Speech by FTC Commissioner Recommends Significant Changes in the Enforcement of FTC Antitrust Cases

By Katherine A. Ambrogi

In a speech at NERA Economic Consulting’s Antitrust & Trade Regulation Seminar on July 3, 2008, Commissioner J. Thomas Rosch of the Federal Trade Commission, discussed the FTC’s dual roles as prosecutor and judge. The views expressed in this speech shed some light on certain of the Commission’s recent merger enforcement suits and other Commission-led investigations. The speech may also have important implications for future FTC antitrust investigations and enforcement actions if Commissioner Rosch’s views are adopted by the Commission itself.

Commissioner Rosch declared that he favors: (1) an aggressive effort to limit the role of federal district courts in deciding motions for preliminary injunctions brought by the FTC under Section 3(b) of the FTC Act; (2) continuing administrative challenges to mergers even in cases in which the FTC unsuccessfully seeks a preliminary injunction in district court; and (3) procedural steps to speed up administrative proceedings at the Commission, including appointing Commissioners to the role of Administrative Law Judges.

If the Commission adopts Commissioner Rosch’s proposals, companies may encounter even greater procedural differences in merger enforcement suits instituted by the FTC compared to those brought by the Antitrust Division of the Department of Justice, which must prove the merits of an antitrust violation in federal district court in the first instance.

Decreased Role for District Courts in FTC Preliminary Injunction Cases

Section 13(b) of the FTC Act authorizes the FTC to seek a preliminary injunction in district court pending a full administrative trial on the merits of an antitrust suit – which is particularly important in merger challenges. Commissioner Rosch believes that district courts should reduce their focus on whether it is likely that the Commission will succeed on the merits. He noted that likelihood of success is just one factor that Congress established for district courts to consider in § 13(b) proceedings, and that the ultimate issue for the court to decide is whether the transaction is likely to be in the public interest.

Quoting from legislative history, Commissioner Rosch stated that a traditional equity standard that merely weights the probability of success on the merits against irreparable harm “‘is not appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and need for injunctive relief.’” As such, Commissioner
Rosch contended that the public interest is generally best preserved by maintaining the status quo until a full administrative trial on the merits can be held. He concluded that “even when success on the merits is not likely, it’s generally in the public interest that the status quo be maintained until the merits can be fully examined in a plenary trial before the Commission.” While it is unlikely that courts will disregard the likelihood of success standard when evaluating future § 13(b) actions, the FTC may argue that this factor should be less important, and may bring actions before courts that may have a more receptive view of this position.

Administrative Challenges Despite a District Court Loss

In the wake of a recent spate of FTC losses in merger cases before district courts, Commissioner Rosch recommended that the FTC should continue administrative enforcement proceedings, even when the agency has lost a motion for preliminary injunction in district court. “[The FTC] must abandon its practice of deferring to adverse federal district court decisions in deciding whether or not to pursue plenary trials after Section 13(b) decisions,” Commissioner Rosch said. According to Commissioner Rosch, the FTC has not conducted an administrative hearing in a single case in more than ten years after a district court has denied its motion for a preliminary injunction, and has allowed the federal courts to “usurp” the FTC’s judicial authority by failing to pursue these administrative trials.

Should the FTC adopt Commissioner Rosch’s suggestion, parties pursuing mergers that are reviewed by the agency may face the additional cost and burden of an administrative challenge, even if they are successful in defending against an FTC preliminary injunction action in district court.

Speeding Administrative Proceedings

Commissioner Rosch suggested that there are certain procedural steps that should be taken to quicken the pace of FTC proceedings. For example, the Commission recently decided to appoint Commissioner Rosch as the Administrative Law Judge in Inova, a merger case, referring to the years of experience that he brought as a trial attorney. Commissioner Rosch hinted that parties and courts may find comfort that a seasoned litigator will lead the effort to provide a full and expeditious administrative trial on the merits.

The views expressed in this speech shed some light on certain of the Commission’s recent merger enforcement suits and other Commission-led investigations.

Commissioner Rosch noted that, if followed in future cases, aggressive scheduling of administrative trials, as well as a commitment by the Commission to handle any appeal from an Administrative Law Judge’s initial decision in an expedited manner, will help speed up the process. He hinted that it is likely that the FTC will continue the practice it initiated in Inova – simultaneously pursuing an administrative action at the Commission while a motion for a preliminary injunction in the district court is pending.

Additional Issues Addressed

Commissioner Rosch also addressed other issues facing the FTC, including compulsory process and market definition.

Compulsory process

- On the procedural front, Commissioner Rosch stated that the FTC might want to routinely use compulsory process at the beginning of an investigation instead of relying on voluntary compliance by the parties. He emphasized that the FTC will obtain better evidence faster under such a practice because parties are “more likely to bend every effort to comply promptly with Commission requests for information and documents if there are sanctions attached to not doing so.” While it is unlikely that the Commission will abandon its approach of initially seeking voluntary cooperation in many investigations, to the extent that the agency follows Commissioner Rosch’s suggested practice, parties to an investigation, as well as third parties, could face the cost and burden of responding to an increasing number of Civil Investigative Demands and subpoenas.

- Commissioner Rosch suggested that the FTC should be bound by set deadlines for non-merger investigations, similar to the restrictions set into place for merger transactions by the HSR Act. Such an approach would speed up non-merger investigations and would respond to criticisms regarding the length of these matters.

Market definition

- Commissioner Rosch also clarified his position on market definition in response to questions raised about a speech that he had given on June 2, 2008, which had attracted widespread interest in the antitrust community. In his June 2 speech, he made comments that were viewed as suggesting that market definition should not be the starting point for merger analysis.
Commissioner Rosch recognized in his NERA speech, however, that courts repeatedly have held that market definition is an essential element of proving an antitrust violation in a merger case. The comments in his previous speech, the Commissioner noted, were only meant to show that a prosecutor may “back into” defining a relevant market after finding direct evidence that a merger may create, enhance, or facilitate the exercise of market power.


U.S. Supreme Court To Review Price Squeeze Claim Against a Vertically Integrated Monopolist in a Partially Regulated Industry

By Kristina A. Sadlak

Introduction

On June 23, 2008, the U.S. Supreme Court accepted for review the Ninth Circuit’s recent antitrust decision in linkLine Communications v. SBC California, Inc.1 At issue is the viability of a price squeeze claim under Section 2 of the Sherman Act filed by a group of internet service providers (“ISPs”) against vertically integrated local exchange carriers (“ILECs”). The ILEC defendants operate both as suppliers to the plaintiffs in the wholesale internet service market, and as competitors to the plaintiffs in the retail market for such services. A price squeeze, as defined by the Ninth Circuit, occurs when a vertically integrated company sets its prices or rates at the first (or ‘upstream’) level so high that its customers cannot compete with it in the second (or ‘downstream’) level.2

The linkLine decision has drawn much attention. At the Supreme Court’s request, the Solicitor General and Department of Justice filed a brief supporting the grant of the certiorari petition and reversal of the Ninth Circuit decision that allowed the case to withstand a dismissal motion. The Federal Trade Commission opposed the petition. Briefs were submitted by several interested parties, including a group of professors and scholars of law and economics, Verizon Communications, Inc., and a group of ten state attorneys general, led by Virginia, all favoring the petition and reversal of the Ninth Circuit decision that allowed the case to proceed on the plaintiffs’ price squeeze theory. The certiorari petition followed.

3 Id. at 12 (emphasis added).
4 Id. at 15.
5 Id. at 13-14.
7 “But I hope the assignment helped address concerns about both the antitrust expertise of the judges conducting plenary trials at the Commission and the time it takes to prepare for and conduct such a trial.” J. Thomas Rosch, Commissioner, FTC, A Peek Inside: One Commissioner’s Perspective on the Commission’s Roles as Prosecutor and Judge (July 3, 2008), available at http://www.ftc.gov/speeches/rosch/080703nera.pdf, at 14.
8 “I respectfully suggest that this emphasis on market definition and market shares in merger litigation is wrong as a matter of law and as a matter of economics. Courts and scholars have repeatedly recognized that market definition is not an end in itself but rather an indirect means to assist in determining the presence or the likelihood of market power. It may be helpful in some cases, but it should not be treated as a threshold requirement.” J. Thomas Rosch, Commissioner, FTC, Litigating Merger Challenges: Lessons Learned (June 2, 2008), available at http://www.ftc.gov/speeches/rosch/080602litigatingmerger.pdf at 4-5.
The Possible Impact of *Trinko* on Price Squeeze Claims

In its 2004 *Trinko* decision, the Supreme Court held that Verizon, a vertically integrated telecommunications firm in a regulated industry, was not required by the antitrust laws to deal with its competitors. According to the Supreme Court, the relationship between Verizon and its competitors was governed by the Telecommunications Act of 1996. Although the Telecommunications Act imposed a number of duties on Verizon, it did not, according to the Court, create “new claims that go beyond existing antitrust standards,” such as a duty to aid competitors.

Although the *Trinko* decision did not deal specifically with price squeeze claims, the question arose as to whether it eliminated the viability of such claims — particularly in regulated industries. The theory is that if a regulated firm does not have an antitrust duty to deal with its competitors, in the event that it does so, there should not be any antitrust significance to the prices it charges. Before *Trinko*, federal courts that addressed price squeeze claims involving monopolists operating at two levels dealt harshly with them when they were accused of a price squeeze.

