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ANTITRUST

Expert Analysis

Second Circuit Sends Paper Conspiracy Case to Trial

By **Elai Katz**

Reversing the district court's summary judgment ruling, the U.S. Court of Appeals for the Second Circuit decided that a jury could reasonably find that publication paper makers conspired to fix prices. The U.S. Court of Appeals for the Ninth Circuit ruled that ATM customers lacked standing to challenge inter-bank fees because they were indirect purchasers and did not pay the allegedly fixed fees.

Other antitrust developments of note included the Ninth Circuit's ruling that the filed rate doctrine did not bar dairy farmers from bringing unfair competition law claims asserting that federally ordered raw milk prices were improperly suppressed and the Department of Justice's rearrangement of reciprocal marketing agreements between a telecommunications company and several cable companies.

Horizontal Price Fixing

The Second Circuit allowed a price fixing claim to survive summary judgment and proceed to trial, stating that a jury could reasonably find that a paper manufacturer entered into an unlawful agreement with a competitor to raise the price of publication paper, a form of paper used in preparing various types of printed material. The appellate court relied on evidence of telephone calls and private meetings between executives of Stora Enso and UPM-Kymmene in reversing the grant of Stora Enso's motion for summary judgment. Plaintiffs, a certified class of direct purchasers of paper products, alleged that Stora Enso and UPM instituted three price increases in 2002 and 2003 pursuant to an illegal horizontal agreement.

Plaintiffs brought suit against Stora Enso in 2004 upon learning that the Department of Justice was investigating price fixing within the publication paper industry. In the course of its investigation, the government granted immunity to UPM in return for its cooperation. Criminal charges were brought against Stora Enso, and at the trial, the president of UPM testified that he had reached an "agreement" with Stora Enso's president that both UPM and Stora Enso would implement a price increase in 2003, and that the two executives had a "common understanding." In 2007, Stora Enso was acquitted by a jury of criminal antitrust violations.

The district court granted summary judgment to Stora Enso because "plaintiffs 'failed to offer sufficient evidence to dispel the possibility that Stora Enso acted independently.'" Evaluating the district court's reasoning, the Second Circuit stressed that the "tends to exclude" language articulated in *Matsushita Electric Industrial v. Zenith Radio*, 475 U.S. 574 (1986), "stands for the proposition that substantive 'antitrust law limits the range of permissible inferences' that may be drawn from ambiguous evidence," and that "the range of inferences that may be draw[n] from such evidence depends on the plausibility of the plaintiff's theory."

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Where a theory of recovery is implausible, stronger evidence is required to satisfy the "tends to exclude" standard, but broader inferences are permitted where the alleged conspiracy makes economic sense. The appellate court rejected the district court's requirement that plaintiffs "exclude" or "dispel" the possibility that defendants acted independently, emphasizing that such requirement "places too heavy a burden on the plaintiff." Rather, "if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw," but "it need not be the sole inference."

The appellate court noted that the publication paper industry is conducive to collusion, given that publication paper has few substitutes and that the market is controlled by a limited number of sellers, and further noted that during the class period, the industry had excess capacity and historically low prices, making collusion especially attractive. Given these factors, together with the "ample evidence of conspiratorial behavior" in the form of private phone calls and meetings wherein the presidents of Stora Enso and UPM discussed their intentions to increase prices, the appellate court concluded that the case presented sufficient evidence to permit a jury to conclude that Stora Enso and UPM unlawfully agreed to raise prices.

The Second Circuit then examined whether there was sufficient evidence for a jury to conclude that an agreement between Stora Enso and UPM actually caused the price increases that occurred. Stora Enso argued that employees who had day-to-day pricing responsibilities were not informed of the agreement. The court emphasized that the causal link was sufficient to bring before a jury, given that the alleged agreement was between senior executives at competing companies, and that each executive had final pricing authority.

