Antitrust and Trade Regulation Bulletin

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FTC Chairman Addresses Application of Antitrust Law to High-Tech Industries

Robert Pitofsky, Chairman of the Federal Trade Commission, recently expressed his views concerning the application of antitrust law to high-technology industries, particularly those industries in which firms achieve dominance through "network efficiencies." Robert Pitofsky, Address to ABA Workshop, *Antitrust Analysis in High-Tech Industries: A 19th Century Discipline Addresses a 21st Century Problem*, February 25-26, 1999. Network efficiencies is the term used to describe the effect that occurs when the value of a product or service is positively correlated with the number of individuals who use the product or service, a notable example being a dominant computer platform. Pitofsky poses what he describes as a "most perplexing" question: what to do about firms that achieve dominant and almost unassailable market positions legally, but maintain those positions for extended periods as a result of network efficiencies.

One possible approach to the treatment of such dominant firms is a "hands off" policy. Not surprisingly, the Chairman of the Federal Trade Commission considers --but quickly rejects--such an approach on the grounds that a network monopoly may have the ability to monopolize successive generations of a product, or complementary products or services, simply by adopting a policy of only allowing products manufactured by it to connect with the existing network. No names were mentioned but quite clearly Pitofsky may have in mind such dominant firms as Microsoft and Intel.

If the "hands off" policy is at one end of the spectrum of possible approaches, "breaking up" the network is at the other end. Such a draconian approach is also fairly easy to dismiss because of it's ability to harm consumers and create diseconomies. The obvious hard question is, where is the middle ground?

Pitofsky discusses mandatory access to the network as one possible middle ground, reviewing the pros and cons, and concluding that "until we know more about the origins and significance of network efficiencies, antitrust should probably concentrate in most situations on its traditional role of ensuring that companies achieve network monopolies through legitimate competitive conduct and that they maintain their network dominance only through superior skill, foresight and industry -- not by unnecessary exclusionary conduct." Robert Pitofsky, Address to ABA Workshop, *Antitrust Analysis* *in High-Tech Industries: A 19th Century Discipline Addresses a 21st Century Problem*, February 25-26, 1999. Pitofsky's willingness to assume a cautious approach leaves open the question of how the Commission will deal with antitrust enforcement in those circumstances where it does find "unnecessary exclusionary conduct." Pitofsky closes his remarks with a reference to the Commission's report on its 1996 hearing on Competition Policy in High Tech and Global Markets. Possible solutions raised in that report are the options of ordering mandatory access to a network *only* if the network is "essential" to the existence of competition or examining the purpose and intent of the dominant firm's denial of access to the network.

Chairman Pitofsky's remarks may well raise more questions than they answer with respect to the treatment of network efficiencies and of high technology firms, generally, but the message is clear. Although the Commission recognizes the complexity and difficulty of applying traditional antitrust principles and remedies to high technology industries and will proceed cautiously, it *will* proceed.

Executive Fined for Failure to Produce Relevant Document

The Federal Trade Commission has sent a strong message that it will prosecute company executives who falsely certify that the company has produced all required documents in connection with a Hart-Scott-Rodino filing. The FTC recently brought an action seeking penalties for false certification against both the company as well as an individual executive which was settled by a payment of $50,000 on behalf of the individual and $2,785,000 on behalf of the company.

The circumstances of the case were particularly egregious because the missing document was written by the certifying official himself (who therefore could not credibly claim to be unaware of its existence) and the document revealed competitive issues about the transaction which were not otherwise apparent from the filing. Ironically, the FTC learned of the missing document because it was filed in connection with another transaction a few months later. These compelling circumstances undoubtedly led to the substantial fines imposed, but the potential exposure of a certifying individual is nonetheless very clear. A diligent search for required documents in connection with an HSR filing must be made and the research itself should be documented.

HSR Filing Thresholds May Increase (But So May The Fees For Those Who Have to File)

At a recent Senate budget hearing, Senator Orrin G. Hatch (R-Utah) inquired of Attorney General Janet Reno whether she believed the Hart-Scott-Rodino (HSR) transaction size dollar thresholds should be increased to account for inflation. *Hearing on S. 467, Senate Judiciary Committee*, April 13, 1999. The dollar thresholds, which have not changed since 1976, dictate which mergers require filing. The FTC and the Justice Department have received an increasing number of merger filings each year, and raising the dollar threshold would have the beneficial effect of decreasing their workload and enabling them to focus their limited resources on larger proposed mergers. On the other hand, each HSR filing brings into the agencies a $ 45,000 filing fee which has been used to fund enforcement activities.

