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Ninth Circuit Revives Sherman Act Claim Against Oil Companies, Recasting Conspiracy Under Rule of Reason

Despite the California Supreme Court's conclusion that gasoline purchasers failed even to imply a price-fixing conspiracy among major oil companies, the Ninth Circuit U.S. Court of Appeals has allowed wholesale gasoline purchasers to proceed with similar claims against the same defendants, repackaged under the rule of reason. William O. Gilley Enters., Inc. v. Atlantic Richfield Co., 2009 U.S. App. LEXIS 7161 (9th Cir. April 3, 2009).

The 2-1 decision revives, for the moment, antitrust claims against major oil producers for their sale of cleaner-burning gasoline. But the Ninth Circuit is lingering at the pump; two defendants petitioned the Ninth Circuit for a rehearing *en banc* and, on April 28, the Court directed plaintiffs to file a response. Such orders are issued in a small minority of cases, and it may indicate a real interest in hearing the case *en banc*.

Plaintiff in Gilley, suing on behalf of wholesale gasoline purchasers, originally claimed that major oil companies violated Sherman Act Section One by conspiring to limit the supply, and raise the price, of CARB gasoline. Plaintiff's allegations mirrored those of retail gasoline purchasers in Aguilar v. Atlantic Richfield Co., 25 Cal. 4th 826 (2001). In Aguilar, the California Supreme Court found that plaintiff's evidence was consistent with independent action by the alleged conspirators, and affirmed summary judgment for defendant oil companies. Id. at 862.

Since that decision, plaintiff in Gilley has filed (or proposed to file) four different amended complaints in an attempt to avoid the collateral estoppel effect of Aguilar. Gilley, 2009 U.S. App. LEXIS 7161 at *3 to *5. According to the Ninth Circuit panel, Aguilar precluded plaintiff from alleging a per-se, horizontal price-fixing conspiracy to control gasoline prices or supply. Id. at *9.

The district court rejected each of Plaintiff's complaints. Id. at *3 to *5. The final complaint, which was the subject of appeal, alleged that each defendant entered into a series of bilateral agreements to deliver CARB gasoline to competitors, intending to limit refining capacity and keep CARB gasoline off the spot market. Id. at *5. According to the complaint, the net effect of each defendant's "exchange agreements" was to raise CARB gas prices above competitive levels. Id.

The district court granted defendants' motion to dismiss. The court found that Aguilar established that the defendants did not collude, through the use of exchange agreements, to control supply and price in the market. Id. at *7. The court then held that plaintiffs failed to allege that the exchange agreements, considered individually, would produce significant anticompetitive effects. Id. at *5.

The Ninth Circuit reversed. The entire panel agreed that Aguilar precludes any claim that defendants colluded to use the exchange agreements to control CARB gasoline supply and prices. Id. at *9. But Judge Steven S. Trott, writing for the majority and joined by Judge Richard R. Clifton, found that plaintiff could, and did, plead a cause of action based on the anticompetitive effect of the exchange agreements under the rule of reason. Id. "To the extent that the [complaint] alleges a claim that Defendants have entered into exchange agreements, without a conspiracy to control supply or to set prices, and that those agreements aggregated together have an anticompetitive effect on competition in the relevant market, it has stated a claim that is not precluded by Aguilar." Id. at *10.

According to the majority, the district court erred in refusing to consider the cumulative effects of each defendant's exchange agreements. Id. at *14. The majority rejected defendants' argument that such aggregation is appropriate only in "exclusive dealing" or "tying" cases. Id. at *15. "[N]o general rule requires that only the easiest cases may be aggregated." Id. As explained by the majority, because plaintiffs alleged that each defendant entered into a series of agreements that, taken together, unreasonably restrained trade, they have stated a Section One claim under the rule of reason. And, on a motion to dismiss, "it is not our role to determine the soundness of Plaintiffs' economic theory." Id. at *16.

This, the majority said, was exactly the mistake made by the district court. The district court concluded that, even if it could consider the aggregate effect of the contracts, plaintiffs still, at base, allege a conspiracy. The district court reasoned that the exchange contracts could not have the anticompetitive effects that plaintiffs allege without some collusion among the defendants. Id. at *21. While this might ultimately prove true, the majority said, at the motion-to-dismiss stage, it is improper to "probe[] the soundness of [plaintiff's] economic theory." Id.

In a lengthy dissent, Judge Consuelo M. Callahan argued that the majority read Aguilar too narrowly, and plaintiffs' complaint too deferentially. To the extent plaintiffs have some claim that survives Aguilar, their attempts to plead that claim are "too broad and amorphous" to satisfy the pleading standards set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), wrote Judge Callahan. Id. at *25-26.

Judge Callahan agreed with the majority that the Court may properly consider the aggregate effect on competition of each defendant's contracts. Id. at *46-47. She also agreed with the majority that Aguilar does not preclude plaintiff from stating "a claim that defendants have entered into exchange agreements, without a conspiracy to control supply or to set prices." Gilley at *29.

But, Judge Callahan wrote, plaintiff's complaint in Gilley, fairly read, alleges that defendants' "network of exchange agreements" have an anticompetitive effect only because defendants used

these agreements as tools to facilitate coordinated production and output. Id. at *33-36. And this is precisely the type of per-se conspiracy that Aguilar precludes. Id. at *38; see also id. at *34 (the complaint "implicitly, if not explicitly, asserts a conspiracy").

According to Judge Callahan, if plaintiffs intended to allege that the agreements themselves restrained trade unreasonably, they have not done so clearly enough to satisfy Twombly. The complaint offers no insight as to how these agreements would amount to an unreasonable restraint, absent collusive behavior. Id. at *38. "[S]omething beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people with the right to do so representing an in *terrorem* increment of the settlement value." Id. at *40-41 (quoting Twombly, 127 S.Ct. at 1966).

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