

3M Company Prevails in en banc hearing before the United States Court of Appeals for the Sixth Circuit

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The Sixth Circuit affirmed, en banc, the dismissal of an antitrust complaint against 3M Company, in *NicSand v. 3M*, a Sherman Act § 2 case dealing with issues of antitrust injury and exclusive dealing in a purported nationwide, do-it-yourself automotive sandpaper market. After a divided panel of the Court had reversed a lower court decision in favor of 3M, Cahill was retained by 3M Company to brief and argue the en banc appeal.

The Cahill team successfully persuaded the en banc court that 3M's efforts to compete against a previously dominant market leader were not actionable. 3M was alleged to have made up-front payments and entered into exclusive contracts with retailers in an effort to take market share from NicSand, which initially held a 67% market share. The en banc court noted that exclusivity and up-front payments were insisted upon by the powerful retailers with whom both NicSand and 3M dealt and that 3M had not engaged in predatory pricing. The Sixth Circuit affirmed dismissal, finding that 3M's practices "flow from the kind of competition that the antitrust laws were designed to foster." The vote on the en banc hearing was 10-4.