New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 252—NO. 125
WEDNESDAY, DECEMBER 31, 2014

ANTITRUST

Expert Analysis

Justice Department Seeks to Block Cinema Advertising Merger

By
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The U.S. Department of Justice sued to block the merger of two major cinema advertising networks, asserting that cinema advertising is a distinct relevant market to the exclusion of other video advertising. The U.S. Court of Appeals for the Seventh Circuit revisited and reaffirmed its ruling from earlier this year that a domestic corporation could not assert price-fixing damages claims on behalf of its foreign subsidiaries but deliberately left undisturbed the Department of Justice's ability to bring enforcement actions against participants in the same price-fixing conspiracy.

A district court decided that the regulatory process through which international airline fares are filed and monitored precluded antitrust attacks on filed airline fares. In other developments of note, the Justice Department announced that it has no current plans to challenge the operation of a cyber-threat discussion and collaboration platform that allows members to share information anonymously. The Federal Trade Commission, meanwhile, settled yet two other matters brought against professional associations in relation to anticompetitive ethical rules in their codes of conduct.

Cinema Advertising Merger

The Department of Justice filed a civil suit in New York federal court seeking to block National CineMedia Inc.'s proposed acquisition of Screenvision LLC. *United States v. National CineMedia*, *No. 14-cv-08732* (S.D.N.Y. Nov. 3, 2014). The two firms are rival major cinema advertising networks. Responsible for packaging and providing pre-show advertisements and special content, they serve as middlemen, standing between advertisers and movie theaters. According to the government's complaint, the entry barriers are high, due to the infrastructure required to develop and attract national advertisers as well as the fact that cinema advertising networks enter into multi-year and exclusive contracts with individual theaters.

The Justice Department claimed that the past two years have seen a surge in intense competition between the two firms, and this continued competition was one of the primary motivators behind the decision to merge. The Justice Department further observed that the two firms together serve 88 percent of all movie theater screens in the United States, and warned that the combination would create a monopoly in violation of §7 of the Clayton Act and result in increased costs to advertisers, which in turn could be passed on to consumers in the form of higher ticket or concessions prices.

The complaint rejected the pro-competitive arguments put forth by the two firms, namely that their merger would allow them to offer ubiquitous and more targeted coverage to advertisers, suggesting that the potential audience for the packaged advertisements would be competitive with broadcast and cable TV networks and online and mobile video ads. Nonetheless, the Justice Department defined the relevant market narrowly as cinema advertising, to the exclusion of advertising in other media, and asserted that few advertisers would switch to other forms of video advertising in response to small but significant price increases. The case is scheduled to go to trial in April 2015.

Extraterritorial Reach

In a case involving an alleged conspiracy to fix the prices of liquid crystal display (LCD) panels, the Seventh Circuit affirmed its prior ruling (discussed in the April 23, 2014 column) that U.S. antitrust laws could not be invoked by Motorola to recover damages for foreign price-fixing that had only an indirect effect in the United States. *Motorola Mobility v. AU Optronics Corp.*, *No. 14-8003*, 2014 WL 6678622 (7th Cir. Nov. 26, 2014). 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 §1 of the Sherman Act.

This appeal involved price-fixed panels that were bought, paid for and delivered to mostly Chinese and Singaporean subsidiaries of Motorola, incorporated into cellphones and then sold and shipped to Motorola (the American parent) for resale in the United States. Writing for a unanimous panel, Judge Richard Posner observed that there are two requirements under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which limits extraterritorial application of the Sherman Act: First, there must be a direct, substantial, and reasonably foreseeable effect on domestic U.S. commerce and, second, the effect must give rise to a federal antitrust claim. Posner explained that the first requirement establishes that there is an antitrust violation, while the second determines who may bring a suit based on it.

The immediate victims of the cartel were

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Motorola's foreign subsidiaries and Motorola's injuries were indirect, according to the Seventh Circuit. The appellate court rejected Motorola's argument that it and its subsidiaries are "one" for antitrust purposes, noting that for other purposes the subsidiaries are distinct legal entities in the sense that, for example, they pay foreign rather than U.S. taxes.

The court went on to describe Motorola's conduct as forum shopping and observed that "should some foreign country…have stronger antitrust remedies than the United States does, Motorola would tell that subsidiary to sue under the antitrust law of that country." In addition, Posner stated that the American parent company could not sue under the federal antitrust laws because the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), precludes federal antitrust damages suits by indirect purchasers.

The court expressed concern that accepting Motorola's position would "enormously increase the global reach of the Sherman Act" and create "friction" with many foreign countries who may resent American efforts to act as "the world's competition police officer." Yet, the court emphasized that precluding damages suits by Motorola and similarly situated firms would not prevent the Department of Justice from bringing criminal charges against the violators, as long as the requisite effect on U.S. commerce could be shown. Judge Posner indicated that, unlike private plaintiffs, the Justice Department has the incentive and capability to consider comity and foreign sovereignty concerns.

