New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 235—NO. 119 WEDNESDAY, JUNE 21, 2006 ALM

ANTITRUST

BY WILLIAM T. LIFLAND AND ELAI KATZ

Executive Hired Into Waning Cartel Convicted

The U.S. Court of Appeals for the Fifth Circuit upheld the conviction of an executive who became president of a company years after it began its participation in a cartel.

In other recent antitrust cases, the European Court of Justice ruled that the European Commission is not obligated to take into account fines paid in other jurisdictions when determining the fine to be levied on a participant in a global cartel. Other developments of interest included a ruling by the U.S. Court of Appeals for the Seventh Circuit that the obligation to join a realtors association in order to access its multiple listing service did not constitute unlawful tying.

Cartels

The Fifth Circuit upheld the conviction of the president of a vitamin manufacturer that participated in a conspiracy to fix prices, rig bids and allocate customers for choline chloride, a B complex vitamin essential for the proper growth and development of animals. The appellate court rejected the defendant's argument that the conspiracy, which had commenced around 1989, no longer existed when he was hired to be president of the company in 1997. The court stated that the jury's verdict was supported by sufficient evidence, including testimony that when the defendant became president the conspiracy was "strained" but "still in place."

United States v. Rose, **2006-1 CCH Trade Cases ¶75,235**

.....•••.....

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 European Court of Justice ruled that the European Commission is not required to take into account fines paid in other jurisdictions when it sets cartel fines. A supplier of food-processing products had unsuccessfully argued that the $61.6 million it was ordered to pay for participating in a conspiracy to fix the prices of lysine, an amino acid used in animal fodder, should have been reduced in light of fines it paid in the United States and Canada for its participation in the global cartel. The court also noted that the commission may consider the total worldwide revenues of a conspirator as well as the percentage of its revenues derived from the sale of cartel products but that the penalty does not have to be proportionate to the conspirator's revenues from the sale of those products, as long as the fine does not exceed 10 percent of the conspirator's total revenues in the last year of the conspiracy.

Archer Daniels Midland Co. v. Commission of the European Communities, **C-397/03 P (May 18, 2006), available at eur-lex.europa.eu**

Tying

A real estate broker wanted to continue his subscription to a local multiple listing service (MLS) but did not wish to continue his membership in the local realtors association that controlled the MLS. The broker brought suit claiming that membership in the association was unlawfully tied to the MLS subscription, in violation of §1 of the Sherman Act. The Seventh Circuit affirmed the grant of summary judgment to the defendant association because the broker did not bring forth sufficient evidence to show that competition has been foreclosed in the tied market—the market for real estate services provided by the association to its members. The appellate court explained that merely establishing that customers purchased an unwanted product does not demonstrate foreclosure if there are no rival sellers of that product.

Reifert v. South Central Wisconsin MLS Corp., **2006 WL 1585570 (June 12, 2006)**

.....•••.....

A distributor of television programs sued a local broadcaster in Houston, Texas, for breach of contract, claiming the broadcaster failed to pay for and broadcast licensed programs. The broadcaster countersued, claiming that the distributor violated the antitrust laws by conditioning the licensing of two popular programs, "Judge Judy" and "Judge Joe Brown," on the broadcaster's accepting a license for a third, less-desirable program.

In denying cross-motions for summary judgment, the court ruled that there was a genuine issue of material fact as to whether the distributor conditioned the license for two programs on the acquisition of a license for a third or merely offered a package of three programs for a lower price.

The court also stated that, even if the license for the third, allegedly tied program were held unenforceable, the payment terms of the license for the first two programs, which the broadcaster desired, would be enforced. The court observed that

otherwise the broadcaster would reap the benefit of the license it sought and used without fulfilling its obligations to pay for it.

In a subsequent decision, the court ruled that the broadcaster presented sufficient evidence of market power in the tying product to withstand summary judgment. The broadcaster argued that there were no reasonable substitutes for "Judge Judy" and "Judge Joe Brown" for the 2002-2003 season because other syndicated programs suitable for broadcast five days a week were either already licensed in the Houston market or had significantly lower ratings.

