IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRADBURN PARENT TEACHER STORE, INC., On Behalf of Itself and Others Similarly Situated	:	CIVIL ACTION
v.	:	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY)	:	NO. 02-7676

MEMORANDUM

Padova, J. **June 9, 2005**

Plaintiff, Bradburn Parent Teacher Store, Inc. ("Bradburn"), has brought this antitrust class action against Defendant 3M for damages arising out of 3M's anti-competitive conduct during the time period from October 2, 1998 through the present. Presently before the Court is 3M's Motion for Reconsideration of the Court's March 30, 2005 Memorandum and Order finding certain material facts to be without substantial controversy and established upon the trial of this action or, in the alternative, Motion for Certification of Interlocutory Appeal. For the reasons that follow, said Motion is granted in part and denied in part.

I. BACKGROUND

The conduct of 3M which forms the basis of this class action lawsuit was the subject of a prior lawsuit in this Court, Le Page's, Inc. v. 3M, Civ. A. No. 97-3983 (E.D. Pa.). In that suit, LePage's, Inc., a competing supplier of transparent tape, sued 3M alleging, *inter alia*, unlawful maintenance of monopoly power in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. After a nine-week trial, the jury found in favor of LePage's on its unlawful maintenance of monopoly power claim. The jury awarded damages in the amount of $22,828,899.00, which were subsequently trebled to $68,486,697.00. See Le Page's, Inc. v. 3M, Civ. A. No. 97-3983, 2000 WL 280350 (E.D. Pa. Mar. 14, 2000). 3M filed a Motion for Judgment as a Matter of Law, which this Court denied on March 14, 2000. See id. 3M thereafter appealed this Court's denial of its Motion for Judgment as a Matter of Law to the United States Court of Appeals for the Third Circuit ("Third Circuit"). A Third Circuit panel initially reversed this Court's Order upholding the jury's verdict and directed the Court to enter judgment for 3M on LePage's' unlawful maintenance of monopoly power claim. LePage's, Inc. v. 3M, 277 F.3d 365 (3d Cir. 2002) ("LePage's I"). Upon rehearing *en banc*, the Third Circuit vacated the panel decision and reinstated the original jury verdict against 3M. LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) ("LePage's II"), cert. denied 124 S. Ct. 2932 (2004).

The Complaint in the instant litigation alleges one count of monopolization in violation of Section 2 of the Sherman Act. The Complaint asserts that 3M unlawfully maintained monopoly power in the transparent tape market through its bundled rebate programs[1] and through exclusive dealing arrangements with various retailers. The Complaint further alleges that, as a result of 3M's conduct,

[1] As described at length in the LePage's litigation, 3M's bundled rebate programs provided purchasers with significant discounts on 3M's products. However, the availability and size of the rebates were dependant upon purchasers buying products from 3M from multiple product lines. See LePage's II, 324 F.3d at 154-55.

Bradburn and other class members[2] have "suffered antitrust injury." (Compl. ¶ 27). The damages period in this case runs from October 2, 1998 to the present. (Id. ¶ 2). Bradburn filed a Motion for Partial Summary Judgment on the basis that several issues had been fully and fairly litigated in the LePage's case so that collateral estoppel now applied. By Memorandum and Order dated March 30, 2005, the Court denied Bradburn's Motion, but held that collateral estoppel nonetheless applied to establish the following facts upon the trial of the instant action:

1. For the time period from June 11, 1993 to October 13, 1999, the relevant market in this matter is the market for invisible and transparent tape for home and office use in the United States;
2. For the time period from June 11, 1993 to October 13, 1999, 3M possessed monopoly power in the relevant market, including the power to control prices and exclude competition in the relevant market;
3. For the time period from June 11, 1993 to October 13, 1999, 3M willfully maintained such monopoly power by predatory or exclusionary conduct; and
4. For the time period from June 11, 1993 to October 13, 1999, 3M's predatory or exclusionary conduct harmed competition.

(03/30/2005 Memorandum and Order at 41.) In the instant Motion, 3M moves the Court to reconsider its March 30, 2005 Memorandum and Order with regard to all issues which the Court deemed established for purposes of the trial of this action, with the exception of its

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[2] On August 18, 2004, the Court certified as a class "[a]ll persons who directly purchased invisible or transparent tape from 3M between October 2, 1998 and the present, who have not purchased, for resale under the class member's own label, any 'private label' invisible or transparent tape from 3M or any of 3M's competitors at any time from October 2, 1988 to the present." (August 18, 2004 Memorandum and Order.)

determination that, for the time period from June 11, 1993 to October 13, 1999, the relevant market in this matter is the market for invisible and transparent tape for home and office use in the United States. In the alternative, 3M has moved the Court to certify this matter for interlocutory appeal.