Airfare Rates

Buyers of airline tickets brought suit against various airlines for violation of §1 of the Sherman Act, alleging that defendants conspired to fix air transportation fares and fuel surcharges. In response, defendants raised the filed rate doctrine, a defense to private antitrust suits that precludes damages where the rates at issue were filed with a regulatory agency. The principle underlying the filed rate doctrine is the notion that, where a government regulatory authority has weighed in on the appropriateness of a rate filed, it would be improper for a court to step in and substitute its judgment in place of the authority's about the legality of those rates. The filed rate doctrine has mostly been applied to utilities, like telecommunications and gas and power companies, and courts considering its application often look to congressional intent and agency expertise.

The defendants had originally raised the filed rate doctrine unsuccessfully at the motion to dismiss stage. With some settlements along the way, the case proceeded to summary judgment, where all five defendants filed individual motions based solely on the filed rate doctrine. At the outset, the court noted that the issue was one of first impression. Defendant airlines argued that the filed rate doctrine applied to all the rates at issue—filed and unfiled alike—alleged by plaintiffs to have been the product of collusive anticompetitive conduct.

The court did not entirely agree. The court decided that the federal system through which airlines submit air fare rates to the Department of Transportation could bar some antitrust claims challenging air fare rates—those air fare rates that were required to be filed pursuant to the Transportation Department's regulatory authority. *In re: Transpacific Passenger Air Transportation Antitrust Litigation*, 2014-2 CCH Trade Cases ¶78,917, No. C 07-05634 (N.D. Cal. Sept. 23, 2014). This meant that claims relating to those rates that went unfiled—such as surcharges or even discounted tickets whose purchase price was based upon actual filed rates—did not get the benefit of the filed rate doctrine.

A district court decided that the regulatory process through which international airline fares are filed and monitored precluded antitrust attacks on filed airline fares.

The court explained that the Federal Aviation Act (FAA), enacted in 1958, required airlines engaged in foreign air transportation to file rates with the Transportation Department's predecessor, and authorized the department's predecessor to both reject and void rates that were inconsistent with statutory requirements or applicable regulations as well as grant antitrust immunity to certain airlines as required by public interest. Certainly if the FAA had been the rule of law at the time of the instant suit, the filed rate doctrine analysis would have been easier. But, notably, Congress fully deregulated the domestic airline industry in 1978 and, in 1979, passed the International Air Transportation Competition Act of 1979 (IATCA).

The stated purpose of the IATCA was to promote competition in the international airline industry, and, while the IATCA did not fully deregulate the international airline industry, it granted the Transportation Department more discretion over rate filing requirements. For example, under the IATCA, the department was permitted to exempt air carriers from filing requirements. Although they disagreed about the impact of this regulatory shift, both sides agreed that there was no direct evidence of, nor was it clear that, the Transportation Department actually evaluated filed rates for reasonableness. But, in the end, as the court noted, it did not really matter.

Critical to the court's assessment of whether the filed rate doctrine preempted plaintiffs' claims was whether the rates were actually filed with the Transportation Department, meaning that the department could step in, if it wanted to. Once that question was resolved, the filed rate doctrine applied, and it was irrelevant—and the department's prerogative—whether the department took a light or heavy hand in regulating the filed rates. But, due to the shift in regulatory scheme, not all of the rates at issue in the case were, in fact, filed rates—many were exempt from filing requirements.

The court stated that plaintiffs could not recover alleged overcharges on filed rates, but, it ruled that the filed rate doctrine did not apply where rates were not filed, or it was otherwise unclear that the Transportation Department could access or monitor the relevant rates, because there was no evidence to suggest that the department actively regulated those rates such that preemption of federal antitrust laws would be appropriate.

The court certified the order for immediate appeal because it involved a controlling question of law as to which there is substantial ground for difference of opinion.

Cyber Intelligence Sharing

The Justice Department announced that it has no present intention to challenge a cyber intelligence data-sharing platform operated by CyberPoint International LLC. Business Review Letter from William J. Baer, Assistant Att'y Gen. (Oct. 2, 2014). CyberPoint currently provides security products, services, and solutions to commercial and government customers, and CyberPoint's proposed platform, called "TruSTAR," was submitted to the Justice Department under the department's business review procedure. TruSTAR is designed to collect and share

incident reports relating to cyber attacks on an anonymous basis. In addition, TruSTAR members may anonymously collaborate on techniques for responding to cyber threats.

The Justice Department's business review letter notes that collaborative efforts (like TruSTAR) must be evaluated under a rule of reason analysis. The Justice Department commented that TruSTAR, as proposed, does not suggest harm to competition or consumers, as it is highly technical information that will be helpful to securing infrastructure. Further, the Justice Department noted, with approval, that in order to be a member of TruSTAR, collaborators must agree not to share competitively sensitive information because the platform would allow competitors to exchange information, in some cases anonymously. The Justice Department stated that the information that will be shared is very technical and "unlikely to facilitate tacit or explicit price or other competitive coordination among competitors."

