New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 251—NO. 77
WEDNESDAY, APRIL 23, 2014

ANTITRUST

Expert Analysis

Seventh Circuit Checks Global Reach of Sherman Act

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The U.S. Court of Appeals for the Seventh Circuit refused to apply U.S. antitrust law in a case where allegedly price-fixed component parts were sold and combined into completed products abroad before being sold to U.S. consumers. A district court decided that chocolate bar manufacturers would not have to face antitrust conspiracy charges at trial because the evidence did not support an inference that their parallel price increases were the result of collusion.

Other antitrust developments of note included the Supreme Court's agreement to review a case interpreting the application of the state action immunity doctrine to a North Carolina dentists board, which sought to curtail services by non-dentists, and the New York Attorney General's imposition of novel remedies in a hospital merger case.

Extraterritorial Reach

In a case involving an alleged conspiracy to fix the prices of liquid crystal display (LCD) panels, the Seventh Circuit ruled that U.S. antitrust laws could not be invoked to reach foreign price-fixing that had only an indirect effect in the United States. Motorola, which manufactures electronic devices that incorporate LCD panels, such as mobile phones, alleged that manufacturers of LCD panels conspired to raise prices in violation of Section 1 of the Sherman Act.

The decision, *Motorola Mobility v. AU Optronics,* No. 14-8003, 2014 WL 1243797 (7th Cir. March 27, 2014), authored by Judge Richard Posner, stated that the domestic effects test of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which limits application of the Sherman Act, was not met where allegedly price-fixed component parts were sold and combined into completed products abroad before being sold to consumers in the United States. Under the domestic effects test, non-import foreign commerce is outside of the Sherman Act's reach unless such conduct (a) has a "direct, substantial, and reasonably foreseeable effect" on American domestic or import commerce; and (b) such effect gives rise to a Sherman Act claim.

The LCD panels involved fell into three categories: (1) 1 percent of the panels at issue were both bought by and delivered to Motorola within the United States; (2) 42 percent of the panels were bought by Motorola's subsidiaries and placed into products that were then shipped to Motorola in the United States to be resold by Motorola domestically; and (3) 57 percent of the panels were bought by Motorola's subsidiaries and placed into products that were sold outside of the United States. Evaluating defendants' motion for partial summary judgment, the district court ruled that Motorola's claims to recover overcharges for panels bought by its subsidiaries (the second and third categories) were barred under the domestic effects test of the FTAIA.

The Seventh Circuit first noted that because the third category of panels never entered the United States, they "never became domestic commerce" and could not support a Sherman Act claim. In addition, although the panels bought by Motorola in the United States were not at issue in the appeal, the court observed that the sale of panels to Motorola in the United States at inflated prices would be subject to the Sherman Act.

Evaluating Motorola's claim regarding the second category (42 percent of the LCD panels), the appellate court emphasized that the panels were sold outside the United States to Motorola's foreign subsidiaries which incorporated them into products that were then exported to the United States for resale by Motorola. Because the "effect of component price fixing on the price of the product of which it is a component is indirect," there was no direct effect on domestic commerce. Therefore, Motorola's claim regarding the 42 percent was barred by the first prong of the FTAIA's test.

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Motorola's claim was also barred by the second prong of the FTAIA's test, requiring that the "effect" of the defendants' conduct on "domestic U.S. commerce 'give rise to' a Sherman Act claim," because the domestic effect of the alleged price fixing was "mediated" by Motorola's decision of what to charge U.S. consumers. Motorola's claim was based "on the effect of the alleged price-fixing on Motorola's foreign subsidiaries" but such subsidiaries had assumed the risk that the antitrust laws of the countries in which they operated might not provide adequate remedies.

