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Exorcising Specter Of Aguilar With Spirit Of Twombly

Law360, New York (February 04, 2010) -- The Ninth Circuit recently affirmed the dismissal of claims based on the aggregation of petroleum exchange agreements to show alleged "cumulative anti-competitive effects." Gilley Enterprises v. Atlantic Richfield Company, No. 06-056059 (9th Cir. Dec. 2, 2009)."

Plaintiff Gilley filed a class action in 1998 on behalf of himself and a class of wholesale purchasers of CARB (California Air Resources Board) gasoline in California. CARB gasoline is a cleaner-burning fuel, the only formulation of which may be sold in California.

The complaint alleged that the defendant major oil producers violated Section 1 of the Sherman Act by entering into a conspiracy to limit the supply of CARB gasoline and to raise CARB gasoline prices. The allegations were substantially similar to those alleged in Aguilar v. Atlantic Richfield Company, 25 Cal. 4th 826 (2001), a class action filed on behalf of a class of retail purchasers in California Superior Court in 1996.

In Aguilar v. Atlantic Richfield Company, the California Supreme Court upheld the affirmance of a grant of summary judgment on the ground that the complaint failed to properly allege an actionable conspiracy. The court held that the allegations were as consistent with independent action within an oligopolistic interdependent market as with collusion.

Based upon amendments to the California Code of Civil Procedure that brought California summary judgment practice substantially in parallel with federal practice, the court concluded that the proper standard was that announced by the United States Supreme Court in Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986.).

In Aguilar, the defendants produced evidence that the information exchanges, which consisted, inter alia, of petroleum exchange agreements, were in the individual economic self-interest of each of the participating companies, and were efficient. Accordingly, the interaction was consistent with independent action.

In Gilley, the Court of Appeals for the Ninth Circuit affirmed the district court's granting of defendants' motion to dismiss plaintiffs' Sherman 1 claim holding that (1) the Aguilar decisions precluded the allegations made in the complaint, and (2) the defendants' petroleum exchange agreements could not be aggregated to establish market power and cumulative anti-competitive effects.

Further, even if the petroleum exchange agreements could be aggregated, the absence of plausible allegations of a conspiracy to limit supply and raise prices eliminated any kind of a connection between the exchange agreements and any anti-competitive effects. Gilley Enterprises v. Atlantic Richfield Co., -06-56059 (9th Cir., Dec. 2, 2009). In so doing, the Ninth Circuit withdrew its prior opinion, filed on April 3, 2009, and reported at 561 F.3d 1004 (9th Cir. 2009).

In essence, the court held that the conspiracy allegations, to be established through the aggregation of the defendants' individual exchange agreements among each other, could not establish a plausible set of allegations of a conspiracy that would survive the holding of Bell Atlantic Corporation v. Twombly, 550 U.S. 544 (2007).

The Ninth Circuit held that: "The breadth of the SAC (second amended complaint) is inconsistent with the spirit of Twombly" 550 U.S. 544. It noted that while Twombly involved an alleged conspiracy based on parallel conduct, parallel conduct without more only provides an opportunity and does not satisfy the Matsushita test.

Specifically, plaintiffs failed to allege any set of facts plausibly explaining how petroleum exchange agreements, either individually or in the aggregate, could provide evidence of anti-competitive effects.

On an individual basis, a petroleum exchange agreement is efficient between the parties, usually of short duration, or terminable at will, and designed to efficiently reduce transaction and transportation costs that would cause the companies to incur the not inconsiderable costs of geographically transporting petroleum products to disparate refining locations, where necessary.

To condemn such exchange agreements as either individually, or in the aggregate, being "anti-competitive" would more likely than not exacerbate supply availability shortfalls and require additional, and not less, refining capacity to meet consumer expectations and needs.

The plaintiffs' aggregation theory is reminiscent of the 1949 decision of the United States Supreme Court in Standard Oil Co. of California v. United States, 337 U.S. 293 (1949) (Standard Stations).

Standard Stations enunciated the "quantitative substantiality" test for exclusive dealing contracts under Section 3 of the Clayton Act. While Standard Stations recognized that exclusive dealing contracts could have pro-competitive purposes and effects, and are not presumed to suppress competition, they may also raise antitrust issues of significance where the use of exclusive dealing arrangements will foreclose a substantial share of a market, when the market is concentrated and entry barriers not insignificant.

The "quantitative substantiality" test allowed for the aggregation of individual exclusive dealing contracts where similar arrangements were in place by a number of individual participants in the relevant market.

Thus, while the foreclosive effect of a single exclusive dealing contract employed by a single dealer might be relatively insignificant, it could raise competition issues where the same practice was employed by a significant number of competing dealers in the same market. There the ability of purchasers to substitute away from the foreclosure is reduced.

While the quantitative substantiality principle has not been extended beyond Standard Stations or exclusive dealing and tying arrangements, it was recently brought to mind by the Supreme Court's decision in Leegin Creative Leather Products Inc. v. PSKS Inc., 551 U.S. 877 (2007).

In overruling its 1911 decision in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), and in holding that resale price maintenance should be examined pursuant to the rule of reason, the Supreme Court recognized that the number of manufacturers that make use of a given practice in a market may suggest the formulation of a truncated "quick look" rule of reason analysis.

The aggregation of the market shares of the number of market participants using a given practice is suggested as an example where burden-shifting might be an appropriate analytical tool. However, the rule of "quantitative substantiality" would not make economic sense in the facts of Gilley.

No one has suggested, and no one was able to articulate, that a given petroleum exchange agreement would be other than pro-competitive and efficient. Accordingly, the aggregation of a number of pro-competitive and efficient, short-term supply agreements cannot, in a cumulative sense, produce an unreasonable restraint, even though engaged in by a number of market firms.

And so it was here. In the spirit of Twombly, the Gilley case suggests no more than the normal operation of traders in an oligopoly market, where the use of substantially similar, efficient, short-term contracts would be expected to be the norm and not the exception. Try as they might, the plaintiffs were unsuccessful in resuscitating their Aguilar claims. May they rest in repose.

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