Professional Associations

Two professional associations have recently settled charges brought by the FTC relating to provisions in their respective codes of ethics. Under the final orders approved by the FTC, the organizations must stop restraining competition among their members through the use of ethical rules. The two professional organizations involved are the National Association of Residential Property Managers, Inc., which represents more than 4,000 real estate managers, brokers, and agents, and the National Association of Teachers of Singing, Inc., which represents more than 7,300 vocal arts teachers.

At issue in the property managers settlement were ethical rules prohibiting members from soliciting competitors' clients or engaging in comparative advertising. *In the matter of National Association of Residential Property Managers, Inc.*, No. C-4490 (F.T.C. Oct. 10, 2014). Along similar lines, the singing teachers settlement implicated ethical rules prohibiting members from soliciting students from other members. *In the matter of National Association of Teachers of Singing*, No. C-4491 (F.T.C. Oct. 10, 2014).

These recent settlements continue the FTC's long-running practice of challenging professional associations' ethical rules that it believes violate §5 of the Federal Trade Commission Act. Professional association codes of conduct are generally analyzed under the rule of reason, and since the Supreme Court's ruling in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), courts and enforcement agencies have made clear that these codes will be carefully scrutinized, even where members of the learned profession in question (medical professionals, engineers, etc.) have argued that price competition might result in inferior work.

Ductile Iron Pipe Fittings

A New Jersey federal judge decided, in an unpublished opinion, that the FTC's dismissal of antitrust claims against ductile iron pipe fitting manufacturer McWane, Inc. did not require the dismissal of private antitrust claims against another defendant that were based on the same allegations. *In re: Ductile Iron Pipe Fittings Direct Purchaser Antitrust Litigation*, 2014-2 CCH Trade Cases ¶78,875, No. 12-711 (D.N.J. Aug. 13, 2014). The class actions arose as a follow-on litigation in early 2012, about a month after the FTC decided to bring an action against McWane and other manufacturers of ductile iron pipe fittings, which direct the flow of pressurized water through pipeline systems.

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The FTC's case against McWane wrapped up in January 2014, right before defendants in the civil cases moved to dismiss. (This column covered that case on Feb. 25, 2014, and the FTC's decision is now on appeal before the U.S. Court of Appeals for the Eleventh Circuit.) Hoping to capitalize on a favorable result before the FTC, defendant Sigma Corporation argued that the district court overseeing the private antitrust claims should follow the FTC's lead and dismiss those claims that were similar in nature. The court did not agree.

The cases in the New Jersey district court are consolidated class actions bringing price-fixing and monopoly claims under the Sherman Act against ductile iron pipe fitting manufacturers McWane, Sigma, and Star Pipe Products, Ltd. All three defendants sold imported ductile iron pipe fittings, and McWane also sold domestic ductile iron pipe fittings. Plaintiffs alleged that defendants both comprised a monopoly in the ductile iron pipe fittings market and, through coordinated price increases, engaged in a price-fixing conspiracy that unreasonably restrained trade in the ductile iron pipe fitting market.

Defendants Sigma and Star settled with the FTC prior to litigation—Sigma with a consent decree in which it did not admit to wrongdoing—but the action against McWane went forward before an administrative law judge and, ultimately, up on appeal before the FTC, with a favorable result for McWane—most of the claims were dismissed. While the FTC found that McWane had unlawfully maintained a monopoly by imposing exclusive dealing arrangements on distributors purchasing domestic ductile iron pipe fittings, the FTC dismissed other charges dealing with unlawful collusion, information exchange, and restraint of trade.

Of special import to Sigma in the follow on litigation was the final FTC opinion's treatment of allegations about a distribution agreement between Sigma and McWane relating to domestic sales of ductile iron pipe fittings. The allegations rejected in the FTC's McWane opinion—and raised by plaintiffs in the follow-on suit—were that the distribution agreement amounted to an antitrust violation and that Sigma and McWane had conspired to allow McWane to monopolize the domestic ductile iron pipe fittings market. Notably, the FTC stated that none of the distribution agreement's provisions had any anticompetitive effects on the domestic ductile iron pipe fittings market, even though the evidence suggested that McWane might have had that intent.

Seeking the benefit of the FTC's recent opinion in its McWane matter, defendant Sigma argued that the FTC's McWane decision should lead the district court to the same conclusion. Rejecting this argument, the district court noted that the FTC's decision was not binding, and moreover that the FTC had only reached its decision to dismiss claims against McWane after "extensive discovery," to which the class action plaintiffs were entitled but had not yet availed themselves.