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ANTITRUST

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Supreme Court Reverses Price Discrimination Award

The Supreme Court ruled that the Robinson-Patman Act's price discrimination provisions did not prohibit charging different wholesale prices to heavy-duty truck dealers unless they were competing to resell the trucks to the same customers.

The Department of Justice approved the combination of two movie theater chains with divestitures of a number of individual theaters. Other recent antitrust developments of interest include the U.S. Court of Appeals for the Second Circuit's ruling that purchasers of rock concert tickets should not be certified as a nationwide class and a decision by a district court that a vertical agreement to license software for free could constitute an unlawful restraint of trade.

Price Discrimination

Customers who seek to purchase heavy-duty trucks typically describe their specifications and invite bids from dealers representing different manufacturers. Dealers obtain price quotes from the manufacturer and submit a bid to the customer. When a given dealer's bid is successful, the trucks are purchased and the manufacturer builds the trucks to specification. In general, customers seek bids from only one dealer for a particular manufacturer.

A dealer of heavy-duty Volvo trucks alleged that its sales and profits declined because Volvo offered other dealers, who covered different territories, more favorable price concessions, in violation of the Robinson-Patman Act. A jury found in favor of the dealer and the court awarded treble damages totaling close to $4 million. A divided panel of the U.S. Court of Appeals for the Eighth Circuit affirmed. The Supreme Court reversed, holding that a manufacturer may not be held liable for secondary-line price discrimination under the act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same customers. In the absence of such actual competition with a favored dealer, the plaintiff could not establish secondary-line competitive injury, that is, the diversion of sales from a disfavored purchaser to a favored purchaser. The court commented that competition of this character ordinarily is not involved when a specially ordered product is sold through customer-specific bidding.

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The court observed that the act should be construed consistently with the broader policies of the antitrust laws, namely the protection of competition, not competitors. In this case, the court noted, the favored dealers did not possess market power and are not like the large retail chains that Congress was concerned about when it enacted the statute.

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., No. 04-905, 2006 WL 43971, (Jan. 10, 2006)

Comment: The decision reported immediately above is the first Supreme Court decision interpreting the Robinson-Patman Act in about a decade. Although the decision can be seen as a mere application of the statutory requirement that the manufacturer discriminated between two purchasers, the Court's declaration that the act should be construed within the context of modern antitrust policy may affect how the act is applied by the lower courts more generally. Commentators and jurists have maintained over the years that the act's original purpose—the protection of small retailers from large chains—is at odds with sound economic policy underlying modern antitrust theory.

Acquisitions

The Department of Justice announced a proposed settlement of its challenge to the planned combination of Loews and AMC, two national movie theater chains, requiring the divestiture of six theaters, including one in midtown Manhattan.

The department defined the relevant product market as the theatrical exhibition of first-run, commercial films, stating that the experience of viewing a film in a theater is inherently different from a live show, a sporting event, or viewing a film at home. The department added that a small but significant increase in the price of first-run film tickets would not cause enough consumers to substitute other forms of entertainment such that the increase would be unprofitable. The department stated that the relevant geographic markets are limited to particular sections of cities, including Chicago North, downtown Boston and midtown Manhattan, because moviegoers do not want to travel far from their homes to see a film.

The department and the states of New York, Illinois and Massachusetts alleged that the proposed merger would lessen competition and likely result in increased prices in five local markets because the merged firm would control all first-run, commercial theaters in Chicago North, downtown Boston, and downtown Seattle, that it would account for about 88 percent of box office revenues in midtown Manhattan (where it would control the only first-run theaters with stadium seating) and that it would have a market share of about 78 percent in north Dallas.

The department stated that in addition to likely increased ticket prices, the proposed merger would lessen the firms' incentives to maintain or upgrade the quality of their theaters' sound systems and seating and may enable the merged entity to reduce the number of early and late shows. The department added that competition for exclusive rights from film distributors to screen first-run commercial films will be diminished in the identified markets.

In addition to requiring curative divestiture, the proposed settlement also obliges the merged firm to provide at least 30 days' notice before acquiring any theaters in the identified markets, as such acquisitions may be too small to be reported under the premerger notification rules of the Hart-Scott-Rodino Act.

