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Legal Advisory

Distributors and Common Supplier Liable for Illegal Boycott of Competing Start-up Distributor

Is it lawful for two distributors to carry out a plan to contact their mutual suppliers with a threat to withhold their future purchases from the supplier unless the supplier agrees to refuse to sell a newly-formed distributor in the same market area? No, was the answer in a recent antitrust case, where the jury concluded the distributors “conspired to persuade, induce, or coerce any steel mill not to sell” product to the new market entrant. (*MM Steel, LP v. JSW Steel (USA) Inc.*, et al., 5th Cir. 2015).

Also caught up in this antitrust conspiracy was JSW Steel, a steel supplier who, the jury found, “knowingly joined” the distributors’ scheme and refused to sell product to the plaintiff, MM Steel. After 24 months in business, MM closed its doors but did prevail in its antitrust lawsuit after a six week jury trial, recovering an astounding \$52 million in damages for lost future profits, which was trebled to over \$150 million.

Background

In September 2011, two longtime salesmen departed their Gulf Coast steel distribution firm and started their own distributorship – MM Steel – in direct competition with their former firm and another local distributor. The two established distributors were not pleased with having MM as a new market entrant. They allegedly met and formed an agreement to coerce and induce their steel suppliers not to sell product to MM, or else the suppliers would lose the distributors’ business. The group boycott plan succeeded in convincing several suppliers to refuse to sell MM.

Before ceasing operations, MM sued the distributors and several steel suppliers in federal district court, alleging all defendants engaged in an illegal group boycott under the Sherman antitrust law, to deprive MM with product to re-sell. Following the jury verdict for MM, all defendants appealed but MM settled with the distributor-defendants, leaving JSW and Nucor as the remaining parties.

On appeal, JSW did not challenge the existence of the distributors’ conspiracy against MM – but they did argue there was no evidence to support the jury’s finding that JSW *knowingly joined* the conspiracy. The appeals court disagreed, noting the following events:

- August 2, 2011 - JSW signs a one-year supply agreement with MM, with stated monthly purchases, and also extends credit to MM.

- September 8, 2011 – Distributor #1 and Distributor #2 executives first meet and form conspiracy to coerce mills not to supply MM.
- September 19, 2011 – Distributor #1 meets with JSW and says JSW has a choice to make: do business with us or with MM.
- October 4, 2011 – Distributor #2 meets with JSW and threatens to cease buying from JSW if JSW sells MM.
- October 20, 2011 – JSW informs MM that it would not be selling to MM going forward, acknowledging “the gravity of its decision.” In making this decision, JSW risked a breach of contract claim for terminating its one-year supply agreement with MM.

The court noted that a manufacturer generally has a right to deal, or refuse to deal, with whomever it likes – however, a company’s refusal to sell must be an independent business decision, not one made in concert with competitors or customers. While evidence of mere complaints from a distributor to a manufacturer about a competing distributor would not be sufficient evidence to establish a conspiracy, or that a manufacturer joined a conspiracy, evidence that a manufacturer responded to a distributor’s actual *threat* can show concerted action by the manufacturer that is not independent conduct. The demarcation between a complaint and a threat is oftentimes unclear but, as this case illustrates, it can be of great legal importance when the threat succeeds in blocking a supply source.

In contrast, the verdict against Nucor was reversed. The evidence showed that Nucor’s decision not to sell MM was based on Nucor’s own independent business decision. The appeals court cited these events:

- September 1, 2011 – MM leaves Nucor’s executive a voicemail announcing formation of MM and desire to buy from Nucor. Nucor executive immediately emails reassurance to its longstanding distributor-customer, and cites its “incumbency practice” whereby Nucor remains loyal to established customers in order to maintain Nucor’s existing supply chain.
- September 2, 2011 – MM makes contact with three Nucor employees and each employee declines to quote or discuss potential sales to MM.
- September 8, 2011 – Distributor #1 and Distributor #2 first meet and form the conspiracy to coerce mills to refuse sales to MM.

Nucor declined to sell MM several days *before* the formation of the conspiracy. Therefore Nucor could not possibly have joined a conspiracy that had not yet been formed. Further, its conduct was consistent with its internal incumbency practice of supporting its established distribution network.

Source: National Association of Wholesaler-Distributors