In the aftermath of *Trinko*, but prior to the Ninth Circuit *linkLine* decision, two other circuit courts had addressed price squeeze claims in regulated industries. In *Covad Comm. Co. v. Bell Atlantic Corp.*, the D.C. Circuit held that the plaintiff failed to state a claim because the defendant ILEC’s duty to provide access to its competitors solely resulted from its regulatory obligations under the Telecommunications Act of 1996. The court noted that the Sherman Act did not impose a duty to aid competitors, “at least where there is no allegation it would have been profitable for the defendant to have made its facilities available to a competitor absent statutory compulsion.”

In *Covad Comm. v. BellSouth Corp.*, the Eleventh Circuit also addressed the effect of *Trinko* on a price squeeze claim. As in *linkLine*, the plaintiff’s claim was based on BellSouth’s retail pricing practices, but the parties used BellSouth’s wholesale prices as a measure of costs to show that its retail prices were below its costs. The Eleventh Circuit permitted the price squeeze claim to proceed because the complaint alleged that the defendant: (1) engaged in below cost pricing at the retail level, and (2) had a “dangerous probability” of recouping its losses.

Despite the *linkLine* plaintiffs’ failure to make such allegations, the Ninth Circuit allowed the price squeeze claim to proceed. Holding that “*Trinko* did not ... completely eliminate the viability of a § 2 price squeeze theory in regulated industries,” the Ninth Circuit stressed that a price squeeze claim has been recognized by some circuit courts (including the Ninth Circuit in a pre-*Trinko* case), and “sat[s]satisfied antitrust standards.” The court pointed out that the industry in which the linkLine parties operate is only regulated at the wholesale level, but not at the retail level, and concluded that “linkLine could prove facts, consistent with its complaint, that involve only unregulated behavior at the retail level.” The dissent argued that after *Trinko*, a price squeeze claim against a monopolist requires both sales below cost and the dangerous probability that it will recoup its losses.

**Many observers anticipate that the Supreme Court will reverse the Ninth Circuit’s decision.**

AT&T’s Certiorari Petition

In its petition for certiorari, AT&T, the successor to the SBC companies, argued that the Ninth Circuit’s decision “creates a square circuit-court conflict,” contradicting the D.C. and Eleventh Circuit decisions noted above, as well as pre-*Trinko* decisions in the Fourth and Seventh Circuits. Asserting that “it makes no sense to permit a price-squeeze claim when the defendant has no antitrust duty to deal in the upstream input,” AT&T claimed that the Ninth Circuit’s “erroneous decision deters voluntary dealing, efficient vertical integration, and retail price competition that benefit consumers.” AT&T asked the Court to “accept this opportunity to eliminate the price squeeze as an independent basis for liability” under Section 2 of the Sherman Act.

Opposing AT&T’s Petition, the plaintiffs argued that the Ninth Circuit’s decision is consistent with the decisions of other circuits that have addressed price squeeze claims, and that their claim “challenge[s] unregulated exclusionary pricing conduct that harms competition (not merely competitors) and consumers.” Additionally, the plaintiffs asserted that their claim is very similar to Covad’s claim in the Eleventh Circuit *Bellsouth* case, which also was approved in dicta by the D.C. Circuit in its denial of a rehearing in *Covad Comm. Co. v. Bell Atlantic Corp.*

**Amicus Curiae Briefs**

The Solicitor General, joined by the Department of Justice, filed an amicus curiae brief urging the Supreme Court to grant the petition for certiorari. The Solicitor General asserted that “[a]ccepting such a price-squeeze
theory based solely on an inadequate margin between a defendant’s wholesale and retail prices would recognize an antitrust claim involving no allegations of predatory pricing, no breach of an antitrust duty to deal, and no conduct that harms competition in a way the antitrust laws forbid.33 The Solicitor General also argued that the Ninth Circuit’s decision conflicts with the decisions of other circuits, and that a price squeeze claim should not create liability under Section 2 without both sales below cost and the dangerous probability of recouping losses created by the defendant’s below-cost prices.34

The Federal Trade Commission subsequently filed a public statement disagreeing with the Solicitor General’s and Department of Justice’s analysis.35 The FTC commented that linkLine is not ripe for review, because in its view the Ninth Circuit’s opinion is “unquestionably correct, because a predatory price squeeze claim in a partially regulated industry remains viable after Trinko.”36

Other interested parties filing amicus curiae briefs also urged the Supreme Court to grant certiorari for various reasons. A group of professors and scholars of law and economics argued that accepting the price squeeze theory advanced by the Ninth Circuit “substitutes a rule of competitor welfare for consumer welfare,” and will deter “efficiency-enhancing conduct and competitive pricing.” They also noted that courts should not attempt to re-regulate through the Sherman Act an industry that is already regulated.38 Verizon Communications, Inc. and the National Association of Manufacturers also filed a brief supporting AT&T, discussing the adverse policy effects that would result from the Ninth Circuit’s decision.39 Finally, ten state attorneys general, led by Virginia, argued that the Court should grant certiorari because the Ninth Circuit’s decision is incorrect, not in the interest of consumer welfare, the conflict among circuits should be resolved, and the Court should use this opportunity to reaffirm the principles it set forth in Trinko.40

The Supreme Court will hear argument in its next Term, and a decision is expected in early 2009.

1 503 F.3d 876 (9th Cir. 2007).
2 linkLine, 503 F.3d at 880.
4 linkLine, 503 F.3d at 877-78.
5 Id.
6 Id. at 878.
7 Id.
8 Id. at 880.
10 Id. at 404.
11 Id. at 406-07.
12 Id.
15 398 F.3d 666 (D.C. Cir. 2005).
16 Id. at 673.
17 374 F.3d 1044 (11th Cir. 2004).
18 Id. at 1050.
19 Id.
20 Id. (citing Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 229, 222 (1993)).
21 linkLine, 503 F.3d at 883.
23 linkLine, 503 F.3d at 883.
24 Id. at 885.
26 See Cavalier Telephone, LLC v. Verizon Virginia, Inc., 330 F.3d 176 (4th Cir. 2004) (rejecting a price squeeze claim by a company that purchased wholesale services from the defendant, which competed with it at the retail level).
27 See Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) (dismissing claim that defendant’s wholesale prices were preventing competitors from competing at the retail level).
29 Id. at *3.
30 Id. at *10.
32 Id. at *16-22.
33 Brief for the United States as Amicus Curiae, Pacific Bell Telephone Co. d/b/a AT&T California, Inc. v. linkLine Comm’ns, Inc., 2008 WL 2155265 (No. 07-512), at *7.
34 Id. at *13.
36 Id. at 3.
37 Brief or Amici Curiae Professors and Scholars in Law and Economics in Support of the Petitioners, Pacific Bell Telephone Co. d/b/a AT&T California, Inc. v. linkLine Comm’ns, Inc., 2007 WL 4132899 (No. 07-512), at *3-4.
38 Id.
40 Brief of the Commonwealth of Virginia and None Other States as Amici Curiae in Support of the Petitioners, Pacific Bell Telephone Co. d/b/a AT&T California, Inc. v. linkLine Comm’ns, Inc., 2007 WL 4132898 (No. 07-512).
Recent Sixth Circuit Decision Adds to the Antitrust Jurisprudence Involving Sports Organizations

By Eric S. Hochstadt

A Sixth Circuit ruling demonstrates that threshold issues continue to play an important role in cases involving sports organizations brought under Section 1 of the Sherman Act. In Bassett v. National Collegiate Athletic Association,1 a former college football coach brought a boycott suit against the National Collegiate Athletic Association (“NCAA”), the South- eastern Conference (“SEC”), and the University of Kentucky Athletic Association (“UKAA”). The coach had resigned amidst a recruiting scandal and challenged the NCAA’s enforcement actions as antitrust violations.

The Sixth Circuit affirmed the district court’s dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) on two independent grounds. First, the Sixth Circuit ruled that the enforcement of college recruiting rules is not “commercial activity,” and thus not subject to § 1, which by its plain language prohibits “restraint[s] of trade or commerce.” Second, it held that there was no antitrust injury because the challenged conduct was not alleged to have caused injury in the coaching market and therefore the Plaintiff’s harm did not flow from an antitrust violation.

Background and Procedural History

Claude L. Bassett (“Bassett”) was a University of Kentucky (“UK”) assistant football coach from 1997-2000. He resigned after the school confronted him with allegations of NCAA recruiting rules infractions. Then, KU conducted an internal investigation and provided the NCAA with the results. The NCAA conducted its own investigation. Although Bassett provided responses to “official inquiry letters,” he chose not to participate in an NCAA hearing “to address allegations which included improper recruiting inducements provided to prospective student athletes and high school coaches, and academic fraud in aiding enrolled student athletes by preparing their papers or having students assistants type their papers.”

The NCAA ultimately sanctioned the UK. In addition, according to the Sixth Circuit, the NCAA:

issued a show cause order requiring [Plaintiff] and any NCAA member institution seeking to hire him in an athletically related position, from January 21, 2002 through January 30, 2010, to appear before [an] NCAA Division I Committee on Infractions to consider whether the member institution should be subject to the show cause procedures of Bylaw 19.6.2.2-(1), which could limit the coach’s athletically related duties at the new institution for a designated period.3

Bassett sued the NCAA, the SEC (the NCAA Division I athletic conference of which the UK is a member), and the UKAA.4 The district court granted a Rule 12(b)(6) dismissal of the antitrust claim because the complaint did not challenge “commercial activity” and failed to allege antitrust injury.5

Sixth Circuit’s Ruling

The threshold issue that the Sixth Circuit analyzed in some detail was whether a challenge to the NCAA’s enforcement of its recruiting standards comes within the reach of § 1. As the Sixth Circuit stated, “[i]n order to state a claim under the Sherman Act there must be a commercial activity implicated.”

