticompetitive conduct had resulted in higher prices for processed milk.

The merging companies argued, though, that Cotterill's econometric models measured price increases that resulted from indisputably legal conduct, including from the unchallenged merger of Legacy Dean and Suiza. In fact, the companies pointed out, Cotterill had used the very same model the Justice Department had employed to analyze the merger and had undertaken no analysis focused on the alleged misconduct. In turn, they argued, Food Lion and Breto had introduced no evidence of injury stemming from the alleged conspiracy—merely evidence that prices had increased.

> Summary judgment is especially important in antitrust cases, which can involve costly discovery, lengthy trials, and significant penalties for those guilty of wrongdoing.

The district court sided with the merging companies and granted their motion for summary judgment, because "Dr. Cotterill's analysis [did] not create a material issue of fact on the question of whether the price increases were 'by reason of' an illegal conspiracy in violation of the antitrust laws and [Food Lion and Breto] do not allege an injury of the kind which the antitrust laws are designed to prevent."

Sixth Circuit's Denial

Food Lion and Breto appealed to the Sixth Circuit, which reversed. In an opinion by Judge Gregory F. Van Tatenhove, U.S. District Judge for the Eastern District of Kentucky, sitting by designation, the court noted a lack of "general agreement on the exact standards to use when resolving antitrust cases," but said that Sixth Circuit courts "are generally reluctant to use summary judgment disposition in antitrust actions."[6]

Given that ambiguity, the court held the district court's dismissal of Cotterill's price-increase modeling rested on "flawed propositions." Van Tatenhove identified three facts that, "taken together," showed that Cotterill's model provided sufficient evidence of antitrust injury to defeat summary judgment. First, was the fact that Food Lion and Breto had purchased processed milk from the petitioners; second, the fact that, following the Legacy Dean-Suiza merger and pursuant to Cotterill's analysis, Food Lion and Breto were charged "more for milk than an econometric analysis could justify"; and third, the fact that the district court found evidence indicating that petitioners conspired to avoid vigorous competition. Ultimately, the court held that "when competition is limited pursuant to an agreement and customers are punished through higher prices, the injury clearly results from anticompetitive conduct" and that summary judgment based on an absence of antitrust injury, therefore, "was not warranted."

A Circuit Split on Causation?

The merging companies have now asked the Supreme Court for certiorari on the quantum of proof of causation required at the summary judgment stage. Petitioners make numerous substantive arguments that the Sixth Circuit's decision in *Dean Foods* has "turn[ed] the summary judgment standard upside down." More significantly at this stage, however, petitioners claim that approaches to this evidentiary question vary among—and even within—the different circuit courts. Such a "circuit split" makes it more likely that the Supreme Court will grant certiorari in an attempt to harmonize perceived disparities.

Petitioners characterize the Sixth Circuit's decision as presuming causation at the summary judgment stage: "because [p]etitioners had not *disproved* that the observed

higher prices were caused by the alleged conspiracy, the court in effect presumed it to be so."[7] The U.S. Court of Appeals for the Second Circuit, they argue, followed a similar approach in its 2012 decision in *In re Publication Paper Antitrust Litigation*,[8] when it vacated a grant of summary judgment and said that "if an act is deemed wrongful because it is believed significantly to increase the risk of a particular injury, we are entitled…to presume that such an injury, if it occurred, was caused by the act."

On the other hand, petitioners say, the Third, Fourth, Fifth, and Eighth circuits require proof of causation at summary judgment before allowing a case to proceed to trial.[9] Petitioners focus primarily on the Eighth Circuit's opinion in *Concord Boat Corp. v. Brunswick Corp.*,[10] in which the court stated that "antitrust injury, causation, and damages are all necessary parts of the proof" and proceeded to direct a verdict for petitioners after rejecting, as evidence of causation, an expert model that "failed to account for market events that both sides agreed were not related to anticompetitive conduct"—including a merger of two competitors. Petitioners also cite *In re Baby Food Antitrust Litigation*,[11] *Abcor Corp. v. AM International*,[12] and *El Aguila Food Products v. Gruma Corp.*,[13] as instances in which courts required proof of causation—not just of injury and misconduct—to withstand a motion for summary judgment.

