

**BLOGS**
Antitrust

Grocery Store's Market-Division Claim Against Wholesalers Survives Summary Judgment

The United States Court of Appeals for the Eighth Circuit has concluded neither side could prevail on summary judgment motions in an antitrust action brought by a “small town, family-owned grocery store” against SuperValu Inc. and C&S Wholesale Grocers, Inc., two of the largest grocery wholesalers in the United States. *In re: Wholesale Grocery Prods. Antitrust Litig.*, 652 F.3d 728 (8th Cir. May 21, 2014). This case arose out of negotiations by SuperValu and C&S to buy assets of a third grocery wholesaler, Fleming Companies, and to acquire certain territories from each other. D&G brought a class action complaint against the wholesalers, alleging that the true basis for their ultimate deal was a territorial division of the market. Among other things, the district court denied D&G’s motion for partial summary judgment, concluding that there was no clear division of geographical territories in the formal agreement between the parties and thus, no *per se* violation of Section 1 of the Sherman Act.

The Eighth Circuit shifted the focus from whether the evidence established a *per se* violation of the antitrust laws and concluded that a reasonable jury could find that the parties’ true agreement involved a geographical division of the market. This conclusion was based, in part, on the possibility that extrinsic evidence—such as the fact neither of the wholesalers actually competed in the other’s regions after the sales—may persuade the jury. Also, a key email written by C&S’s executive vice president indicated that “the basis of the deal” was that SuperValu would “depart[] from New England” and “wo[uld]n’t compete with [C&S] in New England.” C&S also indicated that it was “not interested in a transaction that leaves SuperValu in New England.” If the jury were to find that the true agreement was a market division, then the wholesalers committed a *per se* antitrust violation. Therefore, the Eighth Circuit concluded that the differences between the written agreement and the apparent intention of the agreement, when viewed in light of the subsequent actions taken by the wholesalers and other evidence, created a genuine and material factual dispute about the nature of the alleged scheme.

Related People

Maisa Frank

Partner

Washington, D.C.

202.295.2209

maisa.frank@lathropgpm.com