

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION**

Case No.

STATE OF FLORIDA EX REL.
ROBERT A. BUTTERWORTH,
ATTORNEY GENERAL,

Plaintiff,

v.

KIMBERLY-CLARK CORPORATION,
SCOTT PAPER COMPANY, INC.,
GEORGIA-PACIFIC CORPORATION,
FT. HOWARD CORPORATION,
BAY WEST PAPER CORPORATION,
CASCADES INDUSTRIES, INC.,
ENCORE PAPER COMPANY, INC.,
JAMES RIVER CORPORATION OF
VIRGINIA, MARCAL PAPER MILLS,
INC., AND WISCONSIN TISSUE
MILLS, INC. (A DIVISION OF
CHESAPEAKE CORPORATION),

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, the State of Florida, by and through its Attorney General Robert A. Butterworth, sues defendants Kimberly-Clark Corporation, Scott Paper Company,

Georgia-Pacific Corporation, Fort Howard Corporation, Bay West Paper Corporation, Cascades Industries, Inc., Encore Paper Company, Inc., James River Corporation of Virginia, Marcal Paper Mills, Inc., and Wisconsin Tissue Mills, Inc. (A Division of Chesapeake Corporation) and avers:

Jurisdiction and Venue

1. Count I of this Complaint is a civil antitrust action arising under § 1 of the Sherman Act, 15 U.S.C. § 1, for treble damages in accordance with § 4 of the Clayton Act, 15 U.S.C. § 15, and for permanent injunctive relief in accordance with § 16 of the Clayton Act, 15 U.S.C. § 26. This Court has jurisdiction of this action under 28 U.S.C. § 1337.

2. Count II of this Complaint is an action for treble damages arising under § 542.18, Florida Statutes, in accordance with § 542.22, Florida Statutes, and for injunctive relief in accordance with § 542.23 Florida Statutes. This Court has jurisdiction of claims arising under Florida law pursuant to the doctrine of pendent jurisdiction and 28 U.S.C. § 1367.

3. Count III of this Complaint is brought under § 542.18, Florida Statutes, for civil penalties in accordance with § 542.23, Florida Statutes.

4. Count IV of this Complaint arises under Chapter 501, Part II, Florida Statutes, Florida's Deceptive and Unfair Trade Practices Act, and seeks actual damages and injunctive relief under § 501.207(1); civil penalties under § 501.2075; and attorney's fees and costs under § 501.2105. The statutory violations of § 501.204, Florida Statutes,

set forth below occur in or affect more than one judicial circuit of the State of Florida.

This Court has jurisdiction of claims arising under Florida law pursuant to the doctrine of pendent jurisdiction and 28 U.S.C. § 1337.

5. Venue in the Northern District of Florida, Gainesville Division, is founded on § 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C. 1391(b), (c), and (d).

Definitions

6. As used in this Complaint, “commercial sanitary paper products” means tissue, toilet paper, paper towels, paper napkins, paper toilet seat covers and related paper products which defendants manufacture and sell for use in the commercial or “away from home” sanitary paper market.

7. As used in this Complaint, the commercial or “away from home” market refers to establishments or facilities such as office buildings, hotels, motels, restaurants, airports, schools, or any other establishment, entity or business which buys commercial sanitary paper products for use by the public.

8. As used in this Complaint, “market pulp” means pulp that is sold in the open market, rather than converted to paper within a company’s own mills. It can come from hardwood or softwood fiber, consist of virgin or recycled materials, and be bleached or unbleached.

Plaintiff

9. Plaintiff, the State of Florida, through its Attorney General Robert A. Butterworth, brings this action on behalf of all public entities and natural persons in the State of Florida which purchase or purchased commercial sanitary paper products both directly from the defendants and from defendants' authorized distributors.

10. Additionally, plaintiff, the State of Florida, through its Attorney General Robert A. Butterworth, brings this action as an enforcing authority of Florida's Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes, on behalf of all consumers as defined in § 501.203(7), Florida Statutes, including, but not limited to, public entities which purchase or purchased commercial sanitary paper products, either directly from a defendant or from any of its distributors.

Defendants

11. Defendant Kimberly-Clark Corporation (Kimberly-Clark) is a commercial sanitary paper products manufacturer incorporated in the State of Delaware with its principal place of business in Irving, Texas.