Several years ago, in Worldwide Basketball and Sport Tours, Inc. v. National Collegiate Athletic Association, the Sixth Circuit had its first occasion to “address[] the commercial or non-commercial nature of particular NCAA rules” in the context of a § 1 challenge. In that case, college basketball promoters challenged the “Two in Four Rule,” which was an NCAA “restriction on the type and number of games individual schools are permitted to play.” The Rule’s purpose was to “address competitive equity concerns by giving many [NCAA] Division I institutions an opportunity to compete . . . , so that the inherent recruiting and competitive advantages are distributed equally among Division I institutions.” The Sixth Circuit rejected the NCAA’s argument that the Rule is “academically directed and motivated and its commercial impact is negligible.” Instead, the court concluded that the restriction “has some commercial impact insofar as it regulates games that constitute sources of revenue for both the member schools and the [p]romoters.”

The Sixth Circuit also examined the Third Circuit’s decision in Smith v. National Collegiate Athletic Association, which involved a § 1 challenge to an NCAA eligibility rule. The rule “prohibit[ed] a student-athlete from participating in intercollegiate athletics while enrolled in a graduate program at an insti-
tution other than the student-athlete’s undergraduate institution.”13 There, the Third Circuit agreed with the NCAA that “the Sherman Act does not apply to the NCAA’s promulgation of eligibility requirements.”14 The rationale was that “[r]ather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics.”15

Comparing the Worldwide Basketball and Smith decisions, the Sixth Circuit concluded that the NCAA’s recruiting rules are more like its eligibility rules than its restrictions on the type and number of games a school can play. The “NCAA’s rules on recruiting student athletes, specifically those rules prohibiting improper inducements and academic fraud, are all explicitly non-commercial. In fact, those rules are anti-commercial and designed to promote and ensure competitiveness amongst NCAA member schools.”16

Although a determination that the challenged restraint is not commercial normally would end the analysis, Bassett’s challenge was not to the NCAA’s recruiting rules in and of themselves. Rather, Plaintiff’s attack was on the NCAA enforcement action based on a violation of these rules. Thus, the Sixth Circuit went on to analyze whether the NCAA’s “enforcement of [its] non-commercial rules is reasonably and rationally related to the rules themselves.”17 It concluded that this was the case.

The Sixth Circuit also analyzed the threshold issue of antitrust injury and affirmed the Rule 12(b)(6) dismissal on that basis as well. It reiterated that a “[p]laintiff, alleging violation of the Sherman Act may allege antitrust injury either by alleging the plaintiff’s injury was caused by defendant’s engaging in antitrust violations, or by alleging the antitrust violation was the necessary predicate for its injury.”18 The court concluded that Bassett had failed to allege antitrust injury because his alleged harm, “i.e., the ban [on him gaining employment as an athletic coach], was the result of rules violations,” not conduct flowing from an alleged antitrust violation.19

The Sixth Circuit’s Bassett ruling adds to the antitrust jurisprudence involving challenges to restraints imposed by sports organizations.

Moreover, the challenged conduct did not give rise to an antitrust claim because there were no allegations of injury to competition. The “Complaint contain[ed] no allegations of the effect of [the] NCAA’s enforcement of its non-commercial rules on the coaching market.”20

Antitrust Jurisprudence Involving Sports Organizations

The Sixth Circuit’s Bassett ruling adds to the antitrust jurisprudence involving challenges to restraints imposed by sports organizations. These cases have generated important decisions in several areas, including: (i) whether a sports organization is a single entity and immune from liability under § 1; (ii) whether a restraint imposed by a sports organization is properly analyzed under the per se rule or rule of reason; and, (iii) if the latter, whether it should be a “quick look” or full rule of reason analysis.

Single Entity

A key threshold issue in sports organization antitrust cases is whether the sports organization and its members or teams are separate economic actors capable of conspiring in violation of § 1. In Copperweld Corp. v. Independence Tube Corp.,21 the Supreme Court clarified the scope of the requirement in § 1 that there must be a plurality of economic actors for the provision to apply, concluding that separate organizations are not subject to § 1 when they “have a complete unity of interest” and “their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.”22

Although Copperweld did not involve a challenge to a restraint imposed by a sports organization, such organizations (and others) have tried to extend its “single entity” rule to more complex economic relationships because the Supreme Court emphasized that substance, not form, should govern the “single entity” determination. Post-Copperweld, sports organizations have had, at best, mixed results in asserting this argument.23

American Needle v. New Orleans Louisiana Saints,24 is a recent example of a court accepting the argument. In that case, the Northern District of Illinois rejected a challenge to the National Football League’s (“NFL”) exclusive licensing arrangement with a manufacturer of NFL paraphernalia, holding that “the NFL and the teams act as a single entity in licensing their intellectual property.”25 The district court relied heavily on language in the Seventh Circuit’s decision in Chicago Professional Sports Ltd. Partnership v. National Basketball Association,26 that sports organizations may be single entities for certain purposes:

Sports are sufficiently diverse that it is essential to investigate their organization and ask Copperweld’s functional question one league at a time – and perhaps one facet of a league at a time, for we do not
rule out the possibility that an organization such as the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities.27

An example going the other way was the First Circuit’s 1994 decision in Sullivan v. National Football League.28 In that case, which involved a challenge to a NFL rule preventing owners from offering any percentage of their team ownership to the public, the First Circuit held that the “single entity” doctrine was inapplicable because “NFL member clubs compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise under § 1.”29

Nearly a decade later, in Fraser v. Major League Soccer,30 a case involving a challenge to Major League Soccer’s (“MLS”) “control over player employment,” the First Circuit stated that the “case for expanding Copperweld is debatable and, more so the case for applying the single entity label to MLS.”

Per Se vs. “Quick Look”

Rule of Reason vs. Full Rule of Reason

Although it depends on the type of restraint being challenged, many cases addressing restraints imposed by sports organizations have concluded that the restraints were not subject to the per se rule.31 The question litigated with frequency is the degree to which such restraints should be scrutinized under the rule of reason.

The Supreme Court’s decision in NCAA v. Board of Regents of University of Oklahoma,32 is the seminal authority. In NCAA, the Supreme Court rejected application of the per se rule to an NCAA plan for limiting television coverage of college football games. The per se rule was “inappropriate” because “the case involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all.”33 However, a full rule of reason analysis was not required because the NCAA television plan was a “naked restriction on price and output.”34 As a result, “some competitive justification” was required by the NCAA, “even in the absence of a detailed market analysis” demonstrating that the restraint was anticompetitive or showing that the defendant has market power.35 However, the Court declared that none was provided.

A recent example of how these issues are litigated is the dispute between the New York Rangers and the National Hockey League (“NHL”) over the sports league’s “New Media Strategy.” In Madison Square Garden, L.P. v. National Hockey League,36 Madison Square Garden, L.P. (“MSG”), the owner of the Rangers, challenged the “New Media Strategy,” particularly the prohibition on teams operating independent websites. MSG sought a preliminary injunction because the NHL intended to fine the Rangers $100,000 each day that it operated an independent website commencing on the first day of the 2008-09 hockey season.

MSG did not challenge the “New Media Strategy” as a per se violation of § 1.37 Instead, relying upon NCAA, MSG claimed that the “New Media Strategy” is a “naked” restraint subject to a “quick look” rule of reason analysis.38 The Southern District of New York distinguished NCAA, however, and held that a full rule of reason analysis was appropriate because the “New Media Strategy” benefited consumers and had procompetitive justifications.39 Specifically, “fans prefer the websites under the New Media Strategy over the old,” and “having a central management system is an integral part of [the NHL’s] strategy to create a ‘League brand’ to compete with other major sports entertainment providers,” and that “this is a reasonable step in that direction.”40 Because the district court concluded that MSG failed to show a likelihood of success on the merits under a full rule of reason analysis, a preliminary injunction was denied.41

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1 528 F.3d 426 (6th Cir. 2008).
2 Id. at 429.
3 Id. (internal citations omitted).
4 Bassett also alleged causes of action for fraud, civil conspiracy, and tortious interference with contract, which are not discussed in this article.
5 Id. at 430-31.
6 Id. at 433.
7 388 F.3d 955, 959 (6th Cir. 2005).
8 Id. at 957.
9 Id.
10 Id. at 958.
11 Id. at 959.
13 139 F.3d at 182.
14 Id. at 186.
15 Id. at 185.
16 528 F.3d at 433 (emphasis in original).
17 Id.
18 Id. at 434 (citing In re Cardizem CD Antitrust Litig., 332 F.3d 896, 914 (6th Cir. 2003)).
19 Id.
20 Id.
22 Id. at 771.
23 Sports organizations fared worse pre-Copperweld, particularly at the circuit court level. See, e.g., Los Angeles Memorial Coliseum Comm’n v. National Football League, 726 F.3d 1381, 1389-90 (9th Cir. 1984); North American Soccer League v. National Football League, 670 F.2d 1249, 1256-58 (2d Cir. 1982) (“To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects.”).
24 496 F. Supp. 2d 941 (N.D. Ill. 2007).
25 Id. at 944.
26 95 F.3d 593, 599-600 (7th Cir. 1996).
27 Id. at 600 (emphasis added).
28 34 F.3d 1091, 1099 (1st Cir. 1994).
In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, decided in June 2007, the U.S. Supreme Court overruled the 96 year-old *Dr. Miles* decision that established a rule of *per se* illegality for minimum resale price maintenance (RPM) agreements. The *Leegin* majority stressed that economic literature was “replete with procompetitive justifications” for the use of RPM, noting that vertically imposed RPM encourages retailer investment, services, and promotions in support of a brand, as well as preventing free-riding and facilitating market entry for new firms and brands. Accordingly, the Court ruled that RPM should be subject to the more lenient antitrust “rule of reason,” under which a plaintiff has the burden of proving that the anticompetitive effects of a challenged restraint outweigh any procompetitive effects.

