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ANTITRUST

Expert Analysis

Digital Age Restrictions Survive Antitrust Scrutiny

By **Elai Katz**

Harking back to major antitrust cases of the 1990s, the U.S. Court of Appeals for the Tenth Circuit ruled that Microsoft's refusal to share with rivals interface data for its upcoming operating system did not violate antitrust law. The U.S. Court of Appeals for the Ninth Circuit decided that a consumer could not bring an antitrust suit to challenge Apple's efforts to limit the availability of compatible digital music for the iPod.

Other antitrust developments of note included an opinion by the U.S. Court of Appeals for the D.C. Circuit questioning whether shippers alleging price fixing by railroads satisfied the predominance requirement necessary to pursue their claims as a class and the European Commission's approval of an airline merger that it had blocked two years ago because one of the parties had since become a failing firm.

Refusal to Deal

Novell, seller of the WordPerfect word processing program, which had been Microsoft Word's principal rival in the 1990s and before, claimed that Microsoft violated antitrust laws when it ceased providing crucial information about its then forthcoming operating system, Windows 95, to independent software vendors. At first Microsoft shared early versions of its soon-to-be-released operating system because the availability of third-party applications that could run on Windows 95 would increase sales of the new operating system. However, according to Novell, Microsoft changed course and decided to deny further access to programming interface information that would enable other software vendors to use shortcuts designed into Windows 95, making it harder to develop compatible software. Microsoft allegedly opted to give its own applications a competitive advantage even though causing a delay in the introduction of other compatible applications could reduce sales of Windows 95.

ELAI KATZ *is a partner of* Cahill Gordon & Reindel.

Novell contended that Microsoft's withdrawal of access caused a nine-month delay in rolling out Novell's Windows 95 applications and gave Microsoft's applications a huge leg up that was "designed to and proved to be a permanent advantage," enabling it to maintain its monopoly in operating systems in violation of §2 of the Sherman Act. Following an eight-week jury trial, the district court entered judgment as a matter of law in favor of Microsoft. Novell appealed and the Tenth Circuit affirmed, observing that "the antitrust laws rarely impose on firms—even dominant firms—a duty to deal with their rivals." *Novell v. Microsoft*, No. 12-4143, 2013-2 CCH Trade Cases ¶78,523 (Sept. 23, 2013).

The appellate court noted that the hands-off approach to refusals to deal in current antitrust jurisprudence has a limited exception, based on the U.S. Supreme Court's decision in *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985). According to the Tenth Circuit, refusal to deal by a dominant firm may violate §2 under *Aspen* if (1) there was "a preexisting voluntary and presumably profitable course of dealing between the monopolist and the rival" and (2) the refusal to continue dealing reflected "a willingness to forsake short-term profits to achieve an anticompetitive end." Put another way, the dominant firm's conduct must have been "irrational but for its anticompetitive effect."

The Tenth Circuit stated that if courts must err, they should err on the side of allowing refusals to deal because mandated cooperation with rivals risks inducing collusion and puts courts in the undesirable position of determining prices and other terms for compelled sharing. The panel also rejected Novell's invitation to apply a "raising rivals' costs" test in place of the profit sacrifice test in this context. But the appellate court noted that the refusal to deal doctrine and its profit sacrifice test targeted only a discrete category of anticompetitive conduct and did not "displace doctrines that address a monopolist's more direct interference with rivals."

The court determined that while Novell and Microsoft had a preexisting, profitable relationship, Novell did not present evidence that Microsoft was willing to sacrifice short-term profits. According to the appellate panel, courts must examine the firm's overall profits and thus any diminished success in the launch of Windows 95 had to be considered in light of gains in the sale of Microsoft's applications. The court went on to say that evidence of "hard-nosed intent" to hurt or even destroy competitors was not sufficient to prove a refusal to deal claim absent a showing that the monopolist intended to forgo short-term profits, that is, it had no legitimate business reasons for its refusal.

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The court's opinion reflects a deeply held penchant for autonomy in American monopolization law, but that tendency should not be misconstrued to espouse suspicion of legitimate, voluntary cooperation between rivals, particularly in industries with substantial network effects and interconnections.

Digital Music

A consumer who bought an Apple iPod from a Target store and downloaded music from Apple's iTunes store brought an antitrust suit claiming that Apple monopolized the audio download

market and the portable digital media player market in violation of §2 of the Sherman Act. The iPod owner asserted that by 2004 Apple had over 70 percent of the audio download market and nearly 100 percent of the player market and that Apple maintained its monopoly by using software updates intended to prevent rivals from selling digital music that was compatible with iPods. For example, according to the complaint, after Real Networks introduced a compatible technology, Apple updated its software to prevent its devices from playing Real Networks' music files. The complaint alleged that this and other software updates thwarted competitors from entering the market and threatening Apple's monopoly. The plaintiff asserted that the inability to play music downloaded from rivals diminished her iPod's value and that the elimination of competition allowed Apple to charge supracompetitive prices for music downloads.

