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Expert Analysis

Resale Price Maintenance Examined Under State Laws

By **Elai Katz**

The Supreme Court of Kansas ruled that, unlike a recently reconsidered interpretation of federal law, resale price maintenance agreements are per se illegal under that state's antitrust laws, while a New York appellate court decided that such agreements are not illegal under a New York statute that makes them unenforceable. The U.S. Court of Appeals for the Eleventh Circuit reaffirmed its prior rulings that the settlement of a patent infringement dispute between rival drug makers could not violate antitrust laws unless it exceeded the scope of the patent.

Other antitrust developments of note included the U.S. Court of Appeals for the First Circuit's reinstatement of a complaint charging U-Haul with attempting to fix prices in violation of Massachusetts law as well as several hospital merger challenges by the Federal Trade Commission (FTC).

Pricing Agreements—Kansas

Litigation concerning resale price maintenance—often referred to as vertical price fixing, that is, an agreement between a supplier and a reseller setting the price the reseller must charge its customers—persists in state courts in the wake of the U.S. Supreme Court's decision to overturn century-long precedent classifying resale price maintenance as per se unlawful. *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877 (2007). Despite its success in the federal courts, Leegin Creative Leather Products, the defendant in that landmark case and maker of Brighton bags and accessories, faces continued scrutiny of its pricing policies in Kansas state courts.

The plaintiff, a consumer of Brighton accessories, alleged that Leegin's enforcement of its pricing policy, which calls for retailers to sell its Brighton products at a suggested retail price, amounted to price fixing in violation of Kansas law. Leegin argued, among other defenses, that since it accounted for less than 2 percent of total sales in the accessories market, any agreement arising from its pricing policy would not be unlawful under a rule of reason analysis and that the plaintiff did not suffer antitrust injury. The trial judge granted summary judgment to Leegin, and the plaintiff appealed. The appeal was transferred to the Supreme Court from the Kansas Court of Appeal (on the plaintiff's unopposed motion) and the Supreme Court reversed.

The Kansas Supreme Court ruled that vertical price fixing is per se unlawful under the state's antitrust laws. The court stated that the statutes did not expressly provide for a reasonableness qualification or a rule of reason analysis on price fixing, whether horizontal or vertical, and refused to follow prior Kansas decisions (not involving price fixing) that read a reasonableness gloss onto the antitrust laws. The Kansas Supreme Court observed that, although the state's antitrust law remains largely underdeveloped and federal decisions may be persuasive, cases interpreting federal law are not binding on Kansas courts interpreting Kansas statutes.

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The court rejected Leegin's argument that the plaintiff could not show injury because stores would have charged the same manufacturer suggested price for Brighton products in the absence of any agreement, stating that under Kansas law, the plaintiff did not have to show that the challenged restraint succeeded in increasing prices as long as the arrangement was "for the purpose" of fixing prices and tended to control prices.

O'Brien v. Leegin Creative Leather Products, No. 101,000 (Kansas Supreme Court May 4, 2012)

Comment: The Kansas Supreme Court decision could be read to have suggested that rule of reason analysis should not apply to Kansas antitrust law when it stated, in dictum, that it "would not append a requirement that an antitrust plaintiff demonstrate the unreasonableness of a defendant's trade restraint to show a statutory violation, because the clear language of the governing statutes does not require it." But any regime regulating restraints of trade must incorporate a measure of reasonableness to the evaluation of at least some categories of agreements, lest the laws inadvertently outlaw a wide swath of routine business arrangements not involving price fixing including exclusive distribution agreements and requirements contracts. According to press reports, a bill has been introduced in the Kansas Legislature to overturn the decision reported immediately above.

Pricing Agreements—New York

In another state court decision addressing the treatment of resale price maintenance under state law after the U.S. Supreme Court abandoned per se prohibition of that practice, a New York appellate court adjudicating a resale price maintenance case under that state's law ruled that §369-a of New York's General Business Law, which expressly precludes enforcement of resale price maintenance provisions in contract disputes, does not make them illegal or unlawful, affirming a lower court decision reported in a previous column ("Mattress Maker Averts Resale Price Maintenance Challenges," *NYLJ,* Feb 23, 2011).