Noting that if adopted, Motorola's position would "enormously increase the global reach of the Sherman Act," the appellate court emphasized that the FTAIA was intended to prevent "unreasonable interference with the sovereign authority of other nations." The Seventh Circuit further stressed that "practical stakes" weighed strongly against Motorola's "expansive interpretation" of the FTAIA, as it has become increasingly common for products imported into the United States to contain components bought from foreign manufacturers. The appellate court therefore affirmed the lower court's ruling that Motorola's claims regarding the LCD panels bought by its subsidiaries were barred by the FTAIA.

The Seventh Circuit's construction of the FTAIA's domestic effects test reflects a limited view of the extraterritorial reach of federal antitrust law and may provide defendants with a powerful tool against some Sherman Act claims. The decision adds to the trend seen in the federal courts limiting the foreign application of federal laws—including, most notably, the Supreme Court's 2010 opinion in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

Chocolate Conspiracy

Grocery stores and other retailers brought antitrust suits asserting that Mars, Hershey and Nestlé, inspired by collusive conduct in Canada, conspired to raise the prices of domestic chocolate candy bars. On three occasions between 2002 and 2007, when Mars or Hershey initiated a price increase on single and "king" size chocolate bars, the others immediately implemented similar price hikes. Following "exhaustive and comprehensive" discovery, the district court granted summary judgment in favor of the defendant chocolate makers because the evidence did not permit a reasonable inference of a price-fixing agreement. *In re Chocolate Confectionary Antitrust Litigation*, 08-MDL-1935 (M.D. Penn. Feb. 26, 2014).

> In 'Motorola,' the Seventh Circuit ruled that U.S. antitrust laws could not be invoked to reach foreign price-fixing that had only an indirect effect in the United States.

Mindful of the "fine line separating unlawful conduct from legitimate business practices" and relying on the antitrust summary judgment formulation set out in the Supreme Court's opinion in *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the court stated that plaintiffs did not provide any evidence tending to exclude the possibility that the chocolate makers acted independently in implementing parallel price increases. The court noted that the evidence indicated interdependence rather than conspiracy because the cost of cocoa and other inputs went up significantly during the relevant period and internal documents reflected surprise at the timing and amount of rivals' price increases. Nor did the court find any connection between concerted efforts to curb promotional payments in Canada and the alleged U.S. conspiracy. The court added that participation at a trade association meeting did not permit an inference of conspiracy.

This case highlights the different standards applied at the pleading stage and after discovery at the summary judgment stage. The court observed that while the conspiracy allegations seemed "quite plausible" when the court evaluated the sufficiency of the complaint, at the end of the day, the evidence did not match the allegations.

State Action Immunity

The U.S. Supreme Court agreed to review a decision by the U.S. Court of Appeals for the Fourth Circuit concerning the scope of the state-action exemption from federal antitrust law. *North Carolina Board of Dental Examiners v. Federal Trade Commission*, No. 13-534 (March 3, 2014). As reported in the July 2013 column, the Fourth Circuit affirmed an FTC order finding that the North Carolina State Board of Dental Examiners engaged in unfair competition in the market for teeth-whitening services in North Carolina. The board, a state agency, is comprised of eight members, most of whom are licensed dentists.

Consumers in North Carolina can purchase teeth-whitening in several ways, including as a treatment provided by non-dentists in malls and other locations. The board issued dozens of cease-and-desist letters to non-dentist teeth-whitening providers asserting that they were practicing dentistry illegally. Following an administrative trial, the FTC decided that the board violated the FTC Act by excluding non-dentists from the teeth-whitening market. The Fourth Circuit agreed, finding that in sending the cease-and-desist letters, the board was effectively acting as a private actor rather than as a state regulatory body.

While private parties who act pursuant to a "clearly articulated and affirmatively expressed" state policy and whose behavior is "actively supervised by the State itself" may be exempt from the antitrust laws, the appellate court found that the "letters were sent without state oversight and without the required judicial authorization." In a concurring opinion, Judge Barbara Keenan wrote to emphasize that the board's status as a private actor "turn[ed] on the fact that the members of the Board, who are market participants, are elected by other private participants in the market."