The Supreme Court majority recognized that RPM could, under certain circumstances, be found unlawful under the rule of reason. The Court specified that RPM:

- might be used to organize or facilitate a cartel at the retailer level;
- might be requested by a dominant retailer to forestall innovation and distribution that decreases costs;
- could discourage a manufacturer from lowering its wholesale prices to retailers; or
- might be used by a dominant manufacturer to give retailers an incentive not to carry the products of smaller rivals or new entrants.

Accordingly, the Court warned that these potentially anticompetitive uses of RPM should not be ignored by the lower courts.

After *Leegin*, it was unclear how the Court’s decision would affect interpretations of state antitrust laws, some of which specifically prohibit RPM. Moreover, there was considerable anticipation about how the courts and antitrust enforcement agencies would apply the new standard.

Some early returns are now in, providing preliminary guidance as to the intentions of state attorneys general enforcing their own antitrust laws as well as the enforcement intentions of the Federal Trade Commission (“FTC”).

On the state front, three state attorneys general instituted suits and entered into a settlement agreement with Herman Miller, Inc., a well known furniture manufacturer. The states challenged alleged RPM agreements in circumstances where the only anticompetitive effects alleged were intrabrand – on the prices of Herman Miller chairs. This case strongly suggests that state attorney general RPM enforcement under state antitrust statutes will continue unabated – at least in some states – and that companies contemplating RPM arrangements should consider state law implications before implementing them.

As to the enforcement attitudes of the FTC, on May 6, 2008, the FTC terminated the prohibition of RPM in a Consent Order that was entered in 2000 against Nine West Group, Inc., a major shoe manufacturer. This action provides an indication of the factors the FTC will consider in future RPM suits brought under the rule of reason.
The Herman Miller Case

On March 21, 2008, Herman Miller, Inc., an “upscale” furniture manufacturer, entered into a Consent Decree with the attorneys general of New York, Michigan and Illinois. The decree settled a simultaneously filed Complaint alleging that Miller had entered into RPM agreements involving the Aeron office chair, a well-known – and high-priced – chair advertised as providing “unmatched ergonomic support” for the user’s lower spine.

Filed in the U. S. District Court for the Southern District of New York, the Complaint alleged that the Herman Miller Home division (“HMH”) of the company had coerced retailers into agreeing not to advertise or discount Aeron chairs below HMH’s suggested retail prices (“MSRP”), in violation of §1 of the Sherman Act and the New York, Michigan and Illinois antitrust statutes.

The Complaint asserted that as early as 1998, retailers started to sell the Aeron chair on the internet at discount prices that also were advertised in newspapers. This allegedly led to price competition and lower prices for consumers. According to the Complaint, some HMH retailers complained about the discounting, and on January 1, 2002, HMH adopted an official minimum price policy that forbade retailers from advertising or selling the Aeron chair, (and other identified products) below MSRP. According to the Complaint, under the 2000 policy, retailers advertising or selling the chair below MSRP were terminated or lost access to the products for one year. Prior to the end of a one year termination, it was alleged, HMH began “a dialogue with terminated retailers” pursuant to which retailers “often acquiesced” to the policy. The Complaint alleges that the anticompetitive agreements raised prices of the Aeron chairs to a uniform level and, as a result, consumers paid higher prices for the chairs than they would have paid absent the allegedly anticompetitive agreements.

The Complaint did not indicate whether the attorneys general were claiming per se or rule of reason violations of the Sherman Act or the state antitrust statutes. However, there were no allegations identifying any alleged relevant market or HMH’s market share, or claiming that HMH had market power, which would be essential elements of a rule of reason case. On the other hand, the Complaint did describe the alleged anticompetitive effects of the arrangement – solely within the HMH brand, although the Leegin decision stressed that interbrand competition should be the primary focus of antitrust enforcement. While the New York attorney general has announced that RPM is per se unlawful under the New York antitrust law, RPM suits under the Illinois antitrust statute traditionally have been brought pursuant to the rule of reason, and the Michigan antitrust statute requires “due deference” to federal antitrust standards.

Under the Consent Decree settling the case, which is limited to the HMH division of Herman Miller, Inc. and terminates on December 31, 2010, HMH is enjoined from entering into any RPM agreements with retailers, may not communicate the resale price of one dealer to another dealer, and may not terminate, suspend, or fail to fill orders of any retailer in order “to secure or attempt to secure” a commitment to adhere to any HMH suggested retail price. Additionally, HMH was required to pay $750,000 to the three states in settlement of the suit.

While the Consent Decree requires HMH to notify dealers of their right to determine independently the prices at which they will advertise and sell HMH furniture, it specifically permits HMH to “announce the conditions on which it will do business with its dealers and to unilaterally cease to do business with any dealer who does not adhere to those conditions, provided that HMH does not violate any provisions of the Consent Decree or federal or state law.” Thus, a unilaterally adopted and administered pricing policy (often referred to as a “UMRP” – for unilateral minimum resale price – policy), if properly drawn and implemented, apparently will not violate the Consent Decree.

It is clear from the Herman Miller RPM suit, which involves the offices of three state attorneys general, including New York’s (currently the Chair of the National Association of Attorney General Multi-State Antitrust Task Force), that at least some state enforcers intend to continue to prosecute manufacturers entering into RPM agreements, regardless of whether the manufacturer possesses market power. Indeed, it may be that this particular suit was instituted against a manufacturer without a large market share specifically to make that point. Although the Consent Decree terminates in less than three years and the payment to the three states is less than $1 million, private treble damage suits – particularly in those states that still prohibit all RPM agreements – remain possible.
The FTC Nine West Order

In April 2000, the FTC issued a Consent Order against Nine West Group, a manufacturer and retailer of footwear, prohibiting the company from entering into RPM agreements with retailers. At the same time, Nine West entered into a separate settlement agreement with many state attorneys general resolving alleged violations of their state antitrust laws.

In October 2007, Nine West filed a petition with the FTC contending that the Supreme Court Leegin ruling changed the law governing RPM agreements, and asking the FTC to set aside the prohibitions in its Consent Order as no longer necessary or appropriate in view of Leegin. Nine West argued that the prohibition of minimum RPM agreements no longer is in the public interest in light of Leegin, and because Nine West allegedly would be at a competitive disadvantage in the future as against competitors who may adopt RPM in light of Leegin.

On May 6, the FTC granted the petition pursuant to a unanimous vote of the Commissioners. Referring to the Leegin decision, however, the FTC Order noted that the Supreme Court had admonished the courts and enforcement agencies “to take careful account of possible anticompetitive harm in the treatment of RPM matters under a rule of reason framework.” Having done so in this instance, the FTC concluded that none of the anticompetitive factors referred to in Leegin appeared to be present with respect to Nine West. First, because Nine West has only a “modest market share in any putative relevant product market,” the Commission stated that the company apparently lacked market power. Second, the FTC added that there was no evidence that a “dominant, inefficient retailer” was the impetus for Nine West’s proposed RPM program, nor evidence that the proposed program was caused by any retailer cartel. To the contrary, the Commission pointed out, Nine West stated that it was solely responsible for its desire to engage in RPM, “based on its wish to increase the services offered by retailers that sell Nine West products.” Accordingly, the petition was granted “on the basis that Nine West’s use of resale price maintenance is not likely to harm consumers.”

The Order stresses, however, that had the FTC concluded that Nine West ran afoul of the negative Leegin factors, the burden of persuading the Commission to grant the petition would have shifted to Nine West, which then would have to demonstrate that its use of RPM is procompetitive. Specifically, Nine West would have been required to present evidence that while the practice might increase resale prices for its products, it nevertheless would enhance output.

The Order notes that Nine West had asserted that its RPM agreements would increase consumer demand and thereby enhance competition. However, because Nine West had not provided any evidence of procompetitive effects beyond its conclusory assertion, the FTC Order states that the Commission will continue to monitor the effects of Nine West’s use of RPM “should it choose to adopt a resale price maintenance program.” Accordingly, the FTC modified the Consent Order to require that on the first, third and fifth anniversary of the date of the Order, Nine West would be required to file a written report stating whether it has engaged in any RPM agreements and, if so, to detail the planning, implementation, reasons for, terms, and results of the arrangement, identifying who prompted or initiated the use of RPM agreements, and the projected or actual benefits to consumers from such agreements.

In the press release accompanying the FTC’s Order, it was noted that the Order would have no effect upon the settlement agreement Nine West had entered into with various states in 2000 resolving the alleged violation of their antitrust laws. The press release failed to note, however, that the state agreements all expired in 2005 while the FTC’s Consent Order continues to 2020.

The Nine West Order issued by the FTC on May 6, 2008 does not provide any information as to whether the FTC will in fact bring RPM cases under the rule of reason in the future. However, this development does indicate that if the FTC does so, it will be in the context of all of the “admonitions” raised by the Supreme Court in Leegin. Therefore, the FTC’s rule of reason evaluation of such a practice will depend upon the facts involved in each case. In particular, if a case involves a company without market power that has adopted an RPM program on its own initiative rather than as a result of pressure by a retailer cartel or a dominant, inefficient retailer, the Commission likely will conduct a full rule of reason inquiry. Otherwise, the nature of the inquiry will be more limited, and the manufacturer involved may have to assume the burden of providing evidence that the program did not result in increased prices or, if it did, that output was not reduced.