In re Publication Paper Antitrust Litigation, No. 11-101-cv, 2012-2 CCH Trade Cases ¶78,000 (2d Cir. Aug. 6, 2012)

ATM Fees

Bank customers brought an antitrust suit claiming that large commercial banks conspired to fix the "interchange fee" banks paid to one another when one bank's customer used another bank's automatic teller machine (ATM) to withdraw cash routed over the largest ATM network. The complaint alleged that the defendant banks unlawfully set the interchange fee through their participation on the ATM network's board. The customers claimed that the banks passed along some portion of the artificially inflated interchange fees.

The Ninth Circuit affirmed the district court's order granting the banks' motion for summary judgment on the grounds that the plaintiffs were indirect purchasers of the allegedly fixed services and as such were prohibited from suing to recover

ELAI KATZ is a partner at *Cahill Gordon & Reindel*. JAMIE GOTTLIEB, an associate at the firm, assisted in the preparation of this article.

damages for antitrust violations under the 1977 *Illinois Brick* decision, 431 U.S. 720. The Ninth Circuit observed that the indirect purchaser rule was designed "to eliminate the complications of apportioning overcharges between direct and indirect purchaser" and to "eliminate multiple recoveries." The panel repeated the Ninth Circuit's abridged restatement of the rule: "the price paid by the plaintiff must be fixed."

The Ninth Circuit stated that the claims did not fit within the established exceptions to the rule. Without ruling on whether it is firmly established in the law, the appellate panel considered the applicability of an exception for cases where there is no realistic possibility that the direct purchasers will sue. The appellate court rejected the plaintiffs' argument that there was no realistic possibility that banks—the direct payers of ATM interchange fees—would sue to challenge price-fixing, explaining that many bank members of the ATM network paid more in interchange fees than they received and had a strong financial incentive to bring such a suit.

In re ATM Fee Antitrust Litigation, No. 10-17354, 2012-1 CCH Trade Cases ¶77,969 (9th Cir. July 12, 2012)

Filed Rate Doctrine

In considering the impact of the filed rate doctrine on a lawsuit challenging federal marketing orders setting the prices for raw milk under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §601 et seq., (AMAA), a three-judge panel of the Ninth Circuit reversed a lower court decision barring claims by farmers that dairy cooperatives underpaid them in violation of California unfair competition law. The appellate panel decided that although the filed rate doctrine applied to rates set pursuant to the AMAA, it did not bar dairy farmers who sold raw milk priced according to Federal Milk Marketing Orders from bringing claims against dairy cooperatives alleged to have improperly understated milk prices in periodic reports to the government.

Pursuant to the AMAA, milk products and prices paid by distributors to farmers are regulated by the U.S. Department of Agriculture which issues orders that set minimum prices to be paid by distributors to dairy farmers for each type of milk product. Plaintiffs alleged that the minimum prices set by the orders and paid to dairy farmers were significantly lower from 2002 through 2007 because of the improper inclusion of prices for forward contracts in weekly pricing reports submitted by milk distributors. In 2008, the USDA issued a report valuing the price difference due to the reporting errors at $50 million.

Under the filed rate doctrine, "to the extent Congress has given a federal agency authority to set rates under a federal statute and the agency has exercised that authority, such rates are just and reasonable as a matter of law and cannot be collaterally challenged under federal antitrust or state law." The Ninth Circuit noted that there are three governmental interests underlying the filed rate doctrine: (1) preventing price discrimination, (2) avoiding disruption of a congressional scheme for uniform price regulation, and (3) deference to federal agency expertise in rate-setting. Although the AMAA's statutory scheme—wherein rates consist of minimum prices from which parties may negotiate upwards, rather than consisting of an absolute price, and where such milk prices vary by region, rather than being nationally uniform—did not present the typical filed rate scenario, the court noted that the three governmental interests underlying the doctrine applied to federal marketing order prices set under the AMAA. Given that the rates were authorized by the USDA pursuant to its statutory authority, the court held that such rates were subject to the filed rate doctrine.

