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Antitrust UPDATE
July 2008

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FTC Loses Monopolization Case

The D.C. Circuit recently overturned the Federal Trade Commission's findings that Rambus, Inc. monopolized the market for certain computer memory technology. *Rambus, Inc v. Federal Trade Commission*, 522 