Reno responded favorably to Senator Hatch and agreed to undertake further inquiry. Senator Hatch has since introduced an amendment to the DOJ budget resolution to reflect the "sense of the Senate" that the thresholds should be increased by an unspecified amount. Other members of

Congress favor maintaining current filing thresholds -- and even funding increases in the antitrust enforcement agencies' budgets -- to allow the agencies to keep up with the increased volume of filings.

The obvious compromise would see the thresholds raised as well as the filing fees for those who would still be required to file under the new thresholds.

Supreme Court Asked To Review Ruling That Making Modifications To A Patented Product Violates The Sherman Act

A divided panel of the United States Court of Appeals for the Federal Circuit recently affirmed a jury verdict finding that a patent holder's modification of its patented product was an attempt to monopolize in violation of the Sherman Act and awarded $1.5 million in damages, trebled by the district court. *C.R. Bard v. MC Systems, Inc.,* 157 F.3d 1340 (Fed. Cir. 1998), *cert. filed*, No 98-1373 (Feb. 26, 1999). The patent at issue covers a tissue sampling "gun" that fires needles into tissues to obtain samples. The defendant made replacement needles for the gun that did not infringe the patent. The jury found that the patent holder modified its gun to require a different type of needle in order to limit competition and to monopolize the market for replacement needles.

While the majority of the Federal Circuit panel agreed there was sufficient evidence before the jury to permit the conclusion that the patent holder made the modification for the purpose of foreclosing competition, the dissent viewed the modification as a product improvement, and concluded that imposing antitrust liability on a patent holder in connection with a product improvement is against public policy. The litigation, originally brought by the patent holder against its competitor for infringement, was focused principally on patent issues, but it presents a novel antitrust issue which the Supreme Court has been asked to consider in a petition for *certiorari* .

Exclusive Agreement - Even If Terminable At Will - May Violate The Sherman & Clayton Acts

Although most exclusive dealing agreements that are terminable at will are presumed by courts to be legal, the plaintiff in a recent case challenging such an agreement was permitted to present its claims to a jury. In *Minnesota Mining & Mfg. v. Appleton Papers Inc.*, No. 4-95-786, 1999 WL 74196 (D. Minn. Feb. 16, 1999), the plaintiff, 3M, alleged that Appleton's use of exclusive sole-sourcing agreements caused an increase in its market share from 50% to 67% and a corresponding decrease in 3M's share from 25% to 13%. While most at-will exclusive dealing agreements are valid, the Court held that such agreements do not enjoy immunity from antitrust claims. For example, combining such agreements with incentives that leave a customer's inventory tied up for a significant period may present a triable question of fact -- that is whether the exclusive dealing agreement unreasonably forecloses competition. Similarly, sole-sourcing agreements in industries with high switching costs or in declining markets where entry is unlikely also may receive antitrust scrutiny. While this case does not cast serious doubt on the validity of most at-will sole-sourcing agreements, it does serve as a reminder that such agreements are not immune from challenge.

FTC and Intel Settle Dispute

After nine months of litigation and on the eve of an administrative trial, the FTC and Intel announced a settlement, subject to public comment and final Commission approval. *FTC Press Release*, March 17, 1999. In June, 1998 the FTC filed a complaint against Intel alleging that its denial of "advanced technical information" to customers with whom it had intellectual property disputes was an abuse of its monopoly power. Intel regularly provides advance information to its customers in order to allow them to design computer systems using the newest Intel processors. This works both to the advantage of Intel and its customers, as well as consumers, making the newest technology available on the market as soon as possible. The commission alleged that denial of this information places those Intel customers at a competitive disadvantage because their inability to design in advance essentially precludes them from the market, given quickly changing technology.

The FTC cited three instances in its complaint in which it alleged that Intel had denied customers advance technical information because customers were either asserting intellectual property rights against Intel or refusing to license to Intel intellectual property the customers owned. This, according to the FTC, was an abuse of monopoly power without any business justification.

By the proposed consent decree, Intel has agreed that for ten years it will not deny advance technical information to any customer with whom it has an intellectual property dispute. The exception to this general prohibition is any instance in which the customer is attempting to enjoin Intel from selling the same microprocessor to which the technical information relates. The decree would also permit Intel to deny customers access to advance technical information for legitimate business reasons not related to a pending intellectual property dispute.

