District Court Certifies Class of Direct Purchasers of Mushrooms in Rule of Reason Price-Fixing Case

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On December 22, 2016, Judge Thomas N. O'Neill of the Eastern District of Pennsylvania unsealed an order certifying a class of "[a]ll persons and entities in [36 non-Western states and the District of Columbia] who purchased fresh agaricus mushrooms directly from an [Eastern Mushroom Marketing Cooperative (EMMC)] member or one of its co-conspirators or its owned or controlled affiliates, agents or subsidiaries . . . ." *In re Mushroom Direct Purchaser Litig.*, No. 2:06-cv-00620-TON, ECF 791 (Nov. 22, 2016), at 1. The court's decision is notable for several reasons, including its analysis of impact and damages in what the court is treating as a rule of reason case involving an alleged horizontal and vertical price-fixing conspiracy.

The class representatives—food wholesalers, grocery stores and food processors—allege that EMMC and its members violated the antitrust laws in two ways with respect to fresh agaricus (white, crimini and portabella) mushrooms. First, the plaintiffs claim that EMMC and its members circulated price lists and pricing policies, including minimum prices, for mushroom sales by distributors to the retail, wholesale, and food service markets. *Id.* at 7-9. Second, the plaintiffs assert that the defendants, through EMMC, controlled the supply of mushrooms by prohibiting mushroom production at certain farms they purchased or leased. *Id.* at 9-10.

The defendants argued that evidence showed a lack of adherence to EMMC's pricing policies and that the alleged supply control program was of no consequence. *Id.* at 8-10. They also asserted that before adopting the challenged programs they had relied on the advice of counsel that EMMC was properly formed in accordance with the Capper-Volstead Act. *Id.* at 5 n.7. The court explained that it previously rejected the Capper-Volstead defense, even

though in a prior proceeding the Department of Justice concluded that EMMC was organized pursuant to the Act. *Id.* The court also pointed out that EMMC and the DOJ had entered into a consent judgment regarding the alleged supply control conduct. *Id.* at 9, n.9.

The plaintiffs' expert opined that the non-Western United States constituted a geographic market for the mushrooms at issue. *Id.* at 10. Anticipating likely arguments based on *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), he opined that (1) the minimum pricing policies resulted in an amount of classwide aggregate damages, and (2) that the supply control agreement resulted in a separately calculable amount of aggregate damages. *Id.* The defendants' expert challenged the plaintiffs' geographic market, and opined that impact could not be demonstrated on a classwide basis and that a formulaic approach to damages could not be constructed. *Id.* at 10-11. One defense expert argued that the plaintiffs' expert failed to demonstrate that all class members sustained antitrust injury, that buyer-specific factors affected pricing, and that a properly defined market would include the entire United States and imports. *Id.* at 11-12.

The court found Rule 23(a)'s requirements of numerosity and commonality to be easily met. *Id.* at 15-17. In response to the defendants' typicality and adequacy challenges, the court dismissed a class representative it concluded was an indirect purchaser and placed limits on claims asserted by a class representative that is a group purchasing association. *Id.* at 29-40. However, the court allowed a "mom and pop" class representative, which sold in a small portion of the non-Western United States geographic market, to remain in the case. *Id.* at 40-43.

The defendants attacked ascertainability by arguing that the scope and breadth of the alleged direct purchaser class mandated individual inquiries to determine whether each class member was truly a direct purchaser or fell within the "cost-plus," "co-conspirator," or "owned or controlled" exceptions to *Illinois Brick*'s bar on damages for indirect purchasers. *Id.* at 17-28. The plaintiffs countered that because both the growers and the distributors were involved in the alleged conspiracy, there were no complicating factors involving pass-on and the potential for duplicative recovery. *Id.* at 24. The court was not persuaded by the

plaintiffs' argument, explaining that further evidence was needed regarding the relationships among growers, distributors, and EMMC, and also whether all of the relevant distributors had been named as defendants. *Id.* At the same time, the court ruled that this did not defeat ascertainability, which was addressed by the class definition. *Id.* at 26. In drawing that line, the court made clear that the plaintiffs must demonstrate that the defendants from which they purchased were integrated growers/distributors, or explain how the claimed purchases satisfy an *Illinois Brick* exception. *Id.* at 27-28.