New York v. Tempur-Pedic Int'l., 2012 NY Slip Op. 03557 (1st Dept., May 8, 2012)

Patent Settlements

The Eleventh Circuit affirmed dismissal of the FTC's complaint alleging that the settlement of patent litigation between the maker of a brand name testosterone replacement therapy drug and generic rivals—labeled a "reverse payment" or "pay for delay" settlement because the patent holder paid the alleged infringers to end their challenge to the patent and delay entry into the market—deprived consumers of the benefits of competition in violation of antitrust laws. The FTC did not state a claim, the appellate court explained, because the complaint did not allege that the settlements exceeded the scope of the patents in question.

The appellate panel reaffirmed its prior rulings—in *Valley Drug v. Geneva Pharmaceuticals*, 344 F.3d 1294 (11th Cir. 2003), and other cases—that a reverse payment settlement would not violate antitrust laws if the anticompetitive effects of the settlement fell "within the scope of the exclusionary potential of the patent." The relevant scope of the patent should be defined, according to the Eleventh Circuit, based on its "potential exclusionary power" at the time of settlement, even if a court subsequently limited or invalidated the patent.

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The Eleventh Circuit rejected the FTC's suggestion that a pay-for-delay antitrust claim could be asserted if the underlying infringement lawsuit was "not likely to prevail" because even a patent holder who was "likely" to lose may have had a 49 percent chance of retaining its right to exclude. The court described the FTC's proposed analysis—asking the court to decide "a patent case within an antitrust case about the settlement of the patent case"—as a "turducken" task, referring to a periodically popular dish prepared by stuffing a de-boned chicken into a de-boned duck, which, in turn is stuffed into a de-boned turkey.

FTC v. Watson Pharmaceuticals, No. 10-12729, 2012-1 CCH Trade Cases ¶77,865 (11th Cir. April 25, 2012)

Comment: The court observed that the legal system can ill afford an antitrust rule that would discourage settlements and put the heavy burden of resolving patent infringement disputes back on the courts.

Attempted Price Fixing

Following an FTC enforcement action, a consumer who rented trucks brought an action alleging that U-Haul attempted to collude with its rivals by raising truck-rental rates, encouraging rivals to match the price increase and threatening to reverse the increase if it was not followed. The truck renter did not sue under §1 of the Sherman Act because it does not prohibit unsuccessful attempted conspiracies nor under §5 of the FTC Act because it does not give rise to a private cause of action, instead bringing suit under the Massachusetts unfair competition law, Mass. Gen. Laws ch. 93A, which is modeled after the FTC Act and creates a private cause of action.

A district court dismissed the complaint, and the U.S. Court of Appeals for the First Circuit reversed and stated that it expected Massachusetts courts to follow FTC precedent and find that unsuccessful attempts to fix prices violated Chapter 93A. The appellate panel added that the complaint plausibly pleaded injury by making general allegations about U-Haul's price increases, notwithstanding the absence of specifics about the truck renter's individual transactions.

Liu v. Amerco, No. 11-2053 (1st Cir. May 4, 2012)

Comment: The contention that §5 of the FTC Act can be interpreted expansively, beyond the scope of the Sherman Act, without engendering excessive uncertainty because §5 does not expose businesses to treble damage class actions is undermined by the prospect of private class actions brought under state "baby FTC Acts," as in the decision reported immediately above.

Hospital Mergers

The FTC ordered ProMedica Health System to divest St. Luke's Hospital after finding the hospitals' August 2010 merger was likely to substantially lessen competition and increase prices for general acute-care inpatient hospital services and inpatient obstetric services sold to commercial health plans in the Toledo, Ohio, area. The commission defined the "general acute-care inpatient hospitals services" relevant market to include primary and secondary services, such as treating common conditions and conventional services, while excluding sophisticated tertiary and quaternary services, such as certain major surgeries and organ transplants. The FTC stated that the merger reduced the number of local acute care hospitals from four to three with the merged firm accounting for approximately 60 percent of the market and that the merged firm had approximately 80 percent of the market for inpatient obstetric services.