The Supreme Court certified the question of whether, under the state-action doctrine, a regulatory board created by state law may be treated as a private actor where, pursuant to state law, a majority of the board's members are also market participants and are elected to their board positions by other market participants. The case will be heard in the fall of 2014.

Non-Solicitation Agreements

The Northern District of California denied summary judgment motions of defendants Google, Apple, Intel, and Adobe, stating that claims that they conspired to suppress competition in violation of federal and state antitrust laws by agreeing not to hire each other's employees should go to trial. Defendants had conceded, for the purposes of summary judgment motions, that a series of bilateral agreements existed between Pixar-Lucasfilm, Apple-Adobe, Apple-Google, Apple-Pixar, Google-Intuit, and Google-Intel. The agreements were almost identical and precluded each party from soliciting the other party's employees.

The court found that the evidence, which included communications to and from executives such as Apple's Steve Jobs and Google's Eric Schmidt, tended to exclude the possibility that defendants acted independently. The court noted that many of the defendants knew about each other's anti-solicitation agreements and that there was evidence that the defendants "tried to ensure that the agreements were known only to recruiters and executives who had to enforce them." Furthermore, the agreements were "negotiated by a small group of intertwining high-level executives" and "the same small group of intertwining high-level executives were involved in strictly enforcing the agreements."

The court also found significant that there was evidence showing that defendants shared confidential salary employee information with each other despite the fact that they "considered each other competitors for talent." In addition, evidence that defendants tried to expand the anti-solicitation agreements to other companies undermined their argument that the agreements were independent of each other. The court found that the evidence, viewed in the light most favorable to the plaintiffs, tended to exclude the possibility that defendants acted independently and therefore concluded that the question of whether there was an overarching conspiracy should go to a jury.

In re High-Tech Employee Antitrust Litigation, No. 11-cv-02509 (N.D. Cal. March 28, 2014).

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Hospital Merger

The New York Attorney General announced the settlement of charges that a proposed affiliation of the two general acute care hospitals in Utica would reduce competition in violation of antitrust law. The settlement permits the arrangement to proceed but includes rate-protection provisions—giving private and government insurers and other payers the right to keep current prices for five years if they believe the hospitals are not negotiating in good faith—prohibits most favored nation clauses and other exclusionary conduct, and is designed to ensure that the hospitals have implemented the asserted efficiencies before termination of the rate-protection provisions. (Press Release: A.G. Schneiderman Announces Settlement With Utica Hospitals to Address Competitive Concerns, Dec. 11, 2013)

The New York Attorney General continues to utilize creative, non-structural remedies that seek to address the competitive concerns of a proposed transaction by restricting the merged company's conduct rather than requiring divestitures, which is generally the federal antitrust authorities' preferred form of relief.

Prosthetic Knees

The U.S. Court of Appeals for the Ninth Circuit affirmed a lower court's grant of summary judgment dismissing claims by DAW Industries, a supplier of prosthetic knees that its rival, Hanger Orthopedic Group, violated the Cartwright Act, California's state antitrust statute. *DAW Industries v. Hanger Orthopedic Group*, No. 11-56858 (9th Cir. Feb. 24, 2014; not designated for publication). DAW alleged that Hanger and another competitor conspired to restrain trade and attempted to monopolize the market for prosthetic knees by manipulating insurance codes and by establishing certain definitions and a protocol at an industry symposium in an attempt to eliminate DAW's prosthetic knee from the market.

The court noted that during the time of the alleged conspiracy, several new competitors entered the market for prosthetic microprocessor knees, suggesting that competition as a whole remained robust even if DAW's sales were suffering. The appellate court emphasized that injury to a competitor is not the same as an injury to competition and that "malicious action against a competitor with no adverse effect on competition" is not an antitrust violation. The appellate court similarly found that DAW's claim for attempted monopolization failed given that conspiracies to monopolize are only unlawful if they have a dangerous probability of success and DAW failed to offer evidence regarding each competitor's share of the relevant market.