New York Law Journal

WWW.NYLJ.COM

An ALM Publication

VOLUME 255—NO. 35

WEDNESDAY, FEBRUARY 24, 2016

ANTITRUST

Expert Analysis

Concert Venue Tying Claims Rejected

By **Elai Katz**

The U.S. Court of Appeals for the Fourth Circuit ruled that a national concert promoter and venue operator did not engage in unlawful tying because the evidence showed it did not coerce artists to perform at the allegedly tied venue. A district court allowed exclusive dealing claims against the leading provider of in-store promotion services to proceed to trial since there was sufficient evidence that exclusive arrangements could have substantially foreclosed rivals from the market.

Other antitrust developments of note included another district court's determination that zinc purchasers did not sufficiently plead a conspiracy to reduce the supply of zinc and artificially increase its price. The column concludes with a short note on some of U.S. Supreme Court Justice Antonin Scalia's antitrust opinions.

Tying

A regional concert promoter and venue operator, It's My Party, Inc. (IMP), claimed that Live Nation, Inc., the leading national concert promoter and venue operator, foreclosed competition in the concert promotion and venue markets in violation of the Sherman Act. In the live musical concert business, artists typically contract with either a national promoter or several local promoters to organize their tours. In the Washington, D.C., and Baltimore, Md., area, both parties operated an outdoor amphitheater venue. IMP operated the Merriweather Post Pavilion in Columbia, Md., and Live Nation owned the Nissan Pavilion (now called Jiffy Lube Live) in Bristow, Va.

IMP alleged that artists who hired Live Nation for its promotion services were compelled to perform at its Nissan venue and that Live Nation conditioned access to its venues in other locations on artists' performing at the Nissan Pavilion for their Washington-Baltimore dates.

A district court granted summary judgment to Live Nation, and the Fourth Circuit affirmed on the grounds that IMP failed to define the relevant market and to establish the coercion element of its tying claim. *It's My Party v. Live Nation*, No. 15-1278 (4th Cir. Feb. 4, 2016). Relevant market definition requires an analysis of where customers can obtain reasonable substitutes for the services or products they seek. The appellate court rejected IMP's efforts to define the relevant geographic market for promotion services as national rather than regional.

The court observed that by defining the market as national, IMP attempted to portray itself as a modest regional player facing a much larger company with a high share of nationwide sales, whereas limiting the geographic market to the Washington-Baltimore area would have delineated a more evenly matched competitive dynamic between the two. The court concluded that because the demand for concerts by concertgoers is local and promoters compete for business on a local level using local knowledge and contacts, the relevant market for concert promotion was local.

In two opinions, U.S. Supreme Court Justice Antonin Scalia revealed his faith in markets over antitrust regulation.

The Fourth Circuit panel also rejected IMP's attempt to define the venue market as including only major amphitheaters with a capacity of 8,000 or more and excluding clubs, arenas and stadiums. The panel remarked that only two venues in the Washington-Baltimore area would qualify under such a definition: Merriweather and Nissan. The court compared that definition to an attempt to define a market to include "tennis players who have won more than three Olympic gold medals and finding that only Venus and Serena Williams fit the bill."

Turning to the tying claims, the court distinguished between illegal tying and mere bundling, emphasizing that coercion is required in a tying claim. The court found ample evidence that the tying products—promotion services and other Live Nation venues—were sometimes sold without the tied product—the Nissan Pavilion. Fourteen percent of artists who used Live Nation's promotion services performed at Merriweather. And about one in four artists who performed in a Live Nation amphitheater in regions where that was the only such venue chose Merriweather for their Washington-Baltimore area performance.

Exclusive Dealing

Consumer packaged goods companies, including H.J. Heinz Company and The Dial Corporation, brought a class action asserting that News Corporation violated antitrust law by engaging in exclusive dealing with grocers and other retailers to provide in-store promotions, such as at-shelf signage, end-of-aisle displays, coupon distribution, and cart advertising. News Corp. moved for summary judgment, arguing that its practices were procompetitive and did not substantially lessen competition or monopolize the market. The district court denied the motion, finding that evidence of News Corp.'s exclusive contracts with retailers raised a genuine issue of fact for a jury to determine at trial whether News Corp. violated antitrust law. *Dial Corp. v. News Corp*., 2016-1 CCH Trade Cases 79,467, No. 13-CV-6802 (S.D.N.Y. Jan. 15, 2016).