1. 127 S. Ct. 2705 (U.S. 2007), overruling Dr. Miles Medical Co. v. John D. Park & Sons, 200 U.S. 373 (1911).
2. In State Oil Co. v. Khan, 522 U.S. 3 (1997), the Court previously had declared that maximum (ceiling) RPM was not per se unlawful.
4. 127 S. Ct. at 2716-17.
Fifth Circuit Affirms FTC Decision that Texas Physicians Group Engaged in Illegal Price-Fixing

By Vadim Brusser

On May 14, 2008, a unanimous U.S. Court of Appeals for the Fifth Circuit affirmed a 2005 decision by the Federal Trade Commission (“FTC” or “Commission”) that North Texas Specialty Physicians (“NTSP”) had engaged in horizontal price-fixing in violation of Section 5 of the FTC Act. The Fifth Circuit agreed with the FTC that a full “rule of reason” analysis was unnecessary to find that certain aspects of NTSP’s fee negotiation model were anticompetitive, and upheld the FTC’s use of an abbreviated “inherently suspect” rule of reason analysis to condemn NTSP’s practices. Although the Fifth Circuit validated most of the FTC’s decision, it found that one of the provisions of its remedial order was overly broad and remanded the proceeding to the Commission for modification.

Background

NTSP is a group of independent physicians and physician organizations that operates primarily in the Fort Worth, Texas area. In 2003, the group had 575 members comprised of physicians practicing in 26 medical specialties and primary care physicians. NTSP’s business model entailed negotiating fee contracts on behalf of all of its doctors with “payors” such as insurance companies, health-plan providers, and self-insured employers. NTSP physicians signed a Physician Participation Agreement (“PPA”) that required the physicians to follow NTSP’s rules regarding fee negotiations.

As part of its negotiation process, NTSP annually polled its physicians regarding the minimum fee each physician would accept for providing medical services. NTSP would then calculate the mean, median, and mode of the minimum acceptable fees and provide that information to each physician. During the annual polling period, NTSP would provide the previous year’s poll results.

The court agreed with the Commission’s decision that NTSP’s practices “amounted to horizontal price-fixing that is unrelated to procompetitive efficiencies.” During initial negotiations with payors, NTSP would not deliver a payor’s offer to its physicians unless the payor offered at least the minimum fee determined by the physicians’ poll. NTSP would proceed with negotiations with the payor only after at least 50 percent of its physicians agreed to accept the payor’s qualifying offer. Under the PPA rules, a physician could not individually pursue a contract offer from a specific payor until NTSP had ended negotiations with the payor.

In September 2003, the FTC filed an administrative complaint alleging that these practices constituted antitrust violations under Section 5 of the FTC Act. The complaint alleged that NTSP illegally fixed the payors’ fees to NTSP members for treating patients that were part of the payors’ health plans. In November 2004, the Administrative Law Judge (“ALJ”) found that NTSP illegally conspired to fix prices and ordered NTSP to cease the anticompetitive negotiating practices. NTSP appealed to the full Commission, and in December 2005, the Commission upheld the ALJ’s decision that NTSP had restrained competition through horizontal price-fixing. NTSP then appealed the Commission’s decision to the Fifth Circuit.

Fifth Circuit’s Decision

After confirming the Commission’s jurisdiction over NTSP’s conduct, the Fifth Circuit considered NTSP’s argument that it was a single entity, separate from its physician members, and thus could not enter into an agreement with itself. The court rejected NTSP’s assertion after declaring that NTSP was controlled by its physician members, and confirmed that competitors could not hide collusive behavior behind a formal business structure. The court considered immaterial the fact that NTSP physicians did not communicate directly with one another regarding fee negotiations. Although they did not communicate directly, the physicians knew that NTSP was negotiating on behalf of all its members and for their “collective benefit on price and other material terms.” Therefore, the Fifth Circuit agreed with the Commission that NTSP and its physician members had engaged in concerted action.
upheld by the D.C. Circuit in *Polygram Holding v. FTC*. Similar to the truncated rule of reason analysis referred to as a “quick-look,” a restraint deemed inherently suspect is condemned without a full market analysis when “past judicial experience” has shown that the restraint “warrant[s] summary condemnation.”

The FTC argued that NTSP’s practices were easily classified as inherently suspect restraints. Stating that it could have categorized NTSP’s practices as per se unlawful, the FTC noted concern that per se treatment of the conduct of this physician group could discourage the formation of lawful, efficiency-enhancing physician groups. The court agreed that certain of NTSP’s practices closely resembled conduct that could “generally be deemed a per se violation,” but went on to state that a quick-look analysis was justified in this instance because NTSP had proffered procompetitive justifications.

According to the Fifth Circuit, the FTC would have to meet two requirements to find a violation under an inherently suspect analysis. It would have to show that: (1) NTSP’s behavior clearly had anticompetitive effects, and (2) none of NTSP’s procompetitive justifications offset, or at least neutralized, the anticompetitive effects of its restraints.

Considering these factors, the court concluded that the “net anticompetitive effects of certain of NTSP’s practices were obvious.” NTSP’s practices such as polling its physicians, providing the current year’s and previous year’s poll results, restricting the flow of payors’ offers to NTSP physicians, and limiting the physicians’ ability to negotiate directly with payors, erected “barriers between payors and physicians” and ultimately would have resulted in those payors paying higher fees.

NTSP argued that its restrictive negotiation practices led to better physician teamwork, reduced costs, and reduced medical risks. The court rejected these arguments because NTSP could not show why the restrictions were plausibly related to the justifications. Accordingly, the court agreed with the Commission’s decision that NTSP’s practices “amounted to horizontal price-fixing that is unrelated to procompetitive efficiencies.”

The Fifth Circuit’s only issue with the Commission’s decision related to a remedy provision that prohibited NTSP from dealing, refusing to deal, or threatening to refuse to deal with any payor. The Court believed this provision was overly broad, and remanded the proceedings to the Commission for modification.

**Significance of Decision**

This decision is worthy of note for several reasons. First, it confirms the FTC’s oft-provided guidance that in a “messenger model” physicians group, the messenger can facilitate only “independent, unilateral decisions of network providers” and that it is unlawful to facilitate “collective decisions on pricing or price-related terms.” Second, it endorses the FTC’s use of the “inherently suspect” analysis that the Commission fashioned in *Polygram*, which provides the agency with additional flexibility for analyzing potentially anticompetitive restraints.

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1. *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).
2. Id. at 370.
3. Id. at 372.
4. Id. at 352.
Northern Virginia Hospitals Abandon Proposed Merger Following FTC Challenge

By Jeff L. White

Inova Health System Foundation (“Inova”) announced in June 2008 that it had abandoned its plans to acquire Prince William Health System (“Prince William”) after the Federal Trade Commission (“FTC”) filed an administrative complaint and brought an action in federal district court seeking a preliminary injunction to block the proposed combination of the two Northern Virginia hospital systems. The FTC hailed Inova’s decision to withdraw its plans to acquire Prince William as a “major victory for Northern Virginia consumers [that] affirms the critical importance of competition in the health care industry.”

On August 1, 2006, Inova and Prince William entered into a definitive agreement under which Inova would merge Prince William into its hospital system, already the largest in Northern Virginia. According to the FTC, Prince William operates one general acute care hospital with approximately 80 licensed beds in Manassas, Virginia. Inova operates five hospitals throughout Northern Virginia with a total of nearly 1,900 licensed beds.

The FTC’s Complaint

After a long investigation, on May 9, 2008, the FTC issued an administrative complaint alleging that Inova’s proposed acquisition of Prince William would substantially lessen competition in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. The FTC simultaneously filed a complaint along with the Attorney General of the Commonwealth of Virginia in the U.S. District Court for the Eastern District of Virginia seeking a temporary restraining order and preliminary injunction to prevent the parties from consummating their transaction pending a full administrative trial on the merits.

The FTC’s complaint alleged that the proposed transaction would substantially lessen competition in the Northern Virginia market for general, acute care inpatient hospital services sold to private payors, including commercial health plans. According to the FTC, general acute care inpatient hospital services involve basic medical and surgical diagnostic and treatment services that include an overnight stay in the hospital by the patient. The FTC specifically excluded several other types of services, including services solely for children, military personnel, and veterans, services providing same-day services at outpatient facilities, tertiary services such as open heart surgery and transplants, and psychiatric, substance abuse, and rehabilitation services.

The relevant geographic market alleged in the FTC’s complaint encompassed an area no larger than Northern Virginia, and specifically excluded hospitals in Maryland and Washington, D.C. According to the FTC, approximately 90% of the patients at Northern Virginia hospitals come from Northern Virginia.

The FTC’s decision to challenge the transaction and the ensuing procedural events raise a number of significant issues with respect to future transactions before the agency.

With respect to competitive effects, the FTC alleged that Inova and Prince William are close competitors, and that the elimination of Prince William as an independent substitute would force health plans to pay higher prices for services from the combined entity. In addition, the FTC alleged that the proposed transaction would provide Inova with additional bargaining leverage in its negotiations with health insurers.

Finally, the FTC alleged that market entry was difficult and that it would take three years or longer to defeat any anticompetitive effects, giving planning and construction lead times, as well as the need for state regulatory approval. Further, the FTC alleged that the merger would not result in efficiencies because Inova and Prince William already provide comparable quality of services.
The Administrative Proceeding
On the same day that the FTC challenged the transaction, it also announced that it had designated Commissioner J. Thomas Rosch as the Administrative Law Judge (“ALJ”) to preside over the administrative proceeding. According to the FTC, the Administrative Procedure Act permits the Commission to determine whether the Commission itself, one or more Commissioners, or an administrative law judge appointed under the Act will preside as the fact finder in certain adjudications. The FTC claimed that Commissioner Rosch’s “40 years of experience as a trial lawyer” made him “the best available candidate to sit as a trier of fact in this case.”