Executive And Firm Liable For False Or Misleading Statements About Competitors

False or misleading statements about a competitor may constitute a violation of the Lanham Act. *Coastal Abstract Service, Inc.* 1999 WL 152594 (March 23, 1999). The defendant told one of only a few mortgage companies in a local are a that a competitor was not paying its bills or not paying in a timely fashion. Having demonstrated that the statement was false, the competitor recovered under the false advertising provision of the Lanham Act. The Ninth Circuit upheld the jury verdict based on this statement.

The competitor tried to recover on the basis of two other statements, but the Ninth Circuit reversed the jury verdict with respect to those statements. The first, that the competitor was "too small" to compete, was held to be mere puffery. The second, that the firm was not an escrow agent in the State of California, the court considered an opinion because it was a legal conclusion made by a lay person. Puffery and mere opinion are not actionable.

The jury awarded damages of $2.2 million on the basis of all three statements. Because the damages could not be segregated by statement, the case was remanded for a retrial on damages caused by the one actionable statement.

Mere Allegations Of The Existence Of A Conspiracy Found Insufficient To Avoid Dismissal

A manufacturer of bottled reagent water sued two trade associations alleging that the associations conspired to put the plaintiff out of business. The associations had created an industry standard which required laboratories to manufacture their own reagent water. *DM Research, Inc. v. College of*

American Pathologists, 1999 WL 104446 (1st Cir. March 4, 1999). Even assuming that there was no scientific necessity for such a standard, the court dismissed the complaint because there was no allegation of a written agreement nor any basis for inferring a less formal unlawful combination.

Plaintiff alleged that some members of one of the trade associations had financial interests in firms which manufactured the equipment necessary for laboratories to create their own water. The court noted, however, that there was no allegation that these interests dominated the creation of the standard nor that the members with those interests bribed or lied to other members. The court refused to permit the case to go forward without something more than "unlikely speculations" by plaintiffs that a conspiracy had existed.

Agreement Not To Hire Or Recruit Agents Held Not To Be *Per Se* Violation Of the Sherman Act

Admitting that they could not prevail on a rule of reason claim, two former insurance agents of Northwestern Mutual Life (NML) argued that an agreement by the six general agents of NML to refrain from hiring and/or recruiting each others' downstream agents was a *per se* violation of the Sherman Act. *Bogan v. Hodgkins*, 166 F.3d 509 (2d. Cir. 1999). The U.S. Court of Appeals for the Second Circuit agreed with the district court and affirmed the grant of summary judgment in favor of the NML general agents, finding no *per se* violation.

NML employed six general agents in New York to sell their policies in the metropolitan area. Each general agent contracted with special agents or district agents, who in turn, could contract with soliciting agents. All agents were compensated based on the sales of their downstream agents.

The court's analysis turned on its finding that the alleged agreement promoted interbrand competition even if it also restrained intrabrand competition. In other words, limits on recruiting each other's NML agents enhanced NML's competitive position with respect to other insurance carriers. The court rejected plaintiffs' attempt to define a narrow market limited to experienced NML agents in New York, because other insurance companies regularly competed for experienced NML agents.

Conspiracy Claim Dismissed Despite The Exchange Of Price Information

Wholesalers, supermarket chains and other direct purchasers of baby food failed to present sufficient evidence that the baby food manufacturers fixed prices, according to the U.S. Court of Appeals for the Third Circuit which upheld the district court's dismissal on summary judgment. *In re Baby Food Antitrust Litigation*, 166 F.3d 112 (3d. Cir. 1999). The basis for the plaintiffs' claim was that the manufacturers exchanged price information among themselves. The court refused to infer a conspiracy to fix prices merely from the exchange of price information among competitors because the purchasers failed to demonstrate that the exchange had any impact on the prices they charged. Instead, the court concluded that in the competitive baby food market, it made sense for competing manufacturers to gather as much information as possible about competitors, including price information.

Although one manufacturer's document contained a reference to a "truce" being in effect in the industry, the court concluded that a single occurrence of that language, without other substantiating evidence, was as consistent with competitive activity as it was with price fixing. Moreover, the document, in other parts, made reference to a competitive market.

Nothing in the holding of this case should be read as a relaxation of the rule which prevents competitors from exchanging price information with each other. Pricing information remains competitively sensitive and continues to create a great risk of liability if it is shared with competitors.

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