12. Defendant Scott Paper Company (Scott Paper, now merged with Kimberly-Clark Corporation) was a commercial sanitary paper products manufacturer incorporated in the State of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania.

13. Defendant Georgia-Pacific Corporation (Georgia-Pacific) is a commercial sanitary paper products manufacturer incorporated in the State of Georgia with its principal place of business in Atlanta, Georgia.

14. Defendant Fort Howard Corporation (Fort Howard) is a commercial sanitary paper products manufacturer incorporated in the State of Delaware with its principal place of business in Green Bay, Wisconsin.

15. Defendant Bay West Paper Corporation (Bay West) is a commercial sanitary paper products manufacturer incorporated in the State of Wisconsin with its principal place of business in Harrodsburg, Kentucky.

16. Defendant Cascades Industries, Inc. (Cascades) is a commercial sanitary paper products manufacturer incorporated in the State of North Carolina with its principal place of business in Rockingham, North Carolina.

17. Defendant Encore Paper Company, Inc. (Encore) is a commercial sanitary paper products manufacturer incorporated in the State of Delaware with its principal place of business in South Glens Falls, New York.

18. Defendant James River Corporation of Virginia (James River) is a commercial sanitary paper products manufacturer incorporated in the State of Virginia with its principal place of business in Richmond, Virginia.

19. Defendant Marcal Paper Mills, Inc. (Marcal) is a commercial sanitary paper products manufacturer incorporated in the State of New Jersey with its principal place of business in Baltimore, Maryland.

20. Defendant Wisconsin Tissue Mills, Inc. (A Division of Chesapeake Corp.) (Wisconsin Tissue) is a commercial sanitary paper products manufacturer incorporated in the State of Delaware with its principal place of business in Menasha, Wisconsin.

21. Whenever this Complaint refers to any act, deed, or transaction of any defendant, it means the defendant engaged in the act, deed, or transaction by or through its officers, directors, employees, agents, or other representatives while they actively were engaged in the management, direction, control, or transaction of its business or affairs.

The Commercial Sanitary Paper Products Industry

22. The defendants manufacture, sell, and cause the distribution of sanitary paper products, which is a \$8.9 billion a year industry.

23. The sanitary paper industry is divided into two distinct and separate product markets with different end-users: the “at home” or consumer market, and the commercial or “away from home” market. Schools, airports, hospitals, prisons, hotels, offices, restaurants, factories, and other institutions acquire sanitary paper in the away from home market. The sanitary paper products which defendants manufacture for the commercial or “away from home” market account for approximately one-third of all sanitary paper products produced for use in the United States.

24. Additionally, the commercial sanitary paper products market in the United States is and has been highly concentrated. Five of the larger U.S. paper manufacturers, defendants Fort Howard, Kimberly-Clark¹, James River, Georgia-Pacific, and Wisconsin Tissue, dominate the industry nationally with more than 80% combined market share.

¹In 1995 defendant Scott Paper was purchased by Kimberly-Clark. The combined market share of Scott and Kimberly-Clark is approximately 25%.

Regionally, several smaller paper manufacturers, including the defendants Bay West, Encore, Marcal, and Cascades, also play a significant role.

25. Unlike the consumer or “at home” sanitary paper products market, in which individual users base their product choices upon perceived differences between brands of products, customers in the commercial sanitary paper products market generally view commercial sanitary paper products as generic and interchangeable. With no perceived product differentiation in the market for commercial sanitary paper products, efforts by any one defendant to raise prices in that market typically will not increase profitability without some pricing coordination or concerted action among other defendants. It is defendants’ concerted action in setting and increasing prices for commercial sanitary paper products which has led to this Complaint.

26. As set forth below, in this highly concentrated industry, the defendants’ have acted in concert, conspired or combined to fix prices by coordinating price increases for commercial sanitary paper products in the United States, starting at least as early as 1993. The effect of defendants’ conspiracy is that purchasers of commercial sanitary paper products in Florida and elsewhere have been injured by paying higher prices than would have been paid in the absence of defendants’ concerted efforts to increase their prices.