Inova and Prince William filed a motion to recuse Commissioner Rosch on the grounds that his participation in the FTC’s investigation precluded him from serving as the ALJ and that the totality of events created an appearance of impropriety. In addition, the parties filed a motion to stay the administrative proceeding until the Eastern District of Virginia had ruled on the preliminary injunction. A week later, Commissioner Rosch denied both motions and scheduled a four-week trial to begin in October.

Meanwhile, in the Eastern District of Virginia, the parties met with Judge Claude Hilton on a Motion for Scheduling Order pursuant to which Inova and Prince William sought to proceed with discovery and a live hearing before the court. The FTC argued that a hearing was unnecessary and that a preliminary injunction should be granted on the papers.

Before the district court ruled, the parties decided to abandon their transaction. Citing the FTC’s investigation, Inova stated that “unusual process changes” by the FTC had “threatened to prolong completion of the merger by as much as two years, which both health systems believe is not in the best interest of the communities they serve.”

Implications
On the heels of eight straight losses challenging hospital mergers and several recent losses in other industries, the FTC proclaimed Inova’s abandonment of the transaction as a major victory. From a merger enforcement standpoint, the FTC’s decision to challenge the transaction and the ensuing procedural events raise a number of significant issues with respect to future transactions before the agency.

From a substantive antitrust perspective, it is notable that the transaction was challenged even though Prince William accounted for only 6% of licensed beds and only 3.6% of revenues in the alleged relevant market. Moreover, the FTC acknowledged that four other independent hospitals would remain after the merger, including two or three of which that were larger than Prince William. This suggests that the FTC may aggressively pursue transactions when it believes anticompetitive effects are likely, even if one of the merging parties has a small market share and multiple competitors would remain in the market.

With respect to the fairly unusual procedural aspects of the case, the FTC’s attempt to move the administrative proceeding forward on a parallel track with the motion for a preliminary injunction in federal district court represents somewhat of a departure from past practice. Historically, the FTC has tended to wait for a district court to rule before beginning its administrative proceeding in a merger case. Even more unusual, the FTC designated one of its Commissioners to preside as the ALJ over the administrative trial. These procedural actions may have contributed to the parties’ decision to abandon their merger.

European Antitrust Developments

By Jérôme Fabre & Caroline Genevois

The European Commission Adopts New Cartel Settlement Procedure

The European Commission (the “Commission”) announced on June 30, 2008, that it has finalized a new simplified procedure for settling cartel cases. Under this new procedure, after having seen the evidence in the Commission file, parties to an alleged cartel, can choose to acknowledge their involvement in the cartel and may seek to engage in settlement discussions after initiation of proceedings and prior to the issuance of a Commission statement of objections. The Commission has discretion as to whether to enter into such settlement discussions, which could result in a 10% reduction of the fine imposed on parties.

The parties to a proceeding may not, without the Commission’s consent, disclose to any third party the content of any settlement discussions.

If a party accepts the Commission’s views, the Commission will set a time limit (of at least 15 days) for the company to submit a final settlement submission in accordance with a set template that must contain: acknowledgment of the company’s liability for a defined infringement (including scope and duration), an indication of the maximum fine that the company foresees, and confirmation that the company has been informed of the objections against it, has been given the opportunity to be heard, and will not request access to the file or an oral hearing. Protection mechanisms against discovery orders from other jurisdictions have been established.

The legislative package consists of a Commission Regulation together with a Commission Notice explaining the new system in detail. The key aspects of the finalized settlement procedure are as follows:

- The Commission will have the discretion to determine which cases may be suitable for settlement. In considering whether a case is suitable for the settlement procedure, the Commission may take into account whether it is probable that all the parties concerned will be able to reach a common understanding with it as to the scope of the possible objections within a reasonable time scale.
- A company does not have a right, and is under no obligation, to enter into settlement discussions.
- Settlement discussions can only be entered into after proceedings have been initiated but before a statement of objections has been issued. However, a company may indicate its willingness to explore settlements at an earlier stage (for example, when applying for leniency).
- Leniency applications will not be possible once settlement discussions have commenced.
- Settlement discussions will cover the alleged facts, their classification, the gravity and duration of the alleged infringement, and the liability of the company. They will also cover the potential maximum fine, net of any reduction. However, companies do not have the right to negotiate as to the existence of an infringement or amount of the fine.
- The Commission will disclose non-confidential documents from the case file on reasoned request of a party when this is justified to allow a company to ascertain its position on a certain issue. Parties can request that the Hearing Officer resolve any disputes about access to documents.

A decision issued following application of the settlement procedure is still subject to judicial review before the European courts. Moreover, the settlement procedure does not affect the courts’ unlimited jurisdiction to review fines.

The new procedure will come into force once the Commission Notice and amending Regulation are published in the Official Journal. It remains to be seen whether the 10% reduction in fines will be sufficient to encourage companies to participate in this new settlement procedure.

It remains to be seen whether the 10% reduction in fines will be sufficient to encourage companies to participate in this settlement procedure.
ECJ Overrules CFI Judgment on SonyBMG Joint Venture

On July 10, 2008, the European Court of Justice (“ECJ”) handed down its judgment on the appeal by Bertelsmann AG and Sony Corporation from the judgment of the Court of First Instance (CFI) which had annulled the European Commission’s 2004 decision to approve unconditionally the creation of a joint venture between Sony and Bertelsmann Music Group (BMG). The ECJ has set aside the CFI judgment on the ground that the CFI made a number of errors of law.

Under the transaction notified to the Commission on January 9, 2004, Sony and BMG agreed to merge their recorded music businesses into a 50/50 joint venture named SonyBMG. The Commission’s 2004 decision found that the main markets affected by the concentration were the national markets for recorded music. Given the presence of three other major record companies (Universal, Warner and EMI) and a varying number of independent competitors in each country, the Commission concluded that there was no creation or strengthening of a single dominant position.

However, in almost all member states the merger would result in a reduction of the number of major players from five to four. In the five largest EU markets (UK, France, Germany, Italy and Spain), the four remaining majors would control between 60% and 90% of the market. The Commission therefore assessed the possibility that the merger might create or strengthen a collective dominant position among the merged entity and the remaining three major record companies.

Supposedly applying the test set out in the earlier Airtours case (sufficient transparency of the market, existence of a credible retaliation mechanism against companies that would not collude, and no possibility for competitors or customers to undermine the effects of the collusion), the Commission found that, although there was some evidence of price parallelism in each country, it was not conclusive enough to constitute sufficient evidence for co-ordinated pricing behavior in the past. The Commission also concluded that there was insufficient evidence that discounting was sufficiently aligned or transparent to facilitate co-ordination. Further, it concluded that there was insufficient evidence that a reduction from five to four majors would facilitate transparency and retaliation to such an extent that the creation of a collective dominant position was anticipated.

Upon action by Impala, a trade association representing independent music companies, on July 13, 2006, the CFI annulled the Commission’s decision on the grounds that it had failed to provide adequate reasons for its decision and had committed manifest errors of assessment. In particular, the CFI found that: (i) the statement of reasons in the Commission’s decision relating to the lack of transparency in the market was not sufficient to support its conclusions; (ii) the Commission had erred by requiring a greater level of transparency than was necessary to permit a collective dominant position; (iii) the Commission’s assessment relating to retaliation was vitiated by error of law and a manifest error of assessment; and (iv) in relation to the potential creation of a dominant position, the Commission had not examined in its decision whether the transaction would have the effect of making the market sufficiently transparent. Further, the CFI found that the Commission did not conduct a sufficient analysis of the future prospects for retaliation.

The parties lodged appeals with the ECJ against the CFI’s judgment, alleging that the CFI erred in law in a number of respects. Agreeing with the appealing parties on a number of points, the ECJ ruled in particular that:

- in finding manifest errors of assessment, the CFI placed too much reliance on the conclusions/assessment in the Commission’s statement of objections, considering them to be established and reliable, despite the fact that they should have been regarded as provisional and were actually modified in the Commission's final decision; and

- the CFI did not carry out its analysis of those portions of the Commission’s decision relating to market transparency by having regard to a postulated monitoring mechanism forming part of a plausible theory of tacit co-ordination. In particular, in considering whether certain discount variations could call into question the possible adequacy of market monitoring, the CFI merely relied on unsupported assertions by Impala.

Of interest, the ECJ rejected the parties’ claim that the CFI applied an excessive standard of proof as regards merger clearance decisions, and that a different standard of proof applies in relation to clearance decisions (that would be subject to a lower standard of proof) than prohibition decisions: there is no general presumption that a notified concentration is compatible with, or incompatible with, the common market.

Having found that the appeal was well founded, the ECJ set aside the CFI’s judgment and referred the case back to the CFI.
As a result of the CFI’s judgment, the SonyBMG transaction (which had been fully implemented) had to be re-notified by the parties for re-examination by the Commission on the basis of current market conditions. The Commission announced in October 2007 that it had again decided to approve the merger unconditionally. Impala lodged a further appeal with the CFI against this second Commission decision. It is highly likely though that a final decision (even following remittance of the case back to the CFI from the ECJ) on the 2004 merger clearance will be reached before a final decision in relation to the appeal against the second clearance decision.

