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Supreme Court Decides Boycott Case

On December 14, 1998, the United States Supreme Court held that the per se group boycott rule did not apply to a purchaser's decision to favor one supplier over another, even though the purchaser and favored supplier acted for improper reasons and intended to injure the rival supplier. NYNEX Corp. v. Discon, Inc., 119 S. Ct. 493 (1998). Discon sued NYNEX and various NYNEX subsidiaries alleging that they had illegally agreed with AT&T Technologies, a Discon competitor, to drive Discon out of the market for removing obsolete telephone equipment. This agreement, according to Discon, was created to mask alleged, illicit behavior by NYNEX and AT&T Technologies to "defraud local telephone service customers by hoodwinking regulators." Id. at 496.

The Court of Appeals for the Second Circuit had held that because there was no pro-competitive rationale for the NYNEX and AT&T Technologies agreement to deal only with each other, the agreement constituted a per se violation of Section 1 of the Sherman Act. 93 F.2d 1055, 1060 (2d. Cir. 1996). Justice Breyer, writing for a unanimous Supreme Court, disagreed. The Court held that regardless of the motivation, an agreement between a single supplier and a single customer is not a per se illegal refusal to deal because there is no horizontal agreement at either the supplier or purchaser level. Id. at 1061-62. The Court acknowledged that the agreement caused consumer harm in the form of higher prices, but suggested that the harm resulted more from a lawful monopoly granted to the local phone company combined with the "deception worked upon the regulatory agency," than from the elimination of Discon as a competitor.

The NYNEX decision clarifies the use of the per se rule, limiting it to agreements between horizontal competitors, either at the level of the excluded competitor, as in Fashion Originators Guild of America, Inc. v. FTC, 312 U.S. 457 (1941), or directed against a supplier of the excluded competitor by a rival competitor, as in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). The decision clarifies significant confusion in the lower courts as to whether the per se boycott rule could apply to an agreement between a single supplier and a single customer. The Court remanded the case for consideration under the rule of reason.

Supreme Court Hears Advertising Restriction Case

In January 1999, the United States Supreme Court heard oral argument of a case brought by the FTC against the California Dental Association alleging that its advertising restrictions were unfair restraints of trade in violation of Section 5 of the FTC Act. California Dental Ass'n v. Federal Trade Commission, 128 F.3d 720 (9th Cir. 1997), cert. granted, 119 S. Ct. 29 (1998). The Court should render a decision before the end of the term in June 1999.

An administrative law judge had found that the suppression of truthful advertising about price and other qualities important to consumers when choosing dentists, violated the FTC Act. The Association appealed first to the full Federal Trade Commission and then to the Ninth Circuit, but failed in both instances to overturn the ruling. Certiorari was granted on two issues: first, whether the Association is immune from FTC challenge due to its nonprofit corporate status; and second, whether the lower court conducted a sufficient analysis of market power to reach its conclusion of likely anticompetitive effect under the rule of reason.

As to the first issue, the Association argued that the FTC lacks jurisdiction over it because it is a nonprofit corporation. The FTC disagreed, arguing that the Association is a corporation "organized to carry on business for its own profit or that of its members" within the meaning of the FTC Act.

As to the second issue, while the FTC concluded that the advertising restrictions were unreasonable and could not be justified by the proffered procompetitive benefits, it did so without a detailed inquiry into market structure and power, and without quantifying the injury caused by the restrictions. The FTC used what has come to be known as the "quick-look" rule of reason. The Association asserted that more than a "quick look" was necessary before condemning its practices.

LLC Merger Guidelines Revised

The Federal Trade Commission has announced new guidelines for treatment of the formation of Limited Liability Companies (LLCs) under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended. The new guidelines become effective March 1, 1999. The FTC initially intended to implement its new interpretation on December 14, 1998, but delayed the implementation and made changes to the original proposal based on comments received in response to publication of the initial draft.

The new guidelines will expand the need for those forming or investing in LLCs to file a premerger notification and wait for approval before closing the transaction. In addition to imposing a waiting period, the required HSR filing will increase out-of-pocket costs at least by the $45,000 filing fee (required only of the buyer).

