New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 235—NO. 56 THURSDAY, MARCH 23, 2006 ALM

BY WILLIAM T. LIFLAND AND ELAI KATZ

Per Se Condemnation Curbed by Supreme Court

In separate decisions, the Supreme Court ruled that two alleged restraints should not be subjected to per se condemnation under §1 of the Sherman Act: In the first case, the Court held that it was not per se unlawful for a joint venture to set a single price for the gasoline it sold under the brand names of each of the partners in the venture.

In the second, the Court ruled that tying the sale of patented printhead technology to the purchase of unpatented ink did not constitute a per se antitrust violation and could not be found unlawful unless the seller was shown to possess market power.

Other recent antitrust developments of interest included a ruling by the U.S. Court of Appeals for the Seventh Circuit that price-fixing claims against a financial institution may not be time-barred and an enforcement action by the European Commission charging a telecommunications company with abuse of its dominant position by squeezing the margins of new entrants to the broadband Internet access market.

Joint Ventures

Gasoline service station owners claimed that Texaco and Shell Oil engaged in price fixing when a joint venture they established for the purpose of refining and selling gasoline under the brand names of the two co-venturers set a single price for both brands of gasoline.

William T. Lifland *is senior counsel of the firm of Cahill Gordon & Reindel and* **Elai Katz** *is a partner at the firm.*

William T. Lifland *Elai Katz*

The U.S. Court of Appeals for the Ninth Circuit ruled that the trial court should not have awarded summary judgment to the oil companies and that it erred when it ruled that the claim should be examined under the rule of reason rather than as a per se violation.

In a unanimous decision, the Supreme Court reversed, holding that it was not per se illegal for a lawful joint venture to set the prices of its products. The Supreme Court stated that the joint venture, which was approved by the Federal Trade Commission, was lawful and that the challenged conduct amounted to "little more than price setting by a single entity" rather than an agreement between competitors regarding prices. The Court added that the joint venture should not be treated differently merely because it sold gasoline under two brands at the same price.

The Court noted that any challenge of the creation of the joint venture itself would have been subjected to rule of reason analysis. The Court also stated that pricing products was a core activity of the joint venture and therefore the ancillary restraint doctrine, under which restrictions imposed on nonventure activities are evaluated, had no application in this case.

Texaco Inc. v. Dagher, **2006-1 CCH Trade Cases ¶75,143**

Comment: In the decision reported immediately above, the Court observed that it presumptively applies rule of reason analysis in antitrust cases and that per se condemnation is "reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." This language may cause lower courts to require some antitrust plaintiffs to prove clear anticompetitive effects if they wish to rely on claims of per se illegality.

Tying

A manufacturer of patented printheads and unpatented ink required its customers, printer manufacturers, to agree not to buy ink from other suppliers. A rival ink supplier claimed that the agreement constituted unlawful tying in violation of §§1 and 2 of the Sherman Act. The U.S. Court of Appeals for the Federal Circuit reversed the trial court's grant of summary judgment for the printhead manufacturer, ruling that the lower court erred when it required the complaining rival to make a showing that the patent holder had market power in the patented, tying product. The Federal Circuit stated that Supreme Court precedent required courts to presume the possession of market power by a patent holder that conditions the purchase of the patented product on an agreement to buy unpatented goods exclusively from the patent holder.

A unanimous Supreme Court reversed the Federal Circuit, re-examining its precedents and holding that in tying

cases the plaintiff must prove that the defendant has market power in the tying product. The Court also ruled that tying arrangements involving patented products are no longer unlawful per se. The Court stated that the presumption that a tying patent confers market power was a vestige of the Court's historical distrust of tying arrangements but that the presumption was no longer warranted in light of congressional amendment of the Patent Code, antitrust enforcement agencies' guidelines and "virtual consensus among economists."

***Illinois Tool Works Inc. v. Independent Ink, Inc.*, 2006-1 CCH Trade Cases ¶75,144**

Comment: Outside the context of unlawful tying claims, there has been little doubt even before the ruling reported immediately above that intellectual property rights do not automatically confer market power upon their holders.

Limitation of Actions

Purchasers of copper rod and cathode brought suit alleging that a financial institution participated in a price fixing conspiracy involving a Japanese trading company and a copper merchant, among others. The Seventh Circuit ruled that although the claims against the trading company and copper merchant were time-barred by the four-year statute of limitations applicable to federal antitrust claims, the claims against the financial institution may have been timely filed.

The press had reported on the financial institution's extension of loans to the trading company but did not suggest activities beyond the normal role of a financial institution. The appellate court found that summary judgment for the financial institution was improperly granted by the district court for the additional reason that there were facts in dispute regarding the allegations that the financial institution fraudulently concealed its participation in the conspiracy by destroying documents, providing false information to authorities and instructing other conspirators not to divulge the existence of the conspiracy.

The Seventh Circuit rejected the plaintiffs' contention that the statute of limitations was tolled as a matter of law during the pendency of related class actions in California state court. The court stated that plaintiffs' membership in a class alleging violations of state law does not toll the federal statute of limitations governing a factually similar federal claim.

***In re Copper Antitrust Litigation*, 2006-1 CCH Trade Cases ¶75,118**

Monopolization

The European Commission (EC) announced the commencement of formal proceedings against a Spanish telecommunications company based on charges that the company abused its dominant position in contravention of Article 82 of the EC Treaty by implementing a "margin squeeze" in the Spanish broadband Internet access market. The EC stated that the difference between the telecommunications company's prices for wholesale broadband access charged to new entrants seeking to compete with it and the prices it charged to consumers was not sufficient to cover its own costs for the supply of broadband access to retail consumers. The EC stated that its investigation found that new entrants have not been able to compete and that broadband access prices in Spain are well above average in Europe.

***Competition: Commission Sends Statement of Objections to Telefónica Concerning Provision of Broadband Internet Access*, MEMO/06/91 (Feb. 22, 2006), available at europa.eu.int**

Resale Price Maintenance

The French competition authority, the Conseil de la Concurrence, announced that it imposed substantial fines on 13 perfume and cosmetics suppliers and three retail chains for fixing retail prices to consumers. The authority stated that each supplier set recommended retail prices for each of its products and the maximum permissible discount. In addition, the authority noted, retailers who refused to charge the suppliers' prices faced threats of commercial retaliation. The authority observed that although French and European law affords suppliers a certain degree of control over the retail distribution of luxury items, suppliers may not prevent retailers from setting prices independently and in competition with other retailers.

***Vertical Agreements in the Luxury Perfume Sector* (March 14, 2006), available at www.conseil-concurrence.fr**

Group Boycott

A firm engaged in the installation of point-of-sale cigarette displays and fixtures brought suit alleging that a tobacco company and a contractor performing similar installation services formed a group boycott to exclude the plaintiff from such work, in per se violation of Florida antitrust law. A federal district court granted the defendants' motion to dismiss the complaint for failure to state a claim. The court observed that per se condemnation of group boycotts has been limited to horizontal agreements against direct competitors and that although the plaintiff alleged that the defendants were its competitors, a plain reading of the complaint demonstrates a vertical relationship in the chain of distribution for installation of cigarette fixtures and displays among the alleged conspirators. The court also stated that the plaintiff failed to state a claim under the rule of reason because its proposed definition of the relevant market—limited to display and fixture installation work for a single tobacco company in Florida—did not consider substitute services and was thus insufficient.

***Lawrence H. Flynn, Inc. v. Philip Morris USA, Inc.*, 2006-1 CCH Trade Cases ¶75,141 (N.D. Ill.)**