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LITIGATION NOTE: DuPont Prevails in Antitrust Price-Fixing Lawsuit

Washington – October 6, 2017: E. I. du Pont de Nemours and Company (DuPont) has prevailed in an antitrust price-fixing lawsuit alleging $176 million of damages brought by The Valspar Corporation and Valspar Sourcing, Inc. (collectively "Valspar"). On September 14, 2017, the U.S. Court of Appeals for the Third Circuit affirmed a district court decision that dismissed Valspar's claims that DuPont participated in a conspiracy to fix the price of titanium dioxide.

Prior to filing suit in this case, Valspar had opted out of a class action in the U.S. District Court for the District of Maryland, *In re Titanium Dioxide Antitrust Litigation*, which was dismissed in its entirety following settlement. DuPont and one other defendant settled the class case prior to the summary judgment ruling, and two others settled after the ruling but shortly before trial. On January 25, 2016, Judge Richard G. Andrews of the U.S. District Court for the District of Delaware granted DuPont's motion for summary judgment. Judge Andrews cited the Third Circuit's September 2015 ruling affirming summary judgment in favor of defendants accused of fixing the price of chocolate confectionaries as "quite instructive" in explaining why he reached a different opinion than Judge Richard J. Bennett in the Maryland class action litigation, holding that the chocolate confectionary case suggests that "in the antitrust oligopoly context, summary judgment cannot be avoided simply by having amassed a significant amount of ambiguous evidence."

On September 14, 2017, the United States Circuit Court of Appeals for the Third Circuit affirmed this decision. Judge Thomas Hardiman, writing for the majority, recognized that courts should exercise caution in accepting inferences from circumstantial evidence in price-fixing cases involving oligopolies because independent actions taken by oligopolists can be "nearly indistinguishable from horizontal price fixing." This phenomenon is the result of interdependence, which occurs because, as the court explained, "any rational decision [in an oligopoly] must take into account the anticipated reaction of other firms." Consequently, there is an "important distinction" to the general summary judgment standard in antitrust cases—that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Proof of conspiracy must therefore go beyond "mere interdependence" to be sufficient to survive summary judgment. The court observed that this standard is important because mistaken inferences are especially costly in antitrust cases. Applying the standard, consistent with Third Circuit precedent, the court held that summary judgment was appropriate in this case. In examining the evidence, the court found that 31 parallel price increases were consistent with rational, lawful conduct in an interdependent oligopoly, and did not satisfy the court's previously articulated standard that parallel pricing must "be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it" to be probative of conspiracy. Similarly, addressing the other evidence, the court found that it was all consistent with independent, legitimate action in the marketplace. Ultimately, the court concluded that "Valspar did not offer any single form of evidence that would have gotten it close to showing that a conspiracy is more likely than not."

Crowell & Moring represented DuPont in this matter. The team was led by partner Shari Ross Lahlou, and included partner Clifton S. Elgarten, and associates Benjamin Wastler, and Randa Adra.

Contact: **An Pham**
Manager, Media PR & Communications
+1 202.508.8740
apham@crowell.com