II. LEGAL STANDARD

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). A motion for reconsideration will only be granted if the moving party establishes: (1) the existence of newly available evidence; (2) an intervening change in the controlling law; or (3) a need to correct a clear error of law or prevent manifest injustice. Pub. Interest Research Group of N.J. v. Magnesium Elektron, 123 F.3d 111, 116-17 (3d Cir. 1997). Reconsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of judicial resources. Moyer v. Italwork, Civ. A. No. 95-2264, 1997 WL 312178, at *3 (E.D. Pa. June 3, 1997). Plaintiff does not allege the existence of newly available evidence or an intervening change in the controlling law. Rather, Plaintiff argues that the Court made clear errors of law when it applied collateral estoppel to deem certain issues established for the purposes of this trial.

III. DISCUSSION

Courts apply federal common law principles of issue preclusion when determining the preclusive effect of a prior federal action. Burlington N. R.R. Co. v. Hyundai Merch. Marine Co., 63 F.3d 1227, 1231 (3d Cir. 1995).[3] Under the doctrine of issue preclusion, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). The doctrine of issue preclusion is derived from "the simple principle that later courts should honor the first actual decision of a matter that has been actually litigated." Burlington, 63 F.3d at 1231 (citation omitted). Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

Here, Bradburn, which was not a party to the LePage's litigation, sought to use issue preclusion offensively against 3M, which was a party to LePage's. It is well-settled that "a litigant who was not a party to a prior judgment may nevertheless use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding." Parklane, 439 U.S. at

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[3] Throughout this opinion the Court will use the phrase "issue preclusion" and "collateral estoppel" interchangeably. See Witowski v. Welch, 173 F.3d 192, 198 (3d Cir. 1999) (noting that the doctrine of collateral estoppel is now commonly referred to as issue preclusion).

326. This form of issue preclusion is also known as offensive non-mutual collateral estoppel.[4] Burlington, 63 F.3d at 1232.

The party seeking estoppel must show that the following four elements are satisfied: "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) that issue [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment." Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n, 342 F.3d 242, 252 (3d Cir. 2003) (quoting Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n, 288 F.3d 519, 525 (3d Cir. 2002)). In addition, the application of offensive non-mutual collateral estoppel is "subject to an overriding fairness determination by the trial judge." Burlington, 63 F.3d at 1232. The trial court has "broad discretion to determine when [collateral estoppel] should be applied." Parklane, 439 U.S. at 651.

A. Power to Control Prices and Exclude Competition

3M argues that the Court made a clear error of law when it found pursuant to Rule 56(d) that "3M possessed . . . the power to control prices and exclude competition in the relevant market." (03/30/2005 Memorandum and Order at 41.) 3M does not argue that the jury in LePage's did not determine that 3M had the power to

[4] For the sake of simplicity, the Court will refer to the doctrine of offensive non-mutual collateral estoppel as "collateral estoppel" and "offensive collateral estoppel" when addressing the legal rule which governs the preclusive effect of a prior judgment in this case. See Raytech Corp. v. White, 54 F.3d 187, 190 n.5 (3d Cir. 1995).

exclude competition. Rather, 3M contends that it would be improper to also infer from the jury's verdict in LePage's that 3M had the power to control prices, because 3M presented evidence at trial that the market was dominated by customers much larger than 3M, who were in a position to retaliate on a broad range of product purchases if 3M were to charge supra-competitive prices for transparent of invisible tape. 3M argues that a rational jury in LePage's could, therefore, have found that although 3M had the ability to exclude competition, it did not have the power to control prices.

Collateral estoppel is properly applied to factual inferences drawn from a general jury verdict when such findings are necessarily implied by the prior verdict. Ag. Servs. of Am., Inc. v. Nielson, 231 F.3d 726, 731 (10th Cir. 2000) (citing Butler v. Pollard, 800 F.2d 223, 225 (10th Cir. 1986); Chew v. Gates, 27 F.3d 1432, 1438 (9th Cir. 1994); see also Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 844 (7th Cir. 1978). Inferences are necessarily implied by a prior verdict if they are as a practical matter necessary to support that verdict, and a rational jury thus must have made such findings. Chew, 27 F.3d at 1438; In re Nangle, 274 F.3d 481, 483 (8th Cir. 2001); Hoult v. Hoult, 158 F.3d 29, 31-32 (1st Cir. 1998). In determining whether or not an implicit factual finding was necessary for a prior verdict, courts may consider the reasonableness of various interpretations of the evidence. 18 Charles A. Wright, et al., Federal Practice and Procedure § 4420, at 523 (2d ed. 2002).