The guidelines will apply when (i) at least one of the members of the LLC has $10 million in sales or assets and at least one other member of the LLC has $100 million in sales or asset; (ii) two or more businesses are contributed to the LLC, at least one of which is valued in excess of $15 million; and (iii) at least one member has 50% or more of the interests in the LLC.

The specific rules governing the formation and investment in LLCs, as well as possible exemptions from the reporting and waiting period requirements, are technical, complex and subject to further interpretation by the antitrust agencies. Any proposed investment in LLCs should be reviewed for possible compliance with the Act as well as other possible antitrust implications. Failure to file can result in penalties of up to $11,000 per day.

Competition Director Outlines Antitrust Approach to High Technology Industries

Recently, William J. Baer, Director of the Bureau of Competition, Federal Trade Commission, addressed the American Bar Association in a speech concerning antitrust issues of special concern to high technology companies, with a particular emphasis on intellectual property issues. Baer acknowledged criticism of the use of antitrust enforcement against innovative high technology companies, particularly those with intellectual property rights, but defended enforcement actions when "anticompetitive practices [ ] would deny to consumers the important benefits of innovation." William J. Baer, *"Antitrust Enforcement and High Technology Markets."*

Baer mentioned several anticompetitive circumstances occurring in high technology industries which counter the traditional notion that rapid technological change enables new competitors to enter easily and overturn any dominant incumbent. These circumstances include network effects which can result in a winner-take-all market with limited opportunity for other competition, regulatory barriers such as the need for FDA approval, and intellectual property rights.

Instead of presuming that restrictive use of intellectual property harms competition, the FTC begins with three basic assumptions about those restrictions: "first, intellectual property is comparable to other forms of property; second, the existence of intellectual property does not automatically mean that the owner has market power; and third, the licensing of intellectual property may often be necessary and thus may be procompetitive." *Id.*

While Baer recognized the peculiar nature of intellectual property and its procompetitive potential, he closed his discussion recounting recent enforcement actions involving intellectual property in the merger, standards, fraudulent patent procurement and monopoly maintenance areas which he believes were appropriate and representative of those cases which the FTC will continue to prosecute.

Inadequate Search for Documents May Result in Personal Liability and Civil Penalty

In a recent speech, Joseph G. Krauss (then Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission) discussed trends in the Hart-Scott-Rodino premerger notification program. Among other things, Krauss discussed the necessity for a careful search for documents that are required to be submitted with the initial HSR filing, and cautioned that failure to comply with the requirement could lead to personal liability and/or civil penalties.

In general, documents created by or for an officer or director which analyze the competitive impact of a merger or acquisition must be included with the initial HSR filing. Krauss emphasized the need for HSR counsel to do more than conduct a "telephone search" and suggested that counsel instead visit the client site, examine the documents and determine which should be included.

Krauss stated that although there has not yet been an instance of a certifying person being held personally responsible for an inadequate search, such a result is an option when that person does not have first hand knowledge of the manner in which the search was conducted, or fails to ensure that the search was reasonable. In addition, Krauss reminded the business community that the FTC can seek civil penalties for failure to produce all required documents.

Federal Trade Commission Seeks New Monetary Remedies

On December 21, 1998, the Federal Trade Commission filed a civil action against Mylan Laboratories and three other drug companies, alleging that Mylan, the nation's largest generic drug manufacturer, conspired with the other companies to obtain a monopoly on two different generic drugs. The FTC claims that Mylan's dramatic increase in the price of the drugs cost consumers millions of dollars. While the complaint itself presents no novel theory, the proposed remedy does.

Traditionally, in an antitrust prosecution, the FTC seeks to enjoin the company from continuing the anticompetitive practice in the future. In this case, for the first time in an anti-trust context, the FTC also seeks to obtain a monetary payment in the amount of the profit earned by Mylan and the other companies from the allegedly illegal agreement.

When asked about the FTC's ability to seek disgorgement of profits, FTC Chairman Robert Pitofsky said, "The law allows it. Is it clear? Not yet." David Segal, "FTC Poised to Add New Weapon to Arsenal," The Washington Post, December 8, 1998, p. B1. The FTC's ability to seek disgorgement of profits, if upheld, will increase its power immensely and change the character of many FTC investigations and suits.

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