Ninth Circuit Dismisses Antitrust Suit for Lack of Constitutional Standing Where Plaintiff Could Not Show Injury

By Robert Yezerski

Introduction

In a salient reminder that antitrust plaintiffs must establish constitutional standing to bring their claims in federal court, the Ninth Circuit recently upheld the dismissal of an antitrust claim because the plaintiff was unable to show that he had suffered any injury resulting from the impugned conduct. In Gerlinger v. Amazon.com, Inc., the plaintiff alleged that he was injured as a customer of the online bookseller, Amazon.com (“Amazon”), when the company entered into an agreement with a subsidiary of another book retailer, Borders Group, Inc. (“Borders”), under which Amazon agreed to create and operate a Borders-branded online bookstore. While the plaintiff alleged that he had paid supracompetitive prices as a result of this agreement, the defendants marshaled evidence demonstrating that the prices of the books the plaintiff purchased either remained the same or were lower following the agreement. In the absence of any showing that the plaintiff had paid higher prices as a result of the challenged agreement, the Ninth Circuit held that the plaintiff had not established that he suffered any “injury in fact” – a necessary element in establishing constitutional standing to bring any federal law claim.

Background Facts

Prior to 2002, Borders and Amazon operated separate online retail bookstores. In late 2001, the companies entered into a so-called “Syndicated Store Agreement,” under which they agreed to jointly relaunch the Borders online store as a co-branded website. Under the agreement, Amazon was the actual seller of the products on the new website, and was generally responsible for product selection, terms of sale, customer service, and fulfillment. Borders only maintained control over the terms of sale of books purchased online and physically picked up at a Borders retail location. Borders paid a one-time fee to Amazon for creating the site, and received a commission for each sale.

The plaintiff brought claims under Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, and derivative claims under California law. The plaintiff alleged that the Syndicated Store Agreement was a per se unlawful price-fixing and market division agreement, a conspiracy to monopolize the “online bookselling market,” and an acquisition that substantially lessened competition in that market. The defendants argued that the plaintiff could not establish that he had personally paid a higher price for any book, or that he had suffered other injuries (such as reduced product selection or worse customer service), as a result of the Syndicated Store Agreement. The argument was supported by the declaration of Amazon Vice-President Steven Kessel, who stated that Amazon had lowered its prices five times since entering into the Agreement with Borders.

The District Court initially granted the defendants’ motion in-part, but sought further briefing from the parties on the issue of whether the plaintiff had the requisite standing to bring his claims. Following such briefing, the District Court proceeded to dismiss the plaintiff’s antitrust claims with prejudice. The court held that the plaintiff had failed to establish that he had suffered “actual injury,” and that he therefore lacked the necessary “antitrust standing” to bring his claims.

The Ninth Circuit Decision

On appeal, the Ninth Circuit upheld the District Court’s order, but did so on the ground that the plaintiff could not establish that he had suffered “actual injury,” and that he therefore lacked the necessary “antitrust standing” to bring his claims.
“antitrust standing” concerns a plaintiff’s entitlement to bring an action for damages under the Clayton Act, constitutional standing imposes more fundamental and generally applicable requirements that must be satisfied in order to establish the jurisdiction of the federal courts to hear an action.9 Supreme Court precedent establishes that Article III of the Constitution dictates the “irreducible constitutional minimum for standing” to bring any claim (antitrust or otherwise) in federal court.10 These constitutional standing requirements are threefold: first, the plaintiff must have suffered “injury in fact”; second, “there must be a causal connection between the injury and the conduct complained of”; and third, it must be “likely” that the injury will be redressed by a favorable decision.11 Absent any of these three requirements, a plaintiff is constitutionally barred from bringing a claim in federal court.

The Ninth Circuit upheld the District Court’s order . . . on the ground that the plaintiff had failed to meet the requirements of constitutional standing.

In considering whether the plaintiff in Gerlinger could establish constitutional standing, the Ninth Circuit focused on whether he had suffered “injury in fact.” As noted above, defendants submitted evidence suggesting that the prices for each product purchased by the plaintiff had either remained the same or fallen following execution of the Syndicated Store Agreement. Accordingly, the defendants argued that the plaintiff had suffered no injury because he had not been the victim of any anticompetitive price increase resulting from the Agreement. The plaintiff advanced no evidence to contradict this, other than to assert that the price reductions might have been even greater (and the prices he paid even lower) absent the Agreement. The only evidence the plaintiff submitted to support his claim was an academic article discussing pricing trends for online book sales generally during the applicable time period.12 The Ninth Circuit rejected this evidence as irrelevant, however, because it did not suggest any injury to the plaintiff personally. Given the plaintiff’s inability to advance any evidence that he had suffered injury in fact, the Court held that he had failed to meet his burden under Federal Rule of Civil Procedure 56(e) to respond to a summary judgment motion with “specific facts,” rather than relying on the “mere allegations” in the plaintiff’s own pleadings.13 On that basis, the court held that the defendant lacked constitutional standing to bring his claims.

Analysis

Gerlinger is a noteworthy example of how antitrust claims can often be undone, even without detailed economic and legal analysis or extensive discovery, when a plaintiff fails to attend to the fundamental elements of an antitrust claim. In light of Gerlinger, broad and unspecific allegations that an agreement or merger has resulted in “supracompetitive prices” may not suffice to survive summary judgment when the defendant can establish that the plaintiff has not experienced any change in prices or terms of sale following the challenged conduct. Moreover, given that the demands of constitutional standing are basic and straightforward, summary judgment motions based on constitutional standing arguments may have practical appeal when compared with the more complex doctrine of antitrust standing.

1 526 F.3d 1253 (9th Cir. 2008).
2 The facts are most fully-described in the earlier of two District Court decisions: Gerlinger v. Amazon.com, Inc., 311 F. Supp. 2d 838 (N.D. Cal., 2004).
3 Id. at 845-56.
4 Id. at 843.
5 Id. at 857.
7 Id. at *5-6.
8 526 F.3d 1253 (9th Cir. 2008).
11 Id. at 560-61.
13 526 F.3d at 1255-56 (citing Fed. R. Civ. P. 56(e)). Rule 56(e) provides, in relevant part, “When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.”
Ninth Circuit Rejects Indirect Purchaser’s Attempt To Leap Over *Illinois Brick* Wall Because of Contractual Relationship

By Bryant S. York

The Ninth Circuit has declined to recognize any new exception to the direct purchaser rule first articulated by the Supreme Court in *Illinois Brick Co. v. Illinois*.1 Faced with this issue in *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*,2 on July 26, 2006, the Ninth Circuit, in a unanimous decision by Judge Dorothy W. Nelson, concluded that an end user purchasing goods through an independent distributor does not have standing to assert claims under §1 of the Sherman Act against a manufacturer even though it had an independent contractual relationship with the manufacturer.

Challenged Conduct

The appeal before the Ninth Circuit involved a disagreement between two groups of plaintiffs about which ones had standing as a “direct purchaser” to bring an antitrust claim under §1 of the Sherman Act. One group consisted of Delaware Valley Surgical Supply Company, Inc. (“DVSS”) and Niagara Falls Memorial Medical Center (“Niagara”), both of which purchased medical supplies directly from Johnson & Johnson and its subsidiaries (“J & J”). The other plaintiff was Bamberg County Memorial Hospital & Nursing Center (“Bamberg”). Although Bamberg had a contract with J & J setting a list price for Bamberg’s purchase of medical supplies, it actually purchased its products pursuant to a separate contract with a third-party distributor.

Bamberg, Niagara, and DVSS each filed independent suits against J & J alleging antitrust violations, which were consolidated by the district court. The three actions all arose from J & J’s contracts with hospitals and group purchasing organizations (“GPOs”) as they relate to two categories of products: sutures used to close wounds, and endomechanical products (“endos”) used primarily for minimally invasive laparoscopic surgery. All plaintiffs alleged that J & J committed antitrust violations by impermissibly leveraging its monopoly power in sutures to create a monopoly in the endos market.

**The Ninth Circuit declared . . . that “Supreme Court jurisprudence has been neither vague nor ambiguous in establishing the direct purchaser rule.”**

The plaintiffs objected to J & J’s “market share purchase requirements,” under which J & J allegedly enters into contractual arrangements that condition discounts and rebates on a buyer purchasing the bulk of its products from the company. Plaintiffs contended that the conduct was coercive and resulted in artificially inflated prices. Plaintiffs further contested bundled discounts allegedly offered to hospitals that purchase both sutures and endos from J & J on the grounds that the conduct was exclusionary because of J & J’s alleged dominance in the sutures market. In all, plaintiffs alleged that this conduct unreasonably restrained trade in violation of §1 of the Sherman Act, constituted unlawful exclusive dealing in violation of §3 of the Clayton Act, as well as monopolization and an attempt to monopolize the relevant markets in violation of §2 of the Sherman Act.

**Bamberg’s Contracts with J & J and the Distributor**

Bamberg is a member of a GPO that negotiated agreements for pricing options for sutures and endo products with J & J on Bamberg’s behalf. Bamberg then entered into its own contract with J & J pursuant to the terms of the GPO agreements. Under its contract, Bamberg had the option to order products directly from J & J or from an authorized distributor of J & J’s products. Bamberg opted to purchase from a distributor, Owens & Minor (“O & M”), which contracts specified the terms of purchase of J & J products. Thus, Bamberg did not directly procure any goods from J & J. Moreover, Bamberg did not pay J & J for any goods, and J & J did not directly ship any goods to Bamberg.

