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Antitrust

## Fourth Circuit Upholds Summary Judgment for Manufacturer in Exclusive Dealing Case

Despite being one of two manufacturers that control 99% of the market, E.I. DuPont de Nemours and Co. has persuaded the United States Court of Appeals for the Fourth Circuit to affirm dismissal of exclusive dealing claims against it. *Kolon Indus. Inc. v. E.I. DuPont de Nemours Sr Co.*, 748 F.3d 160 (4th Cir. Apr. 3, 2014). Kolon, a would-be competitor, claimed DuPont’s multi-year supply agreements with large customers comprised an unlawful attempt or successful creation of a monopoly in the market for para-aramid fiber, a synthetic product used in body armor, tires, and other goods. According to Kolon, these long-term exclusive contracts violated section 2 of the Sherman Act. As reported in Issue 157 of *The GPMemorandum*, the district court disagreed and granted summary judgment in 2012.

On appeal, the Fourth Circuit analyzed the exclusive dealing claims using a two-pronged approach. The court first analyzed Kolon’s claim that DuPont possessed monopoly power, and second it determined whether DuPont had willfully acquired or maintained that power through exclusive dealing arrangements. As to the monopoly claim, while there is no fixed percentage of market control that demonstrates a monopoly exists, the Supreme Court has never found that a monopoly existed when a company owned less than 75% market share. Kolon’s own expert identified DuPont’s market share to be less than 60%, a number that decreased during the time period of the alleged monopoly. Based on DuPont’s decreasing market share and lack of a controlling percentage of the market, the court found that no monopoly existed because DuPont lacked the power to control prices or restrict others from entering the industry.

Even if it presented a triable issue regarding DuPont’s alleged monopoly power, Kolon also needed to demonstrate that DuPont willfully maintained that power. Kolon alleged that DuPont’s exclusive dealing agreements satisfied this requirement. DuPont did enter into exclusive contracts with 21 of 1,000 customers, which Kolon argued barred Kolon from crossing a “critical bridge” to larger customers in the U.S. market. The court acknowledged Kolon’s argument, but concluded that it failed to show that DuPont’s agreements foreclosed a large enough volume of the market. Because DuPont neither controlled the para-aramid market nor attempted to willfully exclude Kolon, the appellate court affirmed the grant of summary judgment.

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