New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM

An incisivemedia publication
VOLUME 241—NO. 121
THURSDAY, JUNE 25, 2009

ANTITRUST

Expert Analysis

Price Discrimination In Food Products and iPhones

By **Elai Katz**

A district court ruled that a manufacturer of food products violated the Robinson-Patman Act by offering a global food services company lower prices than those made available to a domestic distributor. Another district court rejected price discrimination claims brought by buyers of Apple's iPhones.

Other recent antitrust developments of note included the Department of Justice and Federal Trade Commission's recommendation to the Supreme Court not to review a case characterizing the joint licensing of sports teams' logos as the conduct of a single entity not subject to §1 of the Sherman Act.

Price Discrimination

A food distributor claimed that a manufacturer offered lower prices for its egg and potato products to the world's largest food services management company in violation of §2(a) of the Robinson-Patman Act. After a three-week bench trial, the district court ruled in favor of the plaintiff and enjoined the manufacturer from discriminating in price in favor of the management company.

Following the U.S. Court of Appeals for the Third Circuit's guidance in a prior ruling in the case, the court stated that although the two firms performed different functions within the food services industry, the distributor and the food management company competed with one another as they had similar customers, such as hospitals and schools that run institutional cafeterias, and sought to take business from each other by persuading those customers to either self-operate and obtain food supplies from a distributor or outsource their food service functions, including purchasing food products, to a management company. The court noted that the fact that the distributor did not participate in head-to-head bidding against the management company did not mean that they did not compete for the same dollar in the sale of the manufacturer's food products to institutional customers.

The court stated that the management company was not able to rebut the presumption of competitive injury from substantial and sustained price discrimination because evidence presented at trial showed that lower food costs played a significant role in the food management company's strategy to win and retain institutional customers and that the company emphasized its lower prices in its marketing materials.

iPhones purchasers alleged that Apple Inc. discriminated in price by reducing the price of iPhones several months after they were introduced.

In a subsequent decision, the court found the defendant-manufacturer in contempt for violating the court's injunction by refusing to sell to the plaintiff-distributor at any price. The court rejected the argument that it did not have the power to require that a seller deal with a particular customer and stated that the manufacturer's decision to terminate the distributor had no valid business reason but instead was motivated by a desire to avoid changing its pricing system to comply with the court's order. The court enjoined the manufacturer from refusing to sell to the plaintiff on the same terms that are offered to the management company.

Feesers Inc. v. Michael Foods Inc., 2009-1 CCH Trade Cases ¶¶76,609, 76,628 (M.D. Pa.)

Purchasers of iPhones brought an action alleging that Apple Inc. discriminated in price in violation of §2(a) of the Robinson-Patman Act by reducing the price of iPhones several months after they were introduced. The plaintiffs asserted that they were injured because they could not resell their iPhones for as high a profit as later purchasers. The district court dismissed the claim and observed that sellers may lawfully change their prices as often as they like as long as they charge the same price to competing customers at the same time.

Li v. Apple Inc., 2009-1 CCH Trade Cases ¶76,607 (E.D.N.Y.)

Joint Ventures

The Department of Justice and the Federal Trade Commission (FTC) responded to the Supreme Court's request for the United States' views on whether the Court should grant certiorari in a case brought by a supplier of caps bearing sports teams' logos challenging the exclusive licensing of professional football teams' collective trademarks as an unreasonable agreement in restraint of trade. The U.S. Court of Appeals for the Seventh Circuit rejected the claim and stated that the league should be considered a single entity, incapable of conspiring under the Supreme Court's opinion in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in the context of joint licensing of its teams' marks.

The government's brief expressed concern that the Seventh Circuit's reasoning could lead to unnecessarily broad application of the single-entity doctrine, but stated that the Court's review is not warranted because the appellate

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court limited its decision to the facts of the dispute. The government's brief observed that the cap-maker's asserted injuries did not flow from the teams' agreement to jointly license their intellectual property but rather from their decision to end the relationship with the complaining cap-maker and contract with a rival firm.

The brief added that the sports league context is not the most appropriate one on which to deal with broader issues involving the application of the *Copperweld* doctrine to joint ventures generally.

American Needle Inc. v. NFL, No. 08-661, Brief for the United States as Amicus Curiae (May 28, 2009), available at www.usdoj.gov/atr

Comment: The U.S. Court of Appeals for the Second Circuit resolved a similar dispute involving the joint licensing of professional baseball team logos using traditional rule of reason analysis and without relying on an expansive reading of the single-entity doctrine in *Major League Baseball Properties Inc. v. Salvino Inc.*, 542 F.3d 290 (2d Cir. 2008), in which Judge Sonia Sotomayor wrote a concurring opinion.

