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Articles

The Aguilar Case: Federal Law Comes To California

08.01.2001

In June, 2001, the California Supreme Court decided a case that has broad implications for summary judgment standards and the type of evidence that is necessary to show an antitrust conspiracy. The defendants in *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 107 Cal.Rptr.2d 841 (2001), were petroleum companies who sold CARB gasoline, a unique type of gasoline formulated to satisfy California's stringent environmental requirements. Alleging that the price of CARB gasoline "moved generally upward across all of the petroleum companies more or less together, rising quickly and falling slowly," the plaintiff claimed that the defendants had conspired to restrict output of CARB gasoline and to raise its price. *Aguilar*, 107 Cal.Rptr.2d at 852. Plaintiffs alleged that such conduct violated both the Cartwright Act, Bus. & Prof. Code § 16720 et seq., and the unfair competition law, Bus. & Prof. Code § 17200 et seq. The defendants moved for summary judgment and submitted declarations from their officers explaining how each company independently priced its CARB gasoline. *Id.* The Court affirmed summary judgment in favor of the defendants. In so doing, the Supreme Court both clarified the summary judgment standard and established what type of evidence plaintiffs must submit to prove an unlawful conspiracy under the Cartwright Act.

The nature and quantum of the evidence necessary to support a conspiracy finding is a frequent issue in many antitrust cases. Occasionally one still finds a case in which there are secret meetings among competitors at which they agree on the prices they will charge. In most cases, however, the evidence of conspiracy will be more ambiguous and susceptible of competing inferences. Courts have long held, for example, that "conscious parallelism" among competitors is not sufficient by itself to establish a conspiracy under the Sherman Act, and there must be "plus" factors. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541-42 (1954). *Zoslaw v. MCA Distributing Corp.*, 693 F.2d. 870, 884 (9th Cir. 1982). For the most part, such principles have been embraced by California courts in adjudicating conspiracy claims under the Cartwright Act. See, e.g., *Biljac Associates v. First Interstate Bank of Oregon, N.A.,* 218 Cal. App. 3d. 1410 (1990).

In *Aguilar*, there was no direct evidence of a conspiracy. Moreover, in support of their respective summary judgment motions, each defendant submitted detailed declarations concerning how they made their capacity, production, and pricing decisions about CARB gasoline, and that they did so independently and there was no collusion with any other defendant. The plaintiff relied upon three types of evidence to support a conspiracy finding. First, plaintiff showed that the defendants had gathered and disseminated capacity, production, and pricing information through a common independent company. Second, the defendants used common consultants to advise them with respect to capacity, production, and pricing issues on CARB gasoline. Third, the defendants had frequently entered into exchange agreements under which two companies trade the same product in different geographical areas or products of different types in the same geographical area at the same time as the alleged conspiratorial activity took place. The plaintiff also offered expert testimony on the conspiracy issue.

The trial court initially granted the summary judgment motion, but then issued an order granting a new trial on the ground that it had made an error of law in granting summary judgment. In an 118 page opinion, the Court of Appeal reversed the order granting a new trial, and remanded with directions to issue an order granting the petroleum companies' summary judgment motion.

The Supreme Court unanimously affirmed the Court of Appeal. The court held that California summary judgment law (Code Civ.Proc. § 437(c)) no longer requires a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action, but only to establish that plaintiff itself does not offer sufficient evidence of that element to create an issue of material fact. 25 Cal.4th at 854. In doing so, the court "largely, but not completely" adopted the federal summary judgment standard established by a trilogy of Supreme Court decisions. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The "not completely" refers to that fact that, under California law, defendants cannot just baldly deny plaintiffs allegations, but rather must offer specific evidence as to why they would prevail at trial. 25 Cal.4th at 855. In *Aguilar*, this was not a problem because defendant's declarations were quite lengthy and detailed, and went far beyond a simple denial of collusion. Such declarations, said the court, were sufficient to carry defendant's initial burden of persuasion to make a prima facie showing of the absence of a conspiracy, and switch the burden to plaintiff to produce evidence that would allow a jury to find the existence of a conspiracy "more likely than not," not just "as likely." It was here that plaintiffs' evidence fell short.