Exclusive dealing arrangements are generally lawful under §1 of the Sherman Act unless they substantially foreclose rivals from the relevant market and are of sufficient duration to prevent meaningful competition. The court stated that plaintiffs presented enough evidence that a significant portion of the market may have been foreclosed to competitors, noting that News Corp.'s exclusive contracts covered over 70 percent of stores and that no more than 25 percent of News Corp.'s total volume became available for competitive bids each year during the period at issue because of the duration and staggered expiration dates of the contracts. The court added that News Corp.'s principal remaining competitor, Valassis, lost key contracts and exited the in-store promotion business. The court acknowledged News Corp.'s contention that consumer product companies benefited from retail exclusivity but could not conclude, as a matter of law, that those procompetitive benefits outweighed the harm to competition.

The court decided that the jury could adopt plaintiffs' relevant market definition for third-party in-store promotion services, excluding out-of-store, digital, and check-out marketing and promotions. News Corp. had over 70 percent

ELAI KATZ *is a partner of Cahill Gordon & Reindel.* KOMAL K. PATEL, *an associate at the firm, assisted in the preparation of this article.*

of that market, which the court found sufficient to infer the existence of monopoly power. The court also ruled that the evidence of exclusive contracts and other allegedly exclusionary conduct was sufficient to withstand summary judgment on the monopolization claims, stating that the standard for exclusive dealing under §2 of the Sherman Act was lower than under §1.

Pleading a Conspiracy

Another New York federal court dismissed a proposed class action antitrust lawsuit alleging that affiliates of Goldman Sachs, JP Morgan Chase and others conspired to increase the price of zinc. See *In Re: Zinc Antitrust Litigation*, 2016 WL 93864, No. 14-cv-3728 (S.D.N.Y. Jan. 7, 2016). Purchasers of zinc brought §1 conspiracy and §2 monopolization claims against three owner-operators of zinc warehouses and their corporate affiliates that traded financial instruments with prices tied to the price of zinc.

Plaintiffs alleged that the conspiracy began in 2010 when JPMorgan, Goldman Sachs and Glencore Ltd. (which had previously acquired another named defendant, Pacorini Metals) acquired zinc warehouse operators and then engaged in load-out delays and other coordinated activity to reduce the supply of zinc and artificially increase its price.

Judge Katherine B. Forrest decided that plaintiffs did not sufficiently allege an agreement between the defendants and dismissed all §1 claims with prejudice. The only claims allowed to be re-pleaded were §2 claims against Glencore and Pacorini.

As evidence of an alleged agreement between defendants, plaintiffs pointed to a 2012 agreement providing that Pacorini would prioritize the loading out of defendants' zinc from its warehouses and that the defendants would coordinate their order cancellations to minimize overlap. The court reasoned that the alleged agreement "is simply too thin a branch" and "too isolated" to support the broad, five-year, multi-defendant scheme alleged. Most of the conduct provided for in the agreement was undertaken by a single defendant, Pacorini. Further, because the agreement only described the way in which Pacorini would prioritize the loading out of zinc, it was output neutral and therefore did not support plaintiffs' theory that defendants restricted the supply of zinc in order to increase its price.

Plaintiffs also asserted that defendants engaged in parallel conduct which provided circumstantial evidence of an agreement. Plaintiffs alleged that defendants acquired zinc warehouses during the same time period in 2010, used those warehouses to make policy recommendations to the London Metal Exchange (LME) regarding minimum load-out rules, offered financial incentives for zinc storage, and engaged in shadow warehousing whereby defendants moved zinc to non-registered warehouses in attempts to manipulate numbers reported to the LME.

The court reasoned that such allegations did little to support the existence of an agreement between defendants because they were consistent with rational, independent economic behavior. "It hardly seems remarkable to have commodities traders decide—if they can afford it—to buy and hold the commodity to drive up the price. While this may violate LME rules, financial regulations, or even market expectations, that alone does not render such conduct a violation of the *antitrust* laws." (emphasis in the original).