**Proceedings in the District Court**

Based on this contractual arrangement, DVSS moved for partial summary judgment. It argued that Bamberg lacked standing to assert antitrust damage claims against J & J because it was not a direct purchaser of J & J’s products, as required by *Illinois Brick*. The district court granted DVSS’s motion, ruling that the contract between Bamberg and J & J did “not change the fact the O & M is the direct purchaser here.”3

**The Ninth Circuit Opinion**

On appeal, the Ninth Circuit concluded that it was “bound by the sensible and straightforward rule set forth in *Illinois Brick*.”4 Although §4 of the Clayton Act authorizes “any person who shall be injured” by an antitrust violation to seek treble
damages from the offending party, the Supreme Court has limited the class of parties that have statutory standing to recover damages through antitrust suits. In Illinois Brick, the Supreme Court held that only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations.5 Allowing indirect purchasers to assert suit, the Court reasoned, “would create a serious risk of multiple liability for defendants.”6 Instead, the Court concluded, “antitrust violations will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue.”7

The Ninth Circuit declared that the appeal fell squarely within the rule of Illinois Brick. The court was not persuaded by Bamberg’s attempt to distinguish its case on the ground that Bamberg and J & J had an independent contractual relationship, concluding instead that “Supreme Court jurisprudence has been neither vague nor ambiguous in establishing the direct purchaser rule.”8 “The Supreme Court intended to make a bright line rule for identifying proper plaintiffs when an antitrust violation occurs in a multi-tiered distribution system,” and had “explicitly rejected attempts to create exceptions to that rule, even when the consideration in a particular market may undermine some of the reasoning used by the Illinois Brick Court.”9

Applying this bright line rule, the court determined that Bamberg lacked standing under § 4 of the Clayton Act to assert an antitrust damages claim against J & J. “It is undisputed that O & M, as the distributor, was the immediate purchaser of sutures and endo products from J & J.”10 The independent contract relationship between Bamberg and J & J “does not change the fact that Bamberg also had a contract with O & M, and it was that contract that ultimately effectuated the transfer of these goods.”11

Plaintiffs argued that the appeal concerned a common arrangement whereby a GPO negotiates prices with manufacturers on behalf of hospitals, but then individual hospitals place orders through independent distributors. Under these circumstances, plaintiffs asserted, the hospital—not the distributor—is the direct victim of the alleged antitrust violations, and therefore best positioned to enforce the antitrust laws. Plaintiffs proposed a new formulation of the direct purchaser rule “that they believe is better attuned to the business relationships between health care providers and manufacturers.”12 Under this new rule, “a party should be deemed ‘direct purchaser’ when (1) the plaintiff contracted directly with the defendant, (2) its complaint challenges the lawfulness of the contract, and (3) the alleged injury is that the defendant charged artificially high prices in its contract with plaintiff.”13

The Ninth Circuit rejected the proposed rule for several reasons. While the court conceded that the plaintiffs “may well be correct in positing that a hospital has a greater incentive than a distributor to bring an antitrust claim when the conduct complained of involves price negotiations with a GPO,” similar arguments had already been rejected by the Supreme Court.14 In Kansas v. UtiliCorp United Inc.,15 the Supreme Court “closed the door on the theory that an end user who buys from an independent distributor, rather than the manufacturer, should have standing because it may be the most efficient enforcer of antitrust laws.”16

The Ninth Circuit added that, even if it “opted to strike out on a new path,” it was not convinced that the plaintiffs’ reformulation of the direct purchaser rule would act as a better enforcement mechanism for antitrust violations.17 Applying the proposed rule, J & J would theoretically be subject to claims filed by both O & M and Bamberg on the same alleged overcharge. “This would subject J & J to the possibility of multiple liability and would require the courts to disentangle the proper recovery for each party in the distribution chain”– precisely the result that the Supreme Court in Illinois Brick intended to avoid.18

The Ninth Circuit also found plaintiffs’ reasoning unpersuasive because “the distributor is not a completely irrelevant economic actor in this conceptual framework.”19 The court noted that the presence of a distributor indicates that third-party distributors are impacted by the alleged pricing scheme and thus have incentives to bring suit. The court stressed that this undermined the plaintiffs’ argument by showing that “[t]here are clearly other motivated plaintiffs, distributors and hospitals alike, who unquestionably meet the direct purchaser requirement and can serve the role of private attorney general contemplated by § 4 of the Clayton Act.”20

Analysis

In its decision in Delaware Valley Surgical Supply, the Ninth Circuit clearly showed that it views the Illinois Brick direct purchaser rule as a bright line principle that is not subject to exceptions premised by a case-by-case analysis. At a minimum it signaled to district courts that antitrust damage suits brought by indirect purchasers under the Sherman Act may only be maintained
Sixth Circuit Refuses To Approve a “Single Cemetery Market” as Permissible in a Tying Arrangement Case

By Jennifer M. Brace

Introduction

On May 1, 2008, in Monument Builders of North America v. Michigan Cemetery Association,1 the Sixth Circuit Court of Appeals affirmed an Eastern District of Michigan District Court’s dismissal of monument builders’ claims that local cemeteries were engaged in illegal tying arrangements in violation of the Sherman Act.2 The monument builders attempted to establish the requisite market power in the tying product market by defining it as “each individual cemetery.” The Sixth Circuit ruled that this market definition was too narrow and therefore inadequate as a matter of law.

Facts and Procedural History

The monument builder plaintiffs claimed in this case that the cemeteries’ alleged violations of the Sherman Act involved the “historical practice[s]” of requiring purchasers of burial plots in each defendant’s cemetery to purchase memorial monuments in that cemetery, thereby excluding the plaintiffs from competing in the market of sales and installation of monuments in each such cemetery.3 The plaintiffs added monopolization claims, alleging that because “each individual cemetery was a separate market,” the defendants “have sufficient market power to come dangerously close to monopolizing the defined market.”4

The District Court dismissed the claims, holding that the proposed tying product market definition was inadequate as a matter of law. Plaintiffs appealed, arguing that they satisfied this pleading requirement and should therefore be entitled to proceed with discovery to prove that their proposed tying product market was sufficient. The Sixth Circuit disagreed.

The Sixth Circuit Opinion

Tying generally is defined as an agreement to sell one product, known as the tying product, on condition that the buyer also agrees to purchase another product, known as the tied product. Tying is illegal under the Sherman Act when the seller has “appreciable economic power” in the tying product market, and a substantial amount of commerce in the tied product market is adversely affected by the agreement.

The builders argued in the Monument Builders case, that because land in itself is a unique product, and because “once a grave is purchased the owner or his or her family who wish to memorialize the deceased must install the memorial or monument in that cemetery,” the plaintiffs’ tying product market definition of “each individual cemetery” was appropriate. At least one other circuit court had considered a factually similar tying case. However, in the earlier case the plaintiffs had proposed a tying product market definition that included all cemeteries in the “greater Kansas City area,” rather than each cemetery separately.7

The Sixth Circuit ruled that [the] market definition was too narrow and therefore inadequate as a matter of law.

The plaintiffs also argued that the district court erred in basing its market power analysis solely on market share, claiming that market power can also exist when the seller offers a unique product that other competitors are not able to offer.8 The plaintiffs asserted that because it is real estate, a burial plot is “unique, and cemeteries are distinct enterprises and have a unique public function.”9 The Sixth Circuit responded that if it accepted the plaintiffs’ proposed tying product market, “any proof of market power

Footnotes:

2 523 F.3d 1116 (9th Cir. 2008).
4 Delaware Valley Surgical Supply, 523 F. 3d at 1122.
5 Illinois Brick, 431 U.S. at 735.
6 Id. at 730.
7 Id. at 735.
8 Delaware Valley Surgical Supply, 523 F. 3d at 1122.
9 Id.
10 Id.
11 Id.
12 Id. at 1123.
13 Id.
14 Id.
16 Delaware Valley Surgical Supply, 523 F. 3d at 1123.
17 Id.
18 Id.
19 Id.
20 Id.
[would be] unnecessary,” because “[t]here can be no competition for the sale of burial lots within a market that contains only one provider of burial lots.” The Sixth Circuit was highly critical of this attempted market definition, pointing out that “each individual cemetery has nothing close to exclusive control over burial lots outside of the four corners of its own land” and, of course, “each cemetery fully controls the internments within its own boundaries.” Moreover, focusing solely on what happens after a grave is purchased ignores the competitive market for the initial sale of the burial lot.

The Sixth Circuit declared that although the United States Supreme Court has ruled that certain real estate holdings may be sufficient to give a defendant market power, the “uniqueness of location is not itself adequate to establish market power.” There must also be evidence showing that the location lends the defendant a competitive advantage others cannot meet.

Analysis
The Sixth Circuit suggested that if the plaintiffs had brought their case under a “lock-in” theory by alleging that a defendant “changed its rules” following the sale of a plot, or had concealed its monument buying condition from purchasers of burial plots, plaintiffs might have stated a claim. Potential tying case plaintiffs should take note of the Sixth Circuit’s preference for a claim brought under a lock-in theory as opposed to a tying claim with an unduly limited tying product market definition.

1 524 F.3d 726 (2008).
2 The court declined to exercise supplementary jurisdiction over the plaintiffs’ state law claims.
3 Id. at 730-731.
4 Id.
5 Id. at 732 (citing Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6 (1958)).
6 Id. (citing Highland Capital, Inc. v. Franklin Nat. Bank, 350 F.3d 558, 565 (6th Cir. 2003)).
7 Monument Builders of Greater Kansas City, Inc. v. Am. Cemetery Assoc. of Kansas, 891 F.2d 1473, 1476 (10th Cir 1989).
8 Id.
9 Id. at 734.
10 Id. at 735.
11 Id. at 736.
12 Id. at 735.
13 Id. at 733 (quoting Baxley-DeLamar Monuments Inc., 938 F.2d at 852).
14 Id. at 737-38.
The Antitrust Update

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