Acts in Furtherance of the Conspiracy

27. Until the late 1980's and early 1990's, commercial sanitary paper products’ prices were increasing at a slow but steady rate. However, between 1990 and 1993, the

defendants entered into a bitter price war, during which time the industry saw prices and profits reach a 25-year low. A depressed economy and weak pulp prices combined to further reduce prices.

28. However, beginning in 1993, the defendants increased the wholesale prices of commercial sanitary paper products dramatically, with most of the larger defendants announcing three sets of wholesale price increases. Scott Paper led the first industry-wide price increase in February of that year. Fort Howard led the second in June. At the time defendants announced their first increase, sales personnel in the commercial sanitary paper products market were concerned that, because costs were decreasing, the sales volume of the manufacturers taking the price increases would suffer if all the manufacturers did not follow suit. These fears were put to rest, however, when, after Scott's initial price increase, Fort Howard made it clear to other manufacturers that it would be taking a second price increase in June.

29. With each of these 1993 price increases, some of the other defendants followed with their own price increases in lockstep with Scott in the first instance and Fort Howard in the second instance. Not only was pricing uniform across products, but the terms accompanying the price increases were also remarkably uniform from defendant to defendant. For example, at least as early as 1993, the defendants adopted a policy of announcing increases in writing to their distributors 30 to 60 days in advance of their scheduled effective dates.

30. Additionally, well before the defendants released their written advance announcements, the defendants purposely leaked prospective price increases to select distributors with the full knowledge and intent that these distributors would relay the information to other defendants so that they would adopt similar price increases.

31. Despite their collusive efforts, the defendants' price increases in 1993 were only partially successful. The smaller manufacturers, Bay West, Wisconsin Tissue, and Marcal, after initially announcing matching the larger competitors' price increases, ultimately undercut these prices, in an effort to increase their market shares.

32. Consequently, as a sales executive for a defendant complained in mid-1994, the 1993 price increases only yielded a net two percent increase for his company despite announced increases of approximately 13.5 percent. Clearly, defendants believed that something more had to be done to boost the sagging profit margins.

33. Then, in 1994, the smaller mills did an about-face. On May 6, defendants Marcal and Bay West uncharacteristically led a price increase for commercial sanitary paper products. The larger defendants, Kimberly-Clark, James River, Fort Howard, and Scott, feared that if they, too, increased prices, they would suffer a repeat of their earlier effort to raise prices in 1993. To be sure that the smaller mills' increases were not simply another ruse to gain market share, some of the large mills decided to ascertain the resolve of the small mills to stick by their price increases.

34. Toward that end, the larger manufacturers asked certain distributors to ascertain from the smaller mills whether the smaller mills' price increase was firm or

whether the smaller mills would eventually undercut the price increase, as they had done in 1993. This message was delivered to the smaller mills. The smaller mills responded that it was a price increase that was desired and that they would not attempt to erode the larger mills' market share. Based on this agreement or understanding, the larger defendants then matched the smaller defendants' May, 1994 price increases. In fact, Georgia-Pacific, James River, and Fort Howard all announced increases on or about the same day, May 20, 1994.

35. With this collusive system now firmly in place, the defendants took two more price increases in 1994, despite largely static or declining costs. Bay West led the 1994 summer increase in May. By December, the large mills had returned to taking the lead on price increases, this time with confidence that the smaller mills would follow. First, Fort Howard announced a 10.5% increase on December 1, 1994. Scott followed with a 10% increase on December 5, 1994. On December 7, Georgia-Pacific, James River, Wisconsin Tissue, Marcal and Bay West all announced increases of approximately 10%. The result was three sets of coordinated price increases for the year which averaged 25% to 30% per defendant. This time, the defendants' price increases stuck. The defendants' conspiracy to fix prices had succeeded. Defendants continued to increase prices in 1995, again, despite generally declining or static costs.

36. During the relevant period, in addition to communicating anticipated price increases through distributors, the defendants used numerous tools to exchange information regarding planned price increases prior to their public announcement,

including, but not limited to, direct communication of anticipated price increases between or among defendants via, among other things, various trade association meetings and conventions, some of which were held immediately before a price increase was taken.

37. Economic conditions do not and cannot explain the price increases and increased margins enjoyed by the manufacturers during the relevant time period. In fact, the price of wood pulp, the major component in paper manufacturing, had declined 18 percent since 1989 while the wholesale price of commercial sanitary paper had increased by 41 percent. In 1994 and 1995 there was excess capacity available to manufacture commercial sanitary paper products. Hence, increased demand, lack of capacity, and increased material costs did not justify the price increases enjoyed by the defendants during the relevant time period.