The Ninth Circuit further ruled that the filed rate doctrine did not bar plaintiffs' suit because (1) the federal agency itself determined that the "prices were incorrect and (2) the policy considerations behind the doctrine do not justify applying the doctrine as a bar in this case." The court noted that under *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), the filed rate doctrine does not bar suit "if the rate has been 'suspended' or 'set aside' by the relevant agency." Evaluating what constitutes sufficient suspension of a rate by an agency, the Ninth Circuit rejected the notion that an agency must formally suspend or set aside the published rates. The court instead found that the USDA's actions—publicly recognizing that the rates were incorrect, attempting to recalculate the rates for the relevant period, and in revising its regulations in an attempt to prevent future misreporting—constituted a sufficient rejection such that the filed rate doctrine did not bar suit.

Additionally, given that the purpose of the scheme is to "raise producer prices," the court stated that it would be contrary to the purposes of the AMAA to allow distributors to avoid liability. Finally, the court concluded that the facts did not justify application of the filed rate doctrine, as the "district court would not need to second-guess agency decision making or speculate about what the agency would have done in order to assess liability or calculate damages."

Carlin v. DairyAmerica, No. 10-16448, 2012-2 CCH Trade Cases ¶78,004 (9th Cir. Aug. 7, 2012)

Marketing Agreements

The U.S. Department of Justice and the New York State Attorney General's Office announced the settlement of charges that a series of airwaves and marketing agreements between Verizon Wireless and several cable companies would harm competition in the markets for the provision of video and broadband services. The agreements involved (1) the sale of unused spectrum to Verizon (and, ultimately, T-Mobile), (2) reciprocal marketing arrangements, and (3) a research and development joint venture to develop and market integrated wireline and wireless products

According to a complaint filed simultaneously with the proposed settlement, the cable companies are dominant in many local markets for both video and broadband services, and Verizon's FiOS service has been an important competitive threat in the regions where it has been built, although it currently has decided to stop expanding the reach of its FiOS network.

The complaint asserts that the reciprocal sales agency agreements—whereby Verizon and the cable companies agreed to sell each other's video and Internet services on a commission basis—would reduce competition in areas where Verizon FiOS's territory is shared with the wireline territory of a cable company, given that the agreements restrain Verizon from marketing or selling FiOS in its stores unless it also sells a cable company's services on an "equivalent basis." Therefore, the agreements "transform" the parties' relationships from ones in which they are "direct, horizontal competitors to ones in which they are also partners" in the sale of cable services, according to the government.

The complaint also alleges that long-term incentives to compete are harmed by the joint venture agreement, which "create[s] an exclusive sales and product development partnership of a potentially unlimited duration," thereby "freez[ing] in place relationships" in an industry usually marked by innovation and technological change.

Under the proposed settlement, Verizon will not be required to sell cable companies' services on an "equivalent basis" in its stores and will be barred from selling those services in areas within its FiOS footprint. The duration of the joint operating agreement would be limited, thereby preserving incentives for competitive innovation. Furthermore, the duration of Verizon's ability to resell cable companies' services in areas where Verizon provides DSL Internet services would also be limited under the proposed settlement, thereby preserving Verizon's incentive to expand the reach of its FiOS network.

The Federal Communications Commission also approved the arrangements, with conditions.

United States v. Verizon Communications, No. 1:12-cv-01354 (D.D.C. Aug. 16, 2012)

Cardiology Services

The Federal Trade Commission (FTC) announced the settlement of a complaint filed against Renown Health, the largest provider of acute care hospital services in northern Nevada, alleging that its recent acquisitions of two medical groups created a highly concentrated market for adult cardiology services in the Reno area in violation of antitrust law.

The FTC asserted that after the acquisitions of the two rival medical groups, Renown employed 88 percent of Reno-area cardiologists, who were encumbered by non-compete provisions. In order to remedy the alleged elimination of competition, the FTC's proposed order suspends the non-compete provisions for at least 30 days and provides that at least six (and up to 10) cardiologists currently employed by Renown must be allowed to join competing medical groups.

In the Matter of Renown Health, FTC File No. 111-0101 (Aug. 3, 2012), available at *www.ftc.gov*.