In its March 30, 2005 Memorandum and Order, the Court found that 3M's power to control prices was essential to the jury's verdict in LePage's because the jury had determined that 3M had the power to exclude competition, and "the ability to exclude competition necessarily results in the ability to control prices." (03/30/2005 Memorandum and Order at 23.) The Court reasoned that

> "Once a monopolist achieves its goal by excluding potential competitors, it can then increase the price of its product to the point at which it will maximize its profit." LePage's II, 324 F.3d at 164. Indeed, "[t]he more competition a company faces, the less it can control prices because competitors will undercut its prices to secure market share. Conversely, a company that can exclude competition can sustain its ability to control prices." Pepsico, Inc. v. Coca-Cola Co., 315 F.3d 101, 107-08 (2d Cir. 2002) (citations omitted); see also LePage's II, 324 F.3d at 164 (exclusion of competitors allows companies to increase price of products); Barr Labs, Inc. v. Abbott Labs., 978 F.2d 98, 114 (3d Cir. 1992) (competition "would have prevented [defendant] from raising prices for any lengthy period of time"); Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 26 (3d Cir. 1978) (ongoing competition "guards against the ability of the dominant entity to increase prices"); see generally 2A Phillip E. Areeda, et al., Areeda & Hovenkamp's Antitrust Law, ¶ 501, at 85-86 (2002).

(Id. at 24.) The United States Court of Appeals for the District of Columbia Circuit has further explained that, while monopoly power is broadly defined as the power to control prices or exclude competition, "[m]ore precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level." United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001) (citing 2A Phillip E. Areeda et al., Antitrust Law ¶ 501, at 85 (1995)).

Contrary to 3M's assertion, the mere fact that 3M's larger customers could have retaliated had 3M raised prices beyond their existing levels did not permit the jury in LePage's to find that 3M did not have the power to control prices. It is well-established that the goal of a monopolist who has attained the power to control prices is not to drive the price of its product up as high as possible, but rather to "increase the price of its product to the point at which it will maximize its profit." LePage's II, 324 F.3d at 164. The ability of consumers to restrain a company from raising prices above the competitive level by decreasing their demand for the monopolist's product is well-recognized, and generally taken into account in the relevant market definition. See Microsoft, 253 F.3d at 52.

While 3M's point of profit maximization for invisible and transparent tape may have been lower than usual due to the potential retaliation by its larger costumers across 3M's product line, the potential for decreases in demand for 3M's products as a result of an increase in tape prices does not establish that 3M might not have had the power to control prices. Rather, the fact that 3M could have faced declining demand across its product range had it exercised its power to raise tape prices merely establishes that the tape price at which 3M maximized its profit was the price which it was actually charging, and that any further price increase would have been unprofitable. See LePage's II, 324 F.3d at 164. Accordingly, the evidence 3M presented in the LePage's trial to suggest that some of its customers might have retaliated by refusing to buy 3M products had 3M raised the price for invisible and transparent tape is has no impact on the Courts determination that the power to exclude competition in this case necessarily results in the power to control prices. The Court thus correctly concluded in its March 30, 2005 Memorandum and Order that the jury in LePage's necessarily determined that 3M possessed both the power to exclude competition and control prices.

3M further argues that a finding that it is established for the purposes of the trial of this action that 3M had the power to control prices creates an unfair risk that the jury in this case will either consider itself constrained to find that 3M did in fact control prices, or speculate that the LePage's jury might have made such a finding. However, a finding that 3M had the power to control prices does not establish that 3M in fact exercised that power to the detriment of Bradburn, and Bradburn retains the burden of proving this allegation at trial. Moreover, as the Court noted in its March 30, 2005 Memorandum and Order, 3M's fears of juror confusion can and will be fully addressed through appropriate jury instructions. Accordingly, the Court finds that it correctly concluded in its March 30, 2005 Memorandum and Order that the application of collateral estoppel to the issue of 3M's power to exclude competition and control prices is fair to 3M. 3M's Motion for Reconsideration is, therefore, denied in this respect.

