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Cross-Market Claims Flunk *Twombly*

In two companion opinions, Magistrate Judge Louis Guirola, Jr. of the Southern District of Mississippi granted motions to dismiss and greatly limited the scope of the claims asserted against several defendants in "opt out" actions following from the *In re OSB Antitrust Litigation* in the Eastern District of Pennsylvania. *Bailey Lumber & Supply Co. v. Georgia-Pacific Corp.* Cause No. 1:08CV1394 LG-JMR (S.D. Miss, Feb. 25, 2010 and March 19, 2010).

In the order entered on February 25, 2010, the court dismissed claims against BlueLinx Corporation on the ground that the plaintiffs had not sufficiently stated a plausible cause of action for violation of Section 1 of the Sherman Act. The plaintiffs are purchasers of plywood and "oriented strand board" ("OSB"). The complaint lumps plywood and OSB together into a single "structural panel" market. Plaintiffs allege that the defendant manufacturers, and BlueLinx, a distributor, violated Section 1 by engaging in coordinated reduction of output, and facilitating anticompetitive effects in the "structural panel" market by coordinated exchanges of pricing information. In ruling on plaintiffs' second amended complaint against BlueLinx, the court again dismissed the action, holding that it would be implausible that BlueLinx, a distributor, and not a manufacturer of either plywood or OSB, would conspire with manufacturers to reduce the output of the products that BlueLinx purchased, and resold, hopefully at a profit, to its customers. The allegations relating to BlueLinx and the manufacturing defendants were held to be conclusory only, and did not plausibly or factually explain how BlueLinx could have contributed to either supply reduction coordination, or price information sharing coordination activities. The complaint does not allege that BlueLinx was a "mule", or a facilitating inter-mediator between the manufacturing defendants. The court held that *Twombly*, and its later companion case, *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), does not permit the maintenance of a complaint that does not permit the court to infer more than the "mere possibility of misconduct".

But the "main course" was the court's decision of March 19, 2010. The plaintiffs were purchasers of plywood and OSB who had opted-out of an OSB price-fixing class action; in the opt-out suit the plaintiffs asserted price-fixing claims for both plywood and OSB. The defendants moved to dismiss and strike the plywood claims as barred by the four year statute of limitations under Section 4b of the Clayton Act, 15 U.S.C. § 15b. The court began by agreeing with the defendants that plywood and OSB occupied different markets, and therefore that the defendants' motion to dismiss could properly target just the plywood claims. The court then found that the limitations

period on plaintiffs' plywood claims had not been tolled by the pendency of the OSB price-fixing class action because a plywood conspiracy was not "embraced" within that action. Accordingly, the court held that plaintiffs' allegations of anticompetitive conduct in the plywood industry prior to November 12, 2004 (i.e., four years prior to the filing of plaintiffs' initial complaint) were barred by the statute of limitations.

Next, the court examined whether the plaintiffs had sufficiently alleged a plywood conspiracy based on conduct occurring on or after November 12, 2004, which would avoid the statute of limitations ruling. The court noted that the only relevant allegations that fell within the limitations period were of "daily price-related conversations" between the defendants. While the court seemed troubled by the Supreme Court's recognition of the dangers of collusion posed by the exchange of pricing information (*see, e.g., Great Atl. & Pac. Tea Co., Inc. v. F.T.C.*, 440 U.S. 69, 80 (1979); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 457 (1978); *United States v. Container Corp.*, 393 U.S. 333, 337 (1969)), it noted that there is nothing inherently improper about competitors communicating with each other or exchanging pricing information, unless such an exchange would indicate the existence of an agreement to fix or stabilize prices. Accordingly, the court suggested that any defendant with a distribution operation might have a "legitimate business purpose" in communicating with other distributors "to inquire into current prices quoted for open market sales and any other information that could affect the current price or availability of products from its sources in the future." The court found, however, that because only one of the defendants had a distribution operation at the time of the alleged communications, this "legitimate" explanation was unavailing, and it was therefore "plausible" for *Twombly* purposes that the alleged communications were in fact in furtherance of a price-fixing conspiracy. As a result, the court concluded that plaintiffs had adequately alleged a plywood conspiracy based on conduct within the applicable limitations period.

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