The conspiracy standard fashioned by the *Aguilar* court is also identical to that established by the US Supreme Court in *Matsushita, supra,* as well as its earlier decision in *Monsanto Co. v. Spray-Rite Serv. Corp*., 465 U.S. 752 (1984). In *Monsanto*, the Supreme Court held that there must be a "conscious commitment to a common scheme" and that the plaintiff must present evidence that tends to "exclude the possibility that defendants acted independently." *Monsanto*, 465 U.S. at 764. In *Matsushita*, the Supreme Court held that ambiguous conduct that is as consistent with competition as collusion is insufficient to prove a conspiracy. The rationale for the *Matsushita* court's decision was that to allow such ambiguous evidence as a basis for a conspiracy finding could "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. The *Aguilar* court embraced the *Monsanto* standard by stating that the plaintiff must "present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently [.]" *Aguilar*, 107 Cal.Rptr.2d at 863. The *Aguilar* court also embraced the *Matsushita* standard, as well as its rationale, holding that to allow ambiguous evidence as a basis for a conspiracy finding could "chill pro-competitive conduct." *Id.*

The *Aguilar* court concluded that plaintiff's evidence was "ambiguous" and "as consistent with permissible competition . . . as with unlawful conspiracy." 25 Cal.4th at 862. It rejected each of the three bases offered by plaintiffs for the conspiracy finding. With respect to the use of a common source to gather and disseminate capacity, production and pricing information, the *Aguilar* court relied upon an ancient US Supreme Court decision, *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563 (1925), which held that the dissemination of such information was pro-competitive, not anti-competitive. Citing *Maple Flooring*, the *Aguilar* court commented that the dissemination of such information "tends to stabilize trade and industry, to produce fairer price levels . . ." and that the "free distribution of knowledge of all the essential factors" does not necessarily impede free competition. *Aguilar*, 107 Cal.Rptr.2d at 872 (quoting *Maple Flooring*, 268 U.S. at 582-83). Since there was no showing that the price and other information itself was misused by defendants, the gathering and dissemination of such information itself was not a basis from which one could infer a conspiracy.

With respect to the second prong of plaintiff's conspiracy evidence -- the use of common consultants by the petroleum companies -- the court noted that there were very few consultants who possessed the requisite expertise. Since all the petroleum companies were faced with the same CARB issues, it was not surprising that they would pick the same consultants. Noting that each company required confidentiality from each consultant, and that there was no evidence that the common consultants were misused as a "conduit" for a conspiracy, the *Aguilar* court concluded that use of common consultants was not a basis from which one could infer a conspiracy. *Aguilar*, 107 Cal.Rptr.2d at 872.

With respect to the third prong of plaintiff's evidence -- the exchange agreement among the petroleum companies -- the court noted that such exchange agreements have long been "common in the petroleum industry." *Id.* at 872. Citing a long series of cases, the *Aguilar* court stated that exchange agreements have "long been recognized as pro-competitive in purpose and effect, enabling or facilitating companies to compete in product and/or geographical and/or temporal markets in which they could not otherwise compete as efficiently or at all." *Id.* Again, since there was no evidence of "misuse," there was no basis to infer conspiracy from the exchange agreements.

Finally, the *Aguilar* court rejected expert testimony that the conduct here must have been collusive because it was "interdependent." It noted that, in oligopoly industries "interdependence is altogether consistent with independence." *Id.* at 873. The *Aguilar* court held that such expert opinion could not serve as a "substitute" for actual conspiracy evidence. *Id.*; *See Cel-Tech Commun., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163 (1999). The fact that the petroleum companies may have possessed the motive, opportunity, and means to enter an unlawful conspiracy was not sufficient to show collusion, but only interdependence.

The court also rejected plaintiff's conspiracy claim under Section 17200 of the Unfair Competition Act. 24 Cal.4th at 866-67. While the court conceded that *Aguilar's* unfair competition claim was not based on allegations asserting a conspiracy unlawful under the Cartwright Act, it was based on allegations asserting a conspiracy. As such, its proof was deficient for the same reasons as the Cartwright Act claim. Although the court noted that, in the abstract, conspiracy is not an element of a Section 17200 claim, it was in this case given the way in which plaintiff had framed her Complaint.

Thus, the *Aguilar* decision is significant both with respect to its formulation of a summary judgment standard, and its analysis of the type of evidence necessary to support a conspiracy finding under the Cartwright Act. There is, however, pending legislation, Senate Bill 475, which has passed the State Senate, which may affect the summary judgment standard aspects of the *Aguilar* decision. The supporters of the bill assert that it will impose "the burden on the moving party to negate the opponent's case before a motion could be granted, even if the opponent would have the burden of proof at trial." Senate Rules Committee, Office of the Senate Floor Analysis (May 15, 2001) p. 6. While this legislation may modify *Aguilar's* summary judgment standard, it should not change the substantive evidentiary requirements articulated by the *Aguilar* court necessary to prove an antitrust conspiracy. Evidence that is ambiguous, and as consistent with permissible competition as with unlawful conspiracy, is insufficient to permit a trier of fact to find a conspiracy under the Cartwright Act.

Practice Areas

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