***Paramount Pictures Corp. v. Johnson Broadcasting Inc.,* 2006-1 CCH Trade Cases ¶75,236 (S.D. Tex.) and 2006 WL 1407473 (S.D. Tex. May 22, 2006)**

Comment: In *Illinois Tool Works,* decided earlier this year, the Supreme Court stated that in tying cases, the plaintiff must prove that the defendant has market power in the tying product market. In the case reported immediately above, the broadcaster defined the relevant market narrowly by excluding syndicated programs that were already licensed to other local broadcasters. If the broadcaster had sought to license programs earlier, when comparable programs had not yet been licensed to other local broadcasters, the relevant market for the tying product might have been analyzed differently.

Group Boycott

A seller of historical replicas and longtime participant in an annual reenactment of a "rendezvous" conducted by a nonprofit organization brought suit alleging that the organization's rejection of the seller's application for a "trading post" constituted a horizontal group boycott or a conspiracy to monopolize the market for sales of pre-1840 replica goods. A district court granted the organization summary judgment and the seller appealed.

On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed but disagreed with the district court's conclusion that the organization's conduct could not violate §1 of the Sherman Act because it was unilateral. The appellate court stated that because most members of the organization were horizontal competitors of the excluded, low-priced seller and the decision to deny the seller's application was not a routine act of the organization, the denial could be deemed concerted action.

The Tenth Circuit ruled that the denial was not per se unlawful because space for trading posts at the reenactment was limited and the organization had to reject some applications. Applying rule of reason analysis, the appellate court stated that the conduct was not shown to have an adverse effect on competition, as other sellers were given spaces, and therefore, denial of the complaining seller's application did not unreasonably restrain trade.

***Gregory v. Fort Bridger Rendezvous Association,* 2006-1 CCH Trade Cases ¶75,265**

Comment: The case reported immediately above illustrates that even though allegations of horizontal group boycotts are usually subjected to per se condemnation, courts often evaluate the context of an alleged restraint before applying per se treatment. The Tenth Circuit observed that "per se treatment of group boycotts should not be undertaken indiscriminately."

Immunities

A regional airport authority in Pennsylvania exercised its power of eminent domain to acquire land that was being used as a parking facility in competition with the airport's long-term parking lot. The Commonwealth of Pennsylvania claimed that the taking amounted to monopolization in violation of §2 of the Sherman Act and the airport asserted that it was shielded from liability by the state action immunity doctrine. A district court dismissed the action and noted that the state statute pursuant to which the airport authority was created specifically conferred upon it the power of eminent domain, which was likely to result in uprooting competitors.

***Pennsylvania v. Susquehanna Area Regional Airport Authority,* 2006-1 CCH Trade Cases ¶75,263 (M.D. Penn.)**

Pre-Emption

The attorney general of California brought suit in state court against an energy company for conspiring to raise prices in the wholesale energy market by participating in "ricochet" or "megawatt laundering" schemes— reselling in-state energy as out-of-state energy at a higher price—in violation of California's antitrust statute, the Cartwright Act. The energy company sought dismissal, asserting that the claims are barred by field-preemption, and the court agreed, stating that even though the Federal Power Act does not supersede the Sherman Act, it nevertheless bars state antitrust claims because federal law exclusively occupies the field of wholesale energy sales.

***California v. Powerex Corp.,* 2006-1 CCH Trade Cases ¶75,232 (E.D. Cal.)**

Acquisitions

The attorney general of the state of California settled charges that a supermarket chain violated §7 of the Clayton Act by taking a lease on a store that had been occupied by an independent grocery store on Santa Catalina Island, off the coast of Southern California. The attorney general stated that since 1999, when the chain took over the lease, the chain operated the only two grocery stores on the island. According to the settlement agreement, the chain will surrender its lease and the landlord will lease the property to another grocery store.

***California v. Vons Companies, Inc.,* 2006-1 CCH Trade Cases ¶75,253 (C.D. Cal.)**

•••••••••••••••••••

Changing its earlier position, the Australian Competition and Consumer Commission announced that it will not oppose the combination of the Australian Stock Exchange and the Sydney Futures Exchange even though each has a monopoly in providing a market for the trading of financial products and earns returns on capital well above those found in competitive markets. The commission stated that exchanges trade different kinds of financial products: equities, derivatives and debt securities are traded on the Australian Stock Exchange while futures and options are traded on the Sydney Futures Exchange. The commission noted that the exchanges do not compete to a large extent and are not likely to compete with one another in the future.

***Australian Stock Exchange and Sydney Futures Exchange* (May 24, 2006), announcement available at www.accc.gov.au**