ProMedica Health System, No. 9346 (March 28, 2012), available at www.ftc.gov

Following another FTC challenge of a hospital merger, preliminarily blocked by a Chicago federal court, OSF Healthcare System abandoned its planned acquisition of rival health care provider Rockford Health System. The commission's complaint alleged that the proposed acquisition would reduce competition to two main competitors in the markets for general acute-care inpatient services and primary care physician services in the Rockford, Ill., area, with the combined firm controlling 64 percent of the market for general acute-care inpatient services and 37 percent of the market for primary care physician services.

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FTC v. OSF Healthcare System, 2012-1 CCH Trade Cases ¶77,850 (N.D. Ill. April 5, 2012) and *OSF Healthcare System and Rockford Health System*, No. 9349, CCH Trade Reg. Rep. ¶16,763 (April 13, 2012)

Comment: In yet another FTC hospital merger case, the commission has asked the Supreme Court to review the Eleventh Circuit's ruling that the state action doctrine immunized a hospital authority's acquisition of the only other hospital in Albany, Ga. *FTC v. Phoebe Putney Health System,* No. 11-1160 (March 2012).

Private Merger Challenge

A Pennsylvania district court rejected efforts by pharmacy trade groups to block preliminarily the merger of two of the three largest pharmacy benefit management firms, Express Scripts and Medco Health Solutions, after the FTC decided not to challenge the transaction (as reported in last month's column). The court stated that the pharmacy groups did not show a likelihood of immediate, irreparable harm to warrant a preliminary injunction requiring the parties to keep the businesses separate. The court stated that the trade groups' fears that the merging firms would combine operations, displace personnel and share competitive information have already been realized. The eggs were scrambled, to use the common metaphor, immediately upon the completion of the merger.

National Association of Chain Drug Stores v. Express Scripts, No. 12-395, 2012-1 CCH Trade Cases ¶77,864 (W.D. Pa. April 25, 2012)

School Bus Merger

Two school bus companies agreed to divest eight contracts in Texas and Washington to proceed with their combination, resolving the Department of Justice's concern that the proposed merger would reduce competition for school bus services in these areas.

National Express and Petermann to Sell Off School Bus Contracts in Texas and Washington to Resolve Antitrust Concerns (April 30, 2012), available at www.usdoj.gov/atr

Premerger Notification

The Department of Justice announced that a South Korean executive agreed to plead guilty and serve five months in prison for obstructing a merger investigation. The department alleged that the executive altered and directed subordinates to alter numerous documents that were submitted with a premerger filing providing notice to U.S. antitrust authorities of a proposed (and since abandoned) merger of automated teller machine manufacturers.

Hyosung Corporation Executive Agrees to Plead Guilty to Obstruction of Justice for Submitting False Documents in an ATM Merger Investigation (May 3, 2012), available at www.usdoj.gov/atr

Criminal Conspiracy

A New York City jury convicted three former financial services executives for participating in conspiracies to rig bids for the investment of proceeds from municipal bonds. The Department of Justice stated that they were found guilty of conspiracy to commit wire fraud and defraud the United States.

Three Former Financial Services Executives Convicted for Roles in Conspiracies Involving Investment Contracts for the Proceeds of Municipal Bonds (May 11, 2012), available at www.usdoj.gov/atr

Following an eight-week trial in San Francisco, a jury convicted Taiwan-based AU Optronics Corporation and two former top executives for participating in a conspiracy to fix the prices of thin-film transistor liquid crystal display (LCD) panels. The jury also found two other employees not guilty, and a mistrial was declared with respect to a former employee. According to the Department of Justice, the maximum fine that can be imposed is $1 billion, twice the $500 million in ill-gotten gains found by the jury.

Taiwan-Based AU Optronics Corporation, Its Houston-Based Subsidiary and Former Top Executives Convicted for Role in LCD Price Fixing Conspiracy (March 13, 2012), available at www.usdoj.gov/atr