B. Maintenance of Monopoly Power

3M also argues that the Court made a clear error of law when found pursuant do Rule 56(d) that "3M willfully maintained . . . monopoly power by predatory or exclusionary conduct." (03/30/2005 Memorandum and Order at 41.) 3M contends that this finding improperly suggests that 3M had unlawfully acquired a monopoly or would have lost its monopoly position absent the conduct challenged in LePage's as predatory or exclusionary. However, the statement that 3M willfully *maintained* monopoly power in no way suggests that 3M willfully *acquired* monopoly power or would have lost such power absent the conduct challenged in LePage's. 3M therefore remains free to argue that it would have acquired and continued to possess its monopoly position even if 3M had not engaged in predatory or exclusionary conduct. (See id.)

3M further contends that it would be unduly prejudicial to apply collateral estoppel to a determination that 3M willfully maintained monopoly power by predatory or exclusionary conduct without being able to tell the jury specifically which of 3M's practices were predatory or exclusionary.[5] 3M argues that this holding will prevent a jury in the instant case from fully exploring the rational nexus between the actual conduct found to be unlawful in LePage's and the claim of injury to Bradburn. However, the Court's March 30, 2005 Memorandum and Order in fact has the opposite effect. As noted in the March 30, 2005 Memorandum and Order, "even for the period from June 11, 1993 through October 13, 1999, Bradburn will still be required to offer proof that 3M's antitrust violations caused Bradburn injury of the type the antitrust laws were intended to prevent." (Id. at 41.) Thus, it remains for the jury in this case to determine not only which of the five practices challenged in LePage's were in fact predatory or exclusionary, but also whether a rational nexus exists between this unlawful conduct and any injury to Bradburn. Accordingly, the

[5] In its Motion for Partial Summary Judgment Bradburn had asked the Court to establish through the application of collateral estoppel that 3M's predatory or exclusionary conduct during the relevant period included:

a) 3M's rebate programs, such as Executive Growth Fund, Partnership Growth Fund, Brand Mix Program;
b) 3M's Market Development Fund, and other payments to customers conditioned on customers achieving certain sales goals or growth targets;
c) 3M's efforts to control, or reduce, or eliminate private label tape;
d) 3M's efforts to switch customers to 3M's more expensive branded tape; and
e) 3M's efforts to raise the price consumers pay for Scotch tape.

The Court, however, declined to apply collateral estoppel to this issue because the jury in LePage's could have "based its finding of predatory or exclusionary conduct on any one of the five examples alone," and thus "none of the five alleged predatory or exclusionary practices were essential to the judgment in LePage's." (03/30/2005 Memorandum and Order at 27.)

Court finds that it correctly concluded in its March 30, 2005 Memorandum and Order that the application of collateral estoppel to the issue of 3M's unlawful maintenance of monopoly power by predatory or exclusionary practices is fair to 3M. 3M's Motion for Reconsideration is, therefore, denied in this respect.

C. Harm to Competition

3M further argues that the Court made a clear error of law when it found pursuant to Rule 56(d) that "3M's predatory or exclusionary conduct harmed competition." (03/30/2005 Memorandum and Order.) 3M argues that the LePage's jury was never instructed that it was required to find harm to competition; that although the jury found that plaintiff in LePage's had been harmed, there was evidence that competition in general was benefitted; and that a finding of harm to competition in any event was not essential to the jury's verdict.

It is well-established that "the antitrust laws . . . were enacted *for the protection of competition not competitors.*" Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 275 n.1 (3d Cir. 1999) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)). To establish unlawful maintenance of a monopoly under section 2 of the Sherman Act, therefore, proof of "[p]redatory or exclusionary practices in themselves are not sufficient. There must be proof that competition, not merely competitors, has been harmed." United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005) (citing LePage's II, 324 F.3d at 162). Nonetheless, "a finding of no anticompetitive market effect would not suffice to dispose of [a] claim under section 2 of the Sherman Act," Angelico, 184 F.3d at 275 n.5 (citing Mahone v. Addicks Util. Dist., 836 F.2d 921, 939 (5th Cir. 1988)), because "[i]njury to competition is *presumed* to follow from the conduct proscribed by section 2." Mahone, 836 F.2d at 939 (emphasis added). In other words, "harm[] to competition itself [is] a *sine qua non* for a § 2 violation." LePage's II, 324 F.3d at 162.