Effects of Conspiracy

38. Among other things, the effects of such concerted actions to set and raise prices have been that:

(a) Price competition among commercial sanitary paper products defendants for the provision of commercial sanitary paper products has been unreasonably restrained;

(b) Public entities in Florida and other Florida consumers have been deprived of the benefits of free and open competition for their purchases of commercial sanitary paper products; and,

(c) Prices for commercial sanitary paper products to public entities and other Florida consumers have been unlawfully increased.

39. In addition to the defendants named above, other entities unknown to the plaintiff and not named as defendants, including, but not limited to, other commercial sanitary paper products manufacturers and various paper products trade associations, have exchanged pricing information with defendants and participated as co-conspirators with defendants in the violations alleged in this Complaint and have performed acts and made statements in furtherance thereof.

Fraudulent Concealment

40. Defendants have fraudulently concealed the existence of antitrust and other violations alleged below. The State of Florida has exercised due diligence to learn of its legal rights and, despite such diligence, failed to uncover the existence of the violations alleged until 1996. Defendants affirmatively concealed the existence of the violations alleged through the following actions, among others:

(a) By conducting activities in furtherance of the conspiracy or other unlawful conduct in secret, avoiding reference to the conspiracy or other unlawful conduct in documents and confining information concerning the conspiracy or other unlawful conduct to a small number of key officials of the companies involved; and,

(b) By providing false explanations to purchasers for the extraordinary increases in the price of commercial sanitary paper products, including, but not limited to, increases in the cost of pulp and/or other costs and the general rate of inflation, well knowing that the price increases far exceeded any increased costs if, in fact, any costs did increase.

COUNT I

(Violations of § 1 of the Sherman Act)

41. Paragraphs 1 through 40 are realleged and incorporated by reference herein.

42. The defendants' business activities are within interstate commerce and/or affect interstate commerce, in that:

(a) Money flowed to and from banks outside the State of Florida and the defendants' operations in the State;

(b) Commercial sanitary paper products, during the period covered by this Complaint, were shipped from manufacturing points outside the State of Florida to distributors within the State of Florida; and,

(c) Agents of the various defendant corporations entered the State of Florida for business purposes and to meet within the State.

43. Beginning at a time uncertain, but at least as early as 1993, and continuing on through the present time, the defendants have entered into and engaged in a conspiracy, combination, or concert of action in unreasonable restraint of trade or commerce within the State of Florida and elsewhere with effects in the State of Florida in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing to fix and raise the prices of commercial sanitary paper products to public entities and natural persons in Florida.

44. As a result of this unlawful conduct, the defendants' customers, including public entities and natural persons in Florida, suffered an antitrust injury resulting in damages in an amount as yet undetermined. The defendants' agreements resulted in higher prices paid by public entities and natural persons in Florida for commercial sanitary paper products than would have been paid in a competitive market.

45. Defendants' unlawful conduct is continuing and unless equitable relief is granted artificially inflated prices for commercial sanitary paper products will continue unabated.

COUNT II

(Damages and Injunctive Relief for Violation of § 542.18, Florida Statutes)

46. Paragraphs 1 through 40 are realleged and incorporated by reference.

47. Sections 542.22(2) and 542.27(2), Florida Statutes, authorize the Attorney General to institute and maintain an antitrust action on behalf of public entities and natural persons in Florida.

48. Beginning at a time uncertain, but at least as early as 1993, and continuing on through the present time, the defendants have entered into and engaged in a conspiracy, combination, or concert of action in unreasonable restraint of trade and commerce within the State of Florida and elsewhere with effects in the State of Florida in violation of § 542.18, Florida Statutes, by agreeing to fix and raise prices of commercial sanitary paper products to public entities and natural persons in Florida. Engaging in the business of selling commercial sanitary paper products within the State of Florida constitutes trade or commerce within the meaning of Chapter 542, Florida Statutes.

49. As a result of this unlawful conduct, the defendants' customers, including public entities and natural persons in Florida suffered an antitrust injury resulting in damages in an amount as yet undetermined. These agreements resulted in higher prices

paid by public entities and natural persons in Florida for commercial sanitary paper products than would have been paid in a competitive market.