The district court dismissed the complaint, and the Ninth Circuit affirmed in *Somers v. Apple*, No. 11-16896, 2013-2 CCH Trade Cases ¶78,503 (Sept. 3, 2013). The appellate court stated that because she did not buy her device directly from Apple, the iPod owner lacked standing to recover for the alleged diminution in the value of her iPod, following *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), which precludes recovery by indirect purchasers for federal antitrust law violations. The appellate panel rejected the diminution-in-value theory for the additional reason that from the time Apple launched the iTunes store, it deployed tools to prevent iPods from playing music from other digital stores, and consequently software updates that maintained that status quo would not have diminished the value of the device.

The Ninth Circuit then rejected plaintiff's claim that she paid inflated prices for music downloads because facts pleaded in the complaint contradicted the assertion that she suffered an injury caused by Apple's anticompetitive conduct. She alleged that Apple charged 99 cents for music downloads before it obtained monopoly power in 2004 and continued to do so even after its monopoly ended in 2008 when Amazon became a significant player in the market. The court stated that the fact that Apple's prices remained unchanged "irrespective of the absence or presence of a competitor" rendered "implausible" the claim that the challenged software updates enabled Apple to charge higher prices.

The appellate court added that Apple's alleged limitation of consumer choice by preventing her from playing digital music purchases on the device of her choice did not amount to an antitrust injury because she did not explain how restricting her listening choices prevented competitors from selling music online. Put differently, her limited ability to play her music did not, according to the Ninth Circuit, restrict her ability to buy music from Apple's competitors.

Railroad Shipper Class Action

Shippers alleged a conspiracy among the four major freight railroads to impose fuel surcharges in violation of antitrust law and persuaded a district court to allow them to pursue their price-fixing claims as a class. The railroads sought appellate review of the district court's certification of a class, arguing that the shippers' methodology did not meet the predominance requirement by failing to distinguish between those who paid allegedly inflated surcharges and those who did not because they had legacy contracts protecting them from inflated surcharges.

Under Rule 23(b)(3) of the Federal Rules of Civil Procedure, to proceed as a class, plaintiffs must show that "questions of law or fact common to class members predominate" over individual questions. The D.C. Circuit vacated the district court's certification order and remanded to the district court for reconsideration. *In re Freight Rail Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (Aug. 9, 2013).

A federal jury in Northern California returned a split verdict in retailer Best Buy's antitrust suit alleging that manufacturers conspired to fix the prices of thin-film transistor liquid crystal display panels, used in televisions and computer monitors.

The D.C. Circuit noted that appellate review of a certification decision is discretionary, not automatic, and is generally disfavored. This case warranted review, however, according to the appellate panel, because the Supreme Court's latest pronouncement on these issues came down after the district court's decision, the potential liability was so substantial that class certification may pressure the railroads to settle regardless of the merits of the claims (a "death knell" scenario), and the certification decision was "questionable."

The appellate court criticized the shippers' economic model for detecting injury "where none could exist" with respect to shippers who negotiated contracts before the alleged conspiracy. The court agreed with the railroads' argument that the shippers could not show through common evidence, as they must to merit certification, injury by all members of the proposed class and that as a result individualized trials would be required. The D.C. Circuit stated that the district court's decision did not address these concerns. In addition, the Supreme Court's subsequent opinion in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), holding that plaintiffs must affirmatively establish that damages are capable of measurement on a class-wide basis to satisfy the predominance requirement, "sharpens the defendants' critique of the damages model as prone to false positives."

Flat-Panel Price Fixing

A federal jury in Northern California returned a split verdict in retailer Best Buy's antitrust suit alleging that manufacturers conspired to fix the prices of thin-film transistor liquid crystal display (TFT-LCD) panels, used in televisions and computer monitors. The jury found that Best Buy did not prove by a preponderance of the evidence that Toshiba knowingly participated in the conspiracy, but the jury concluded that Best Buy proved its case against HannStar and that the conspiracy produced substantial intended effects in the United States. The jury awarded $7.5 million in damages, subject to trebling and the addition of attorney fees, significantly less than Best Buy sought to recover. *In re TFT-LCD (Flat Panel) Antitrust Litigation: Best Buy v. Toshiba*, No. 12-CV-4114 (MDL No. 1827, N.D. Cal. Sept. 3, 2013).

The court had previously denied Toshiba's motion for summary judgment, stating that while the evidence may show that Toshiba did not participate in any conspiracy meetings, there was sufficient evidence to allow a jury to consider if Toshiba participated through discussions outside those meetings. 2013 WL 3387652 (N.D. Cal. July 8, 2013).

Airline Merger

The European Commission approved the proposed acquisition of Olympic Air by rival Greek air carrier Aegean Airlines. IP/13/927, Oct. 9, 2013. The commission had blocked a prior merger attempt by the two airlines in 2011 but cleared the current proposal because, without the merger, Olympic would exit the market in the near future due to the Greek economic crisis and its own difficult financial situation, leaving Aegean as the only major domestic Greek airline. The commission decided that the merger would not harm competition, since Olympic was a failing firm with no other credible buyers and would soon disappear as a competitor to Aegean in any event.

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