The court dismissed plaintiffs' §2 claims as well. In doing so, the court highlighted the tension between plaintiffs' §1 and §2 claims. In support of their §2 claims, plaintiffs alleged that Glencore possessed a significant dominance in the physical zinc market accounting for 60 percent of the world's zinc trading. Such allegations, however, required further explanation with regards to plaintiffs' §1 claims. For example, the court posited, given Glencore's alleged dominance in the physical zinc market, why would it need to rely on outside conspirators to assist in the alleged anticompetitive scheme?

The court also declined to extend the "inextricably intertwined" theory of antitrust injury to plaintiffs' §2 claims. Although antitrust injury is generally limited to consumers or competitors of the defendant in the restrained market, antitrust injury extends to injuries that are "inextricably intertwined with the injury the conspirators sought to inflict." Plaintiffs in this case were not participants in the zinc warehousing market, but they paid inflated prices in the market for purchasing zinc. These inflated prices, the court reasoned, were "necessarily directly impacted" by defendants' alleged scheme to cause dysfunction in the price-setting process in order to drive up the price of zinc. Therefore, plaintiffs had antitrust standing to bring their §1 claims.

> A New York federal court dismissed a proposed class action antitrust lawsuit alleging that affiliates of Goldman Sachs, JP Morgan Chase and others conspired to increase the price of zinc.

However, the court held that the "inextricably intertwined" theory could not apply to plaintiffs' §2 claims. Section 2 is aimed at conduct within a single market, and requires specific intent to monopolize a particular market. Therefore, injury in a market other than that in which defendants allegedly conspired to monopolize "is not of the type that Section 2 was intended to prevent."

Justice Scalia

The passing of Justice Scalia and the ensuing battle over his replacement have spawned heated debates in political spheres. His antitrust legacy is perhaps slightly less controversial but undoubtedly worthy of examination. While Justice Scalia authored many majority, dissenting and concurring opinions in antitrust cases, we will focus on three decisions.

Scalia authored the majority opinion in *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), where the Supreme Court decided that Verizon's alleged breach of its duty to share its network with rivals under telecommunications law did not state a Sherman Act claim.

He dissented in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992), where it was alleged that Kodak had unlawfully tied the sale of service for its copying machines to the sale of parts, in violation of §1 of the Sherman Act, and had unlawfully monopolized the sale of service and parts for such machines, in violation of §2. The court ruled that a jury could find that Kodak possessed market power in the aftermarket for Kodak parts and that Kodak could be found liable for per se tying.

Justice Scalia disagreed: "Because the interbrand market will generally punish intrabrand restraints that consumers do not find in their interest, we should not—under the guise of a per se rule—condemn such potentially procompetitive arrangements simply because of the antitrust defendant's inherent power over the unique parts for its own brand." 504 U.S. at 502.

In both of these opinions, Justice Scalia revealed his faith in markets over antitrust regulation. In *Trinko*, he observed that the opportunity to charge monopoly prices, at least for a short time, induces risk-taking and that if antitrust law imposed upon monopolists a duty to deal, it may lessen the incentive to innovate. "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system." 540 U.S. at 407.

And as he wrote in *Kodak*, "…if the interbrand market is vibrant, it is simply not necessary to enlist §2's machinery to police a seller's intrabrand restraints. In such circumstances, the interbrand market functions as an infinitely more efficient and more precise corrective to such behavior, rewarding the seller whose intrabrand restraints enhance consumer welfare while punishing the seller whose control of the aftermarkets is viewed unfavorably by interbrand consumers." Id. at 503.

Justice Scalia's conviction that competition between brands would discipline restraints involving sellers of the same brand was also evident in his opinion for the majority in *Business Electronics v. Sharp Electronics*, 485 U.S. 717 (1988), where the court affirmed that vertical non-price restraints are not per se unlawful, even when designed to penalize a price-cutting dealer. In rejecting the possibility that the categories subject to per se illegality should remain forever fixed, Justice Scalia confronted the tension between applying current economic learning and interpreting the Sherman Act as it was originally understood when enacted in 1890.

Justice Scalia wrote: "The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890." 485 U.S. at 732.