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Antitrust

Expert Analysis

Competitor Communications Not Enough to Infer Antitrust Conspiracy

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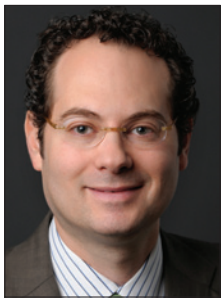

Two federal appellate courts considered whether plaintiffs had garnered sufficient circumstantial evidence—including discussions among competitors—to present antitrust conspiracy claims to a jury. In one case, the U.S. Court of Appeals for the Second Circuit affirmed summary judgment for magazine publishers accused of orchestrating a group boycott in response to a wholesaler's announcement of new pricing terms. In another case, the U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment for containerboard manufacturers alleged to have agreed to fix prices. In both cases, the courts of appeals decided that despite the presence of frequent communications among rivals and some parallel conduct, there was not enough evidence of a conspiracy to proceed to trial.

The cases turn on the essential requirement that an *agreement* must be proven to find a violation of §1 of the Sherman Act, which prohibits every "contract, combination … or conspiracy, in restraint of trade." In the absence of direct evidence, such as a confession or a "smoking gun," plaintiffs must assemble circumstantial evidence that supports an inference of an agreement. That task is advisedly difficult because the commercial conduct at issue in many antitrust cases could be in the independent, non-collusive interest of each business. For example, each business may prefer not to deal with a distributor that seeks to impose costlier terms. A group boycott may not be necessary for rival businesses to decide, independently, not to deal with the distributor. In some concentrated markets, businesses have an economic incentive to attempt a price hike on their own, as long as they can retreat quickly without losing market share if others do not follow or market forces reject the increase. And distinguishing collusion from mere competitor communications is central to §1 analysis, as information exchanges are often benign or even procompetitive. To avoid deterring or penalizing legitimate and procompetitive conduct, antitrust jurisprudence requires that a plaintiff present evidence that "tends to exclude the possibility" of independent behavior.

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Magazine Boycott

At the time the magazine boycott litigation began, magazines were overwhelmingly sold in the United States either through subscriptions or as single copies at retail stores. Anderson News was one of the largest magazine wholesalers; it received

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magazines from publishers, delivered them to retailers, and then recollected those magazines retailers were unable to sell.

Traditionally, publishers would sell single-copy magazines to the wholesalers at a discount to their cover price—the price a retailer would charge end-customers. The wholesaler, in turn, would sell the magazines to the retailer for a slightly higher price than it had paid, but one still below the cover price. If any copies went unsold, the wholesaler would pick those up and refund the retailer for their cost. The publisher would refund the wholesaler for what it paid for the unsold copies. Starting in the early 2000s, however, the industry embraced a new means of magazine delivery and payment. Retailers began selling magazines on consignment from wholesalers, whereby they would track each magazine received and only pay wholesalers once a magazine was sold. The new system raised inventory expenses for wholesalers like Anderson. While wholesalers still had to pay publishers when picking up magazines, retailers no longer paid wholesalers immediately upon receiving copies.

After years of losses stemming in part from the new system, Anderson announced in January 2009 that it would require publishers to cover those inventory expenses and pay Anderson a seven cent surcharge for each magazine it delivered. Having attempted and failed to impose similar conditions in years past, the company believed it could secure publishers' agreement this time by threatening to implement a "going dark" plan, with support from two leading retailers and its delivery logistics affiliate. Anderson's proposal sparked a flurry of communications between publishers, distributors and other players in the industry.

Although several publishers tried to negotiate various compromises with Anderson, as it accounted for around 30 percent of the wholesale business, ultimately no publisher agreed to the new terms on a long-term basis. Following its failure to achieve publishers' acquiescence, Anderson ceased operations.

Anderson sued magazine publishers and others, alleging they conspired in violation of §1 of the Sherman Act to boycott Anderson and drive it out of business. The district court initially dismissed the complaint, but the Second Circuit reversed and the parties proceeded to discovery. The district court subsequently granted the publishers' motion for summary judgment and the Second Circuit affirmed in a unanimous and thorough opinion authored by Judge Susan L. Carney. *Anderson News v. American Media*, 899 F.3d 87 (2d Cir. 2018).

'No Economic Sense'

At issue in the appeal was whether Anderson had provided enough direct or circumstantial evidence to allow a reasonable jury to conclude that the publishers' rejection of the company's proposal "more likely than not" resulted from a conspiracy as opposed to independent decision-making.

