New York Law Journal

WWW.NYLJ.COM

©2010 ALM
An ALM Publication

VOLUME 243—NO. 13

THURSDAY, JANUARY 21, 2010

ANTITRUST

Expert Analysis

Second Circuit Reinstates Music Industry Conspiracy Complaints

By
Elai Katz

The U.S. Court of Appeals for the Second Circuit ruled that claims of price fixing by music companies should not have been dismissed and indicated that courts must look to the context surrounding parallel conduct when determining the sufficiency and plausibility of complaints alleging agreements in restraint of trade. The U.S. Court of Appeals for the Sixth Circuit dismissed a racetrack's monopolization claims against NASCAR because the plaintiff's economist failed to show that premium stock car racing constituted its own relevant market and neglected to consider other forms of entertainment.

Other recent antitrust developments of note included a decision by the U.S. Court of Appeals for the Eighth Circuit that cardiologists complaining of exclusion from a health insurance network could not limit the relevant market definition in their antitrust suit to patients who had private insurance plans and a ruling by the U.S. Court of Appeals for the Third Circuit vacating a price discrimination judgment for failure to satisfy the competitive injury requirement.

Pleading

A complaint alleging a conspiracy by major music companies to fix the prices and terms of digital music sold online was dismissed by a district court for failure to assert a plausible claim under the pleading standards set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A Second Circuit panel reversed and reinstated the complaint.

In a decision authored by Judge Robert A. Katzmann, the appellate court stated that although allegations of parallel conduct coupled with only a bare assertion of conspiracy do not suffice to state a claim under §1 of the Sherman Act, the plaintiff is not required at the pleading stage to allege facts that tend to exclude independent self-interested conduct. The Second Circuit found that the complaint pleaded specific facts sufficient to plausibly suggest that the parallel conduct alleged—charging unreasonably high prices and setting unpopular terms for digital music—was the result of an agreement among the defendant music companies.

The court explained that the context of the alleged parallel acts raised a suggestion of a preceding agreement. Among the contextual facts identified by the court were: The defendants collectively held over 80 percent of the digital music market; the two joint ventures formed by the defendants to sell music online charged unreasonably high prices and imposed unpopular limitations on consumers; the defendants attempted to hide their use of "most favored nation" clauses in their digital music licenses; federal and state investigations were pending; and the defendants increased prices even though costs had decreased substantially.

What does 'Twombly' require when conspiracy claims rest on parallel conduct?

The Second Circuit added that when conspiracy claims rest on parallel conduct, *Twombly* does not require identification of the specific time, place or person involved in each conspiracy allegation.

The appellate court emphasized that, contrary to the lower court's opinion, the plaintiffs challenged the legality of the defendants' joint ventures and that, unlike the joint venture examined in *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), the music companies' ventures had not been expressly approved by antitrust regulators.

In a concurring opinion, Judge Jon O. Newman wrote that the determination of the sufficiency of a complaint depends on the context in which the alleged parallel conduct took place. He added that the Supreme Court did not categorically reject the possibility that parallel conduct would form the basis for an inference of an unlawful agreement.

Starr v. Sony BMG Music Entertainment, No. 08-5637-CV (Jan. 13, 2010)

Comment: The extent to which conduct by joint ventures is shielded from antitrust scrutiny was a subject of debate earlier this month during the U.S. Supreme Court oral argument of *American Needle v. NFL*, No. 08-661.

Relevant Market—Experts

The owner of a Kentucky racetrack alleged that the leading stock car racing association and an affiliated company that owns many racetracks violated antitrust law by refusing to sanction "major league" races at the plaintiff's track and preventing plaintiff from buying other tracks that already host such major league races.

The plaintiff asserted that it built a first-class racetrack and obtained top ratings and high attendance records, yet NASCAR, the defendant association, would not sanction a major league race at the track for the alleged purpose of shutting out competitive independent racetracks and preventing any challenges to the association's dominance in sanctioning races.

A district court granted summary judgment to the defendants on the grounds that plaintiff's expert opinions on the definition of the relevant market were unreliable and that the plaintiff did not establish antitrust injury. The Sixth Circuit affirmed.

The Sixth Circuit stated that the district court did not abuse its discretion in excluding plaintiff's economic expert's testimony, which had determined that the defendant association was the sole supplier of the relevant product, premier stock-car races. The appellate court noted that the expert should have considered evidence that stock-car races compete with various forms of entertainment, including other auto races and different sports, for ticket sales, corporate sponsorship and broadcast license fees. The Sixth Circuit rejected the plaintiff's contention that the consumers in the stock-car race sanctioning market are racetracks, not fans, broadcasters and sponsors, because plaintiff's own expert testimony disputed that view.

The Sixth Circuit added that the district court did not err in determining that plaintiff's expert did not properly perform the "small but significant non-transitory increase in price" (SSNIP) test, a well-established economic method to define relevant markets by asking whether

ELAI KATZ *is a partner of Cahill Gordon & Reindel.*

consumers would switch to other products when faced with a price increase (typically around 5 percent). Instead of analyzing whether a price increase would lead to substitution, the expert looked at ticket prices and attendance figures over an eight-year period and concluded that both price and demand went up during that time, a methodology that the court stated had not been subject to peer review or generally accepted within the scientific community.

The Sixth Circuit also questioned whether the plaintiff's failure to obtain a major league race or buy another track constituted antitrust injuries as there were legitimate business reasons for these disappointments and the plaintiff's track continued to derive significant revenue from other races.