Finally, the First, Seventh, and Ninth circuits, according to petitioners, have inconsistently approached the standard of proof of causation necessary to defeat summary judgment.[14] The U.S. Court of Appeals for the Seventh Circuit, for example, purportedly requires proof of causation at summary judgment in antitrust cases but not in the civil RICO context (despite authorizing statutes that both require injury "by reason of" the statutory violation). Similarly, "[d]ecisions in the First and Ninth Circuits…run both directions, depending on the context."

Observations

When they file their Response, Food Lion and Breto will no doubt contest petitioners' factual and legal claims and argue that the Sixth Circuit's decision should stand. They may attempt to reconcile the apparently conflicting cases petitioners have identified. Not even Food Lion and Breto, however, can argue with petitioners' claim that unclear standards at summary judgment threaten to impose "significant burdens on both litigants and the judiciary."

> Petitioners seek review of the question of "[w]hether…a plaintiff must produce evidence of causation to defeat a motion for summary judgment, or whether a court may instead presume causation at summary judgment and permit the case to proceed to trial based on that presumption."

Summary judgment is especially important in antitrust cases, which can involve costly discovery, lengthy trials, and significant penalties for those guilty of wrongdoing. Indeed, two groups of amici—the Air Transport Association of America and the National Association of Manufacturers and International Dairy Foods Association—have already filed briefs urging the court to hear the case (both have also urged the court to overturn the Sixth Circuit).[15] Hopefully, then, the Supreme Court will carefully consider this petition and, if action is necessary, inject clarity that allows litigating parties and courts to resolve disputes both correctly and efficiently.

Finally, there is some chance that the court will be interested, in light of *Comcast*, in addressing economic expert testimony that does not appear to attempt to isolate injury that flows only (if at all) from the alleged antitrust misconduct. While the case in this sequel could be cast as an outlier, economic expert testimony obviously is a subject of significant interest to many on the court.

1. *In re Se. Milk Antitrust Litig.*, 739 F.3d 262 (6th Cir. 2014).
2. Defendant-Appellee's Petition for Writ of Certiorari at (i), *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 270 (6th Cir. 2014) (No. 14-110) [hereinafter "Cert. Petition"].
3. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).
4. See *In re Se. Milk Antitrust Litig.*, 730 F.Supp.2d 804, 813-16 (E.D. Tenn. 2010).
5. *In re Se. Milk Antitrust Litig.*, 2012 WL 1032797, at *5 (E.D. Tenn. March 27, 2012).
6. *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 270 (6th Cir. 2014).
7. Cert. Petition at 19 (emphasis in original).
8. *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 66 (2d Cir. 2012), cert. denied, 133 S. Ct. 940 (U.S. 2013).
9. Cert. Petition at 20.
10. 207 F.3d 1039, 1054-55 (8th Cir. 2000).
11. 166 F.3d 112, 125 (3d Cir. 1999) ("[T]o survive summary judgment, there must be evidence that the [challenged conduct] has an impact on pricing.").
12. *Abcor Corp. v. AM Int'l*, 916 F.2d 924, 931 (4th Cir. 1990) (affirming grant of summary judgment; "[w]hile…profit margin may have declined, the Respondents have failed to show a causal link to anticompetitive activity").
13. *El Aguila Food Products v. Gruma Corp.*, 131 F. App'x 450, 454-555 (5th Cir. 2005) ("Though jury inferences of causation are in some instances permissible, the required causal link must be proved as a matter of fact and with a fair degree of certainty.").
14. Cert. Petition at 22 (collecting cases).
15. See Brief of Amici Curiae Air Transport Ass'n of Am., Inc. et al. at 4, *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 270 (6th Cir. 2014) (No. 14-110) ("Courts of appeals exhibit continuing confusion over the rules governing the summary judgment process; departures from the standard announced by this Court are imposing enormous and unwarranted costs on litigants and the judicial system; and the approach taken by decisions like the one below in this case have the perverse effect of encouraging abusive, nuisance litigation."); Brief for Amici Curiae Nat'l Ass'n of Manu.facturers & Int'l Dairy Foods Ass'n at 2, *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 270 (6th Cir. 2014) (No. 14-110) ("The petition presents serious problems with the application of the summary judgment standard in complex civil and antitrust cases….[T]his brief will focus more narrowly on the issue of antitrust law presented by this case, which is directly relevant to amici's members, who are too often subject to meritless private antitrust litigation that can result in large settlements due to business disruption, litigation costs, and the always present risk of an erroneous ruling after trial.").