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Posted at 5:06 PM on June 12, 2009 by Sheppard Mullin

Eighth Circuit Affirms Dismissal of Antitrust Claims Against Amway

The Court of Appeals for the Eighth Circuit has affirmed a grant of summary judgment for defendants in an antitrust action which, according to the court, mischaracterized a vertical course of conduct as a "horizontal conspiracy." Nitro Distributing, Inc. v. Alticor, Inc., No. 08-1451, 2009 WL 1175504 (8th Cir. May 4, 2009). Applying the principles of Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), and Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986), the court held that it is incumbent upon an antitrust plaintiff, in attempting to allege a "genuine issue," to exclude the possibility of independent action. This is so whether the alleged conduct is characterized as "direct evidence," or "circumstantial evidence." The court held that only by assuming its conclusion, and by mischaracterizing a vertical course of conduct as "horizontal," could plaintiffs' complaint state a claim.

Amway operates via a "network marketing" structure under which "marketing materials" or "tool" distributors sponsor new product distributors into the company. As each "tool" distributor sponsors new "product" distributors into the company, a "sponsorship line" is thus created. Sponsoring distributors profit from their own product sales and those of other down-stream distributors in their "sponsorship line." To encourage product sales and recruit new distributors, sponsors use motivational business support materials, or "marketing materials," including tapes, lectures and rallies. In an earlier opinion, the court noted that the plaintiffs alleged that Amway's distribution plan was an illegal "pyramid-type scheme," in which distributors earned money by recruiting other distributors, with a percentage of each distributor's revenues passed along to higher-ups in the pyramid scheme. See Nitro Distributing, Inc. v. Alticor, Inc., 453 F.3d 995, 997 (8th Cir. 2006).

In affirming the district court's grant of summary judgment after remand from the 2006 Court of Appeals decision, the Eighth Circuit noted that only by assuming its conclusion, and by mischaracterizing a set of vertical arrangements as a "horizontal conspiracy," could the plaintiffs allege a genuine issue. The court stated:

> "We conclude that appellants' claims of antitrust conspiracy were appropriately dismissed. The record shows that appellants failed to exclude the possibility of independent action, have attempted to characterize vertical restraints as a horizontal restraint conspiracy,

> and have set forth factual allegations and do not demonstrate the existence of an unlawful restraint of trade."

The court held that it is not determinative that the plaintiffs had mischaracterized the course of conduct as involving "direct evidence," as opposed to "circumstantial evidence," when its mischaracterization requires the assumption of its own conclusion. The court thus distinguished arguably conflicting opinions in the Third and Eleventh Circuits. See, e.g., Rossi v. Standard Roofing, 156 F.3d 452, 466 (3rd Cir. 1998), and Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1300 (11th Cir. 2003). Whether "direct" or "circumstantial," properly pled allegations must exclude the possibility of independent action.

The court noted that a fair reading of the allegations of the complaint was that Amway was motivated to protect its products' business, and to avoid a "war" among its downstream distributors. In so doing, it provided an "antitrust primer", legal assistance and model contracts to hopefully negate the various claims that were asserted in the complaint. Thus, the Court of Appeals concluded that the course of conduct engaged in by Amway demonstrated a legitimate business justification, and thus could not be used to infer a horizontal allocation of customers or territories, or the fixing of price levels. The court also noted that plaintiffs' arguments of "dual distribution" conduct were unavailing, as Amway's participation in down-stream activities was "a small fraction of Amway's overall business and does not meaningfully compete with plaintiffs in 'product' distribution. Appellants evidenced nothing to suggest otherwise." The court stated:

> "Once again, appellant's theories are cognizable only if a conspiracy is assumed. Without this assumption, Amway's motivations and actions are all vertical – between quasi-parent company and distributor, not horizontal competitors. Vertical non-price restraints are not per se illegal." (Citing Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 724 (1988), (quoting Continental T.V., Inc. v. GTE Sylvannia, Inc., 433 U.S. 36, 58 (1977).

In essence, the Eight Circuit criticized plaintiff's mischaracterization of the course of conduct as the basic logical fallacy of assuming one's conclusion. As is often attributed to the French Philosopher Voltaire, "Grant me an 'if', and I could put Paris in a bottle." Quod erat demonstrandum.

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