Kentucky Speedway, LLC v. National Association of Stock Car Auto Racing Inc., No. 08-5041 (Dec. 11, 2009)

Relevant Market—Form of Payment

In another case where market definition problems proved fatal, a cardiology practice group claimed that an operator of Arkansas hospitals and several insurers excluded the group from health insurance network coverage in violation of antitrust law. The Eighth Circuit affirmed the trial court's dismissal of the complaint for failure to properly define a relevant market. The practice group sought to limit the relevant market to cardiology services obtained by patients covered by private insurance.

The court stated that in an antitrust claim brought by a seller, the relevant product market cannot be limited to a single method of payment when other methods of payment are acceptable. The appellate court indicated that since the lawsuit was about excluding cardiologists, the relevant inquiry was whether there are alternative patients available to the cardiologists, not whether patients can reasonably substitute government insurance for private insurance.

Little Rock Cardiology Clinic PA v. Baptist Health, 2009-2 CCH Trade Cases ¶76,849.

Comment: Even when the plaintiff is an excluded rival of the defendant, the ultimate focus of the antitrust inquiry remains the competitive effect on consumers in the market served by the foreclosed and foreclosing suppliers, rather than the impact on the suppliers themselves.

Price Discrimination

A food distributor claimed that a manufacturer offered lower prices for its egg and potato products to the world's largest food services management company in violation of §2(a) of the Robinson-Patman Act. After a three-week bench trial, the district court ruled in favor of the plaintiff.

The Third Circuit reversed and stated that the complaining food distributor could not satisfy the competitive injury requirement of a price discrimination claim. The district court had stated that although the two firms performed different functions within the food services industry, the distributor and the food management company competed with one another as they had similar customers, such as hospitals and schools that run institutional cafeterias, and sought to take business from each other by persuading those customers to either self-operate and obtain food supplies from a distributor or outsource their food service functions, including purchasing, to a management company.

The Third Circuit disagreed and explained that the allegedly discriminating manufacturer sold food products to the distributor and food management company only after the conclusion of any competition between the two firms to obtain a customer.

Feesers Inc. v. Michael Foods Inc., Nos. 09-2548, 09-2952, 09-2993 (Jan. 7, 2010)

Anticompetitive Effects

The U.S. Court of Appeals for the Fifth Circuit, sitting en banc, held that a plaintiff must demonstrate actual or likely injury to competition to properly assert violations of the Packers and Stockyards Act, which among other things prohibits "unfair, unjustly discriminatory or deceptive" practices by meat packers, swine contractors and live poultry dealers.

In this case, chicken growers claimed that another grower, who unlike plaintiffs bought chickens rather than raising them on consignment, received preferential contractual terms from a poultry integrator (processor/dealer) in violation of the act. A district court denied defendants' summary judgment motion, and a three-judge panel of the Fifth Circuit affirmed, stating that a showing of anticompetitive effects was not required.

> In 'Kentucky Speedway,' the Sixth Circuit stated that the district court did not abuse its discretion in excluding plaintiff's economic expert's testimony, which had determined that the defendant association was the sole supplier of the relevant product, premier stock-car races.

The en banc appellate court concluded that an anticompetitive effect is necessary in light of legislative history and judicial interpretation of the act. The court observed that the act was passed in the 1920s when five meat-packing conglomerates dominated the market and legislators were concerned about anticompetitive, monopolistic conduct.

Wheeler v. Pilgrim's Pride Corp., 2009-2 CCH Trade Cases ¶76,846

Class Actions

Farmers alleged that an agricultural biotechnology firm along with two seed producers imposed anticompetitive restrictions on the sale of genetically modified seeds in violation of antitrust laws. The plaintiffs reached a settlement with one of the seed producers and sought preliminary court approval of the settlement agreement and the settlement classes.

The district court decided that the predominance requirement set forth in Rule 23(b)(3) of the Federal Rules of Civil Procedure was not satisfied and refused to approve the settlement class. The court noted that individualized inquiry would be required because of the wide variation in list prices charged to farmers for bags of seed and stated that plaintiffs did not demonstrate a common method of proof of antitrust impact.

Schoenbaum v. E.I. Dupont de Nemours & Co., 2009-2 CCH Trade Cases ¶76,837 (E.D. Mo.)

Acquisitions

The Federal Trade Commission (FTC) announced the closing of its investigation into the consummated acquisition of a financially troubled hospital by its sole rival in Temple, Tex. The acquisition was not reportable under the Hart-Scott-Rodino Act's premerger notification scheme.

The FTC's investigation focused on whether the acquired hospital qualified for the "failing firm" defense, in the sense that in the absence of an acquisition it would have exited the market and it could not have been acquired by a less anticompetitive purchaser. The FTC closed its investigation after a viable, alternative buyer decided not to acquire the deteriorating hospital.

Scott & White Healthcare/King's Daughters Hospital, File No. 091-0084, CCH Trade Reg. Rep. ¶16,402 (Dec. 23, 2009), also available at www.ftc.gov

Private Merger Challenges

Pharmacies claimed that the combination of two major pharmaceutical companies—which had been approved with conditions by the FTC and the European Commission—was likely to lessen competition in violation of §7 of the Clayton Act.

A district court dismissed the complaint because several of the plaintiffs' product market definitions—including all prescription drugs and all brand name prescription drugs—were not sufficiently pleaded. In addition, the court determined that the pharmacies did not have standing to seek relief for the lessening of competition in animal health markets that had been identified by the FTC because they did not buy or make animal health products.

Golden Gate Pharmacy Services Inc. v. Pfizer, 2009-2 CCH Trade Cases ¶76,824 (N.D. Cal.)

Reprinted with permission from the January 21, 2010 edition of the NEW YORK LAW JOURNAL © 2010. ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-01-10-24