***United States v. Marquee Holdings, Inc.*, CCH Trade Reg. Rep. ¶¶45,105 (No. 4807), 50,933 (SDNY Dec. 22, 2005)**

Comment: If the enforcement action reported immediately above had been litigated in court, the parties may have had occasion to explore the possibility that theaters in business and entertainment districts such as midtown Manhattan, which are frequented by many nonresident workers and visitors, may constitute part of a broader geographic market than primarily residential areas, such as Chicago North.

Class Actions

A purchaser of live rock concert tickets brought suit alleging that the nation's largest promoter and producer of live entertainment events unlawfully monopolized the market and forced purchasers to pay inflated prices for concert tickets. The Second Circuit affirmed the district court's denial of a motion to certify a nationwide class of rock concert ticket purchasers because it found that the relevant geographic market was local, not national.

The court stated that the named plaintiff was not an adequate or typical representative of a class of ticket purchasers beyond those in the plaintiff's local market, Chicago: Plaintiff did not travel outside of Chicago to attend concerts and would not have traveled to New York to see a concert at a lower price. The appellate court stated that the concert promoter's national course of conduct, in the sense that it operated and set prices nationally, does not render the relevant market national. The court distinguished the Supreme Court's 1966 *Grinnell* opinion, in which the geographic market was found to be national even though the defendant could provide its alarm services only to customers within a 25-mile radius of its service centers, stating that *Grinnell* involved nationwide contracts and horizontal agreements between multi-state competitors.

The Second Circuit rejected the plaintiff's contention that it is not necessary to define a relevant geographic market because the monopolization claims can be proved with direct evidence of market power, explaining that the power to control prices or exclude competition must be analyzed with reference to a particular market.

> *In 'Heerwagen,' the court analyzed the market from the perspective of the customer, examining how far customers might travel to buy the same product at a lower price.*

***Heerwagen v. Clear Channel Communications*, No. 04-0699-CV, 2006 WL 45859 (Jan. 10, 2006)**

Comment: In the case reported immediately above, the court analyzed the relevant market from the perspective of the customer, not the seller, examining how far customers might travel to purchase the same product or service at a lower price.

Restraint of Trade

A computer programmer claimed that the licensor of "open source" Linux operating system software violated §1 of the Sherman Act because its general public license, which requires free licensing of the software, amounted to a conspiracy with commercial distributors to fix the price of its software. A district court stated that the alleged restraint was not a per se violation, relying on the Supreme Court's 1997 *State Oil v. Khan* decision, which held that vertical maximum price fixing agreements must be examined under the rule of reason. The court ruled that the programmer's complaint stated a §1 claim under the rule of reason because the license was an agreement to control the price of software and could have an anticompetitive effect. The court explained that by making certain software available at no charge, the licensor may discourage developers from creating new and better programs, thereby reducing output and quality. Nevertheless, the court dismissed the complaint without prejudice, holding that the programmer did not allege antitrust injury because its inability or unwillingness to enter into the software market constituted harm to a competitor, not harm to consumers or competition.

***Wallace v. Free Software Foundation, Inc.*, 2005-2 CCH Trade Cases ¶75,060 (S.D. Ind.)**

Exclusive Dealing

Providers of radiology services in Cumberland, Md., claimed that affiliated hospitals violated federal antitrust laws by, among other things, entering into exclusive dealing arrangements with competing radiology service providers. The exclusive contracts for the provision of radiology services at the affiliated hospitals accounted for 80 percent of all radiology services performed in the area. The U.S. Court of Appeals for the Fourth Circuit affirmed summary judgment for the defendants and stated that even if the exclusive contracts foreclosed a substantial share of the market, the hospitals provided procompetitive justifications for the restraints. The hospitals asserted that exclusive arrangements are necessary to control quality and cost and ensure the availability of round-the-clock services. The court noted that prices did not increase and output and quality did not decrease during the relevant period.

***The Imaging Center, Inc. v. Western Maryland Health Systems, Inc.*, 2005-2 CCH Trade Cases ¶75,056**