50. Defendants' unlawful conduct is continuing and unless equitable relief is granted artificially inflated prices for commercial sanitary paper products will continue unabated.

COUNT III

(Civil Penalties for Violation of § 542.18, Florida Statutes)

51. Paragraphs 1 through 40 are realleged and incorporated by reference herein.

52. The unlawful conduct described in paragraphs 1 through 40 of this complaint constitutes a violation of § 542.18, Florida Statutes.

53. A violation of 542.18, Florida Statutes, subjects corporations to the civil penalty outlined in § 542.21(1), Florida Statutes.

54. Engaging in the business of selling commercial sanitary paper products within the State of Florida constitutes trade or commerce within the meaning of Chapter 542, Florida Statutes.

55. The above-described conspiracy resulted in considerably higher prices paid by purchasers in Florida for commercial sanitary paper products than would have been paid in a competitive market.

COUNT IV

(Remedies for Violation of § 501.204, Florida Statutes)

56. Paragraphs 1 through 40 are realleged and incorporated by reference herein.

57. Chapter 501, Part II, Florida Statutes, provides that the Attorney General may seek injunctions and civil penalties, and actual damages on behalf of consumers.

58. Defendants engage in trade or commerce as that term is defined in § 501.203(8), Florida Statutes.

59. The unlawful conduct described in Paragraphs 1 through 40 constitutes a violation of § 501.204(1), Florida Statutes, as the acts described therein are unfair methods of competition or unfair acts or practices in the conduct of any trade or commerce within or affecting the State of Florida.

60. Defendants knew or should have known that their conduct was unfair within the meaning of § 501.204, Florida Statutes.

61. The acts and practices described in Paragraphs 1 through 40 above resulted in considerably higher prices paid by Florida consumers for commercial sanitary paper products than would have been paid in a market free of the acts and practices described above.

62. Defendants' unlawful conduct is continuing and unless equitable relief is granted, the marketing and sale of commercial sanitary paper products at artificially inflated prices will continue unabated.

Prayer for Relief

WHEREFORE, plaintiff requests the following relief:

- A. A jury verdict for compensatory damages.
- B. A judgment against all defendants, jointly and severally, by the Court for treble the amount of the jury verdict and for attorney's fees, costs and interest as allowable by law for violations of the Sherman Act and the Florida Antitrust Act.
- C. A judgment against all defendants, jointly and severally, by the Court for the actual amount of compensatory damages and for attorney's fees, costs and interest as allowable by law for violations of the Florida Deceptive and Unfair Trade Practices Act.
- D. To order that each defendant be permanently enjoined from future violations of § 1 of the Sherman Act, 15 U.S.C. § 1.
- E. To order that the plaintiff be awarded its costs of this suit and reasonable attorney's fees.
- F. To judge and decree that defendants have engaged in an unlawful combination or a conspiracy restricting trade and commerce in violation of § 542.18, Florida Statutes.
- G. To order each corporate defendant to pay a civil penalty in the amount of one million dollars (\$1,000,000) for each violation in accordance with § 542.21, Florida Statutes.
- H. To order that each defendant be permanently enjoined from future violations of Chapter 542, Florida Statutes.

I. To order that each defendant be permanently enjoined from future violations of § 501.204, Florida Statutes.

J. To order each defendant pay a civil penalty in the amount of \$10,000 for each violation of § 501.204, Florida Statutes, pursuant to § 501.2075, Florida Statutes.

K. To order such further relief as the Court may deem just and proper under Florida law.

JURY DEMAND

Plaintiff hereby requests a trial by jury on all issues triable by jury.

Respectfully submitted this _____ day of _____, 1997.

ROBERT A. BUTTERWORTH
Attorney General

PETER ANTONACCI

Florida Bar No. 280690

PATRICIA A. CONNERS

Florida Bar No. 0361275

LIZABETH A. LEEDS

Florida Bar No. 0457991

MARK S. FISTOS

Florida Bar No. 0909191

Assistant Attorneys General

Office of the Attorney General

Antitrust Section

PL-01, The Capitol

Tallahassee, Florida 32399

Tel: (904) 488-9105

Fax: (904) 488-9134