Thus, even though the Court in LePage's properly noted that harm to competition was not an element of a section 2 claim and did not instruct the jury that it was required to find harm to competition, such finding was necessarily implied by the jury's determination that 3M had unlawfully maintained monopoly power in violation of section 2. Accordingly, in reviewing the jury's verdict in LePage's, the Third Circuit explicitly stated that "3M's exclusionary conduct not only impeded [plaintiff's] ability to compete, *but also it harmed competition itself*." Id. The Court thus finds that it correctly concluded in its March 30, 2005 Memorandum and Order that the application of collateral estoppel to the issue that 3M's predatory or exclusionary conduct harmed competition is appropriate and fair to 3M. 3M's Motion for Reconsideration is, therefore, denied in this respect.

D. Applicable Time Period

Finally, 3M argues that the Court made a clear error of law when it applied collateral estoppel to the jury's findings in LePage's for "the time period from June 11, 1993 to October 13, 1999." (03/30/2005 Memorandum and Order at 41.) 3M argues that, due to the general nature of the verdict rendered in LePage's, it impossible to discern the exact time period for which the jury in LePage's found that 3M possessed monopoly power, willfully maintained such power, and harmed competition. Accordingly, 3M contends that it was incorrect for the Court to apply collateral estoppel to the jury's findings in LePage's for the entire period from June 11, 1993 to October 13, 1999.

The jury in LePage's returned a general verdict which contained no special interrogatories relating to the time period during which it found that 3M had engaged in unlawful conduct. Similarly, the jury charge did not instruct the jury to find that 3M had acted in violation of section 2 from June 11, 1993 until the present. Consequently, the Court agrees that although the jury in LePage's considered evidence for the period from June 11, 1993 until October 13, 1999, the date on which the jury rendered its verdict, it is not possible to infer from the jury's verdict that 3M had engaged in unlawful conduct throughout the entire June 11, 1993 to October 13, 1999 period of time. Collateral estoppel, therefore, can only be applied to establish that 3M engaged in unlawful behavior for some period of time between June 11, 1993 and

October 13, 1999. Accordingly, the Court reconsiders its March 30, 2005 Memorandum and Order with respect to the application of collateral estoppel for the period of time from June 11, 1993 through October 13, 1999, and finds that collateral estoppel is properly applied to establish only that, for some period of time between June 11, 1993 and October 13, 1999, 3M possessed monopoly power, willfully maintained such power and harmed competition. 3M's Motion for Reconsideration is, therefore, granted in this respect.[6]

IV. CONCLUSION

For the foregoing reasons, 3M's Motion for Reconsideration is granted in part and denied in part. As 3M's Motion for Reconsideration grants 3M substantial relief, the Court further concludes that it need not reach 3M's alternative Motion for Certification of Interlocutory Appeal. Should 3M desire certification of this matter for interlocutory appeal despite the Court's reconsideration of its March 30, 2005 Memorandum and Order, 3M may renew its Motion within ten days of the date of this Memorandum and Order.

An appropriate Order follows.

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[6] The Court notes that this amendment to the March 30, 2005 Memorandum and Order has no impact on this Court's determination that the application of collateral estoppel in this case is fair to 3M and will serve judicial economy. See (03/30/2005 Memorandum and Order at 27-41.)

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3M (MINNESOTA MINING AND MANUFACTURING COMPANY)	:	

O R D E R

AND NOW, this 9th day of June, 2005, upon consideration of Defendant 3M's Motion for Reconsideration of March 30, 2005 Order (Doc. No. 215), all documents submitted in response thereto, and the Argument held on May 9, 2005, **IT IS HEREBY ORDERED** that said Motion is **GRANTED IN PART** and **DENIED IN PART**, and the Court's March 30, 2005 Memorandum and Order (Doc. No. 211) **IS HEREBY AMENDED** to read as follows:

1. For the time period from June 11, 1993 and October 13, 1999, the relevant market in this matter is the market for invisible and transparent tape for home and office use in the United States;
2. For some period of time between June 11, 1993 and October 13, 1999, 3M possessed monopoly power in the relevant market, including the power to control prices and exclude competition in the relevant market;
3. For some period of time between June 11, 1993 and October 13, 1999, 3M willfully maintained such monopoly power by predatory or exclusionary conduct; and
4. For some period of time between June 11, 1993 and October

13, 1999, 3M’s predatory or exclusionary conduct harmed competition.

IT IS FURTHER ORDERED that 3M’s alternative Motion for Certification of Interlocutory Appeal (Doc. No. 215) is **DISMISSED AS MOOT WITHOUT PREJUDICE** to renew said Motion within ten days of the date of this Order.

BY THE COURT:

/s/ John R. Padova

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John R. Padova, J.