Amnesty

Direct purchasers of thin film transistor-liquid crystal display (TFT-LCD) panels alleged a price fixing conspiracy among panel manufacturers and sought the identification and cooperation of a defendant that was apparently granted leniency under the Department of Justice's amnesty program. The court denied the plaintiffs' motion to compel cooperation under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which provides that an amnesty applicant's liability in private actions may be limited to single rather than treble damages. The court stated that its assessment of an amnesty applicant's cooperation does not occur until the court determines liability and damages issues.

In re TFT-LCD (Flat Panel) Antitrust Litigation, 2009-1 CCH Trade Cases ¶76,626 (N.D. Cal.)

Acquisitions

Two firms that develop and sell cryotherapy products used for the treatment of prostate and renal cancer had agreed to merge. Although the transaction was not reportable under the Hart-Scott-Rodino (HSR) Act's premerger notification program, the FTC opened an investigation. According to the commission's statements, the parties were the only two companies that make and market such products, but the FTC's statements left open the possibility that other methods of treating prostate and renal cancer compete with the cryogenic therapies. About six months after the commencement of the inquiry, the parties announced that they were abandoning the proposed merger.

Commissioner J. Thomas Rosch issued a statement in response to the abandonment of the proposed merger in which he wrote that the commission in effect blocked the merger by "failing to timely conclude its investigation and reach a determination on the merger's legality." In a counter-statement, Chairman Jon Leibowitz and Commissioners Pamela Jones Harbour and William E. Kovacic defended the FTC staff's conduct and maintained that they could not justify closing their investigation, primarily due to the lack of full disclosure of relevant documents by the parties.

The Supreme Court was asked to grant certiorari in a case brought by a supplier of caps bearing sports teams' logos challenging the exclusive licensing of professional football teams' collective trademarks as an unreasonable agreement in restraint of trade.

Statement of Commissioner J. Thomas Rosch on the Abandonment of the Endocare Inc./Galil Medical Ltd. Merger and Joint Statement of Chairman Leibowitz, Commissioner Harbour and Commissioner Kovacic (June 6, 2009) available at www. ftc.gov

Premerger Notification

The European Commission (EC) announced that it had imposed a substantial fine on an electricity producer for failing to submit notification and await EC approval prior to its December 2003 acquisition of a "de facto" controlling stake in another producer of electricity. The commission stated that the electricity producer had become the other firm's largest shareholder with close to 50 percent of the shares, providing a stable majority at shareholder meetings due to the wide dispersion of the remaining shares and limited attendance at meetings. The EC noted that the transaction did not give rise to any substantive competition concerns.

Mergers: Commission fines Electrabel 20 million euros for acquiring control of Compagnie Nationale du Rhône without prior Commission approval, IP/09/895 (June 10, 2009), available at ec.europa.eu/competition

Antitrust Injury

The owner of an Andy Warhol painting claimed that two organizations conspired to restrain competition by improperly refusing to authenticate the artist's works in order to artificially increase the price of Warhol artwork. The defendants moved to dismiss the complaint, and the district court granted the motion in part. The court stated that to the extent the plaintiff's claims were premised on the alleged increase in the price of Warhol paintings, he did not sufficiently plead antitrust injury because he did not allege that he bought his painting from one of the organizations or that it was authenticated by them and, in any event, the claim was time barred as he bought the painting more than four years prior to the filing of the complaint.

On the other hand, the court stated that the plaintiff could proceed with his claim that the denial of authentication of his painting in furtherance of the alleged conspiracy prevented him from competing in the lucrative market for Warhol paintings. The court noted that the allegations of a submarket in the offering and sale of Warhol works within the modern and contemporary art market were sufficient to survive a motion to dismiss.

Simon-Whelan v. The Andy Warhol Foundation for the Visual Arts, No. 07 Civ. 6423 (LTS) (S.D.N.Y. May 26, 2009)

Bid Rigging

The Department of Justice announced the indictment of two Baltimore businessmen for conspiring to rig bids at Maryland tax lien auctions, where the rights to collect unpaid property taxes and eventually foreclose on the properties are sold to the highest bidder. The indictment alleged that the defendants allocated which tax liens or properties each would bid on and discussed prices to ensure that they do not submit higher bids than one another.

Two Baltimore Businessmen Indicted for Conspiring to Rig Bids at Maryland Tax Lien Auctions (June 16, 1009), available at www. usdoj.gov/atr