The court then found that the plaintiffs demonstrated that common issues will predominate under Rule 23(b)(3). The court quickly found that common issues predominate as to whether the defendants violated the antitrust laws through their pricing and supply agreements. *Id.* at 45-46. The court's analysis of impact was more complicated, as it had previously ruled that because the plaintiffs allege a horizontal and vertical price-fixing conspiracy—not just a horizontal conspiracy—"plaintiffs' proposed proof of impact . . . must be considered through the lens of the rule of reason." *Id.* at 46-49. The court rejected application of the *Bogosian* shortcut (*see Bogosian v. Gulf Oil Corp.*, 561 F.3d 434 (3d Cir. 1977)), because it was persuaded that in the Third Circuit the shortcut applies only to *per se* violations. *Id.* at 49-51. The court was nonetheless persuaded that common issues predominate with respect to the nature of the alleged conspiracy and the structure of the market—including the commoditized nature of agaricus mushrooms, the alleged geographic market, and the vertical relationships among growers and distributors. *Id.* at 51-67.

The court also relied on the plaintiffs' expert's pricing regression analysis, which he used to conclude there was common impact. *Id.* at 70-71. Relying on *In re Plastic Additives*, No. 03-2038, 2010 WL 3431837, at *15 (E.D. Pa. Aug. 21, 2010), the defendants challenged the regression on the ground that it generated an "average overcharge," which "is legally insufficient to meet the requirement of proving fact of damage for every class member . . . ." *Id.* at 71. The court agreed with the general point, but found that, in contrast to *Plastic Additives*, plaintiffs' expert supported his opinion by running the regression for each class member for which the defendants had produced transaction data, and the percentage

that were impacted was high enough (although the exact percentage is redacted from the publicly available opinion). *Id.* at 72-74. The court agreed with the plaintiffs that the possibility of uninjured class members does not foreclose a finding of predominance, citing *Kleen Products* and *Tyson Foods*, and rejected the defendants' argument that the regression was insufficient because it used only the data produced by 11 of the 27 defendants, the reasonably available data. *Id.* at 74-76.

The plaintiffs' expert also performed a before and after price comparison showing a range of price increases for some class members. (The specific ranges and percentage of class members are redacted). *Id.* at 77. The defendants levied several criticisms: the fact some paid price increases does not mean all did; there was a lack of control variables; there was a "cherry picking" problem. *Id.* at 77-78. Although the court agreed that "at trial, plaintiffs must show that they experienced price increases that resulted from anticompetitive conduct," quoting *In re Blood Reagents Antitrust Litig.*, No. 09-2081, 2015 WL 6123211, at *32 (E.D. Pa. Oct. 19, 2015), it concluded the regression analysis and report were sufficient at the class certification stage. *Id.* at 78.

The court also found that the plaintiffs met their burden to demonstrate the predominance of common questions with respect to damages based on their expert's separate damages calculations for the alleged price-fixing and supply control schemes. *Id.* at 80-84. In addition to disagreeing with the defendants' argument that aggregate damages are not sufficient at the class certification, the court rejected the defendants' *Comcast* argument that the plaintiffs' damages model did not quantify the impact of the various alleged vertical agreements between growers and their distributors, according to the defendants, a fatal flaw if an alleged agreement did not exist or did not harm competition. *Id.* at 82-83. The court distinguished *Comcast* on the ground that in *Comcast* the court rejected three of the plaintiffs' four liability theories at the class certification stage, and the damages model could not be disaggregated in a way that would create support for the remaining theory of liability. *Id.* at 83-84. That was not the situation in *Mushrooms* because both the price-fixing and

supply control theories were still in the case, and the plaintiffs' theory regarding all of the various vertical agreements matched their model, at least at the class certification stage. *Id.*

The court has ordered the parties to submit an agreed-upon class notice plan and proposed form of class notice. The defendants have filed a motion for reconsideration.