The court began by explaining that it would evaluate the evidence within the context of the economic plausibility of the claims. If the alleged agreement "simply makes no economic sense," the plaintiff must come forward with more persuasive evidence. This is because, as the Supreme Court stated in *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986), "antitrust law limits the range of permissible inferences from ambiguous evidence."

The court rejected the argument that publishers had a strong motive to conspire to drive Anderson out of business, concluding that the alleged agreement was economically implausible because of the likelihood that the demise of Anderson would harm the publishers: less competition among wholesalers could lead to higher prices for retailers as well as publishers.

Two-Sided Markets

To buttress its argument that eliminating a major wholesaler would have benefitted publishers and made economic sense, Anderson tried to invoke the economic literature on multi-sided platforms, which was reviewed extensively in the Supreme Court's recent decision in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), and criticized by some commentators as a boon to antitrust defendants. Although the Second Circuit did not find Anderson's two-sided analysis persuasive, the court's discussion demonstrates that creative plaintiffs may consider two-sided market theories to advance their claims.

Exchanging Information

The Second Circuit rejected Anderson's contention that evidence of allegedly incriminating communications and parallel conduct supported an inference of collusion.

The court determined that it was reasonable and prudent for publishers to constantly monitor industry conditions in reaction to Anderson's ultimatum and discuss plans for the looming possibility that it would "go dark." In that context, the court noted, the increased frequency of interfirm communications amounted to little. The appellate panel observed that other courts granted summary judgment for defendants in the face of evidence that they monitored competitors' conduct or tried to influence others to switch wholesalers.

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Contrary to Anderson's claims, the court added, the publishers' responses were not uniform or parallel. Many took independent efforts to negotiate with Anderson and some agreed to temporarily pay the surcharge. And while the publishers responded within a similar timeframe, they did so because of the tight deadlines imposed by Anderson.

Boycotts

Courts have long recognized that antitrust analysis of boycotts may require more nuance than other categories of restraints, such as bid rigging. In the absence of direct evidence of collusion, plaintiffs may have difficulty proving boycott claims asserting concerted efforts by competitors not to deal with a troublesome distributor or collective refusal to embrace a disruptive new entrant proposing a less profitable business model. After all, agreement is not necessary when resisting higher prices or lower profits is a predictable and rational reaction.

Containerboard

The Seventh Circuit's decision addressed the sufficiency of evidence in support of claims that manufacturers conspired to fix the prices of containerboard. Containerboard is used to make various kinds of boxes and is manufactured in large, costly mills by a handful of major players. The plaintiffs—representing a class of containerboard buyers—alleged that prices rose dramatically from 2004 to 2010 due to many parallel price increases. After one manufacturer announced a price increase, others often followed suit with similar or identical increases within hours, days or weeks. Nine of fifteen price increases were sustained, but six increase attempts did not hold.

A district court granted summary judgment to the remaining defendants (several had settled) and the Seventh Circuit affirmed in a unanimous opinion penned by Chief Judge Diane Wood, who had served in a senior position at the Antitrust Division of the Department of Justice. *Kleen Products v. Georgia-Pacific*, No. 17-2808 (7th Cir. Dec. 7, 2018). The court noted that its prior decision affirming certification of a class did not address the merits.

Mindful of *Matsushita*'s warning against "mistaken inferences … [that] chill the very conduct the antitrust laws are designed to protect," the Seventh Circuit ruled that the plaintiffs did not produce evidence that would permit a jury to find collusion and "rule out the hypothesis that the defendants were engaged in self-interested but lawful oligopolistic behavior." The appellate panel observed that upon close inspection the manufacturers' conduct was not as coordinated as plaintiffs suggested. For example, 40 percent of the 15 attempted price hikes failed and there was no evidence of an enforcement mechanism to discipline "cheaters" who did not go along with the price increases. With respect to supply restrictions, one of the manufacturers bought a new mill and kept the others open but underutilized, enabling it to reduce or increase output flexibly and independently "through watchful attention of [its] competitors' actions."

Plaintiffs emphasized the numerous contacts between company executives by phone and at trade association meetings and, like Anderson, highlighted the frequency and timing of the communications. The Seventh Circuit panel declined to infer a conspiracy from these contacts, especially when the manufacturers had legitimate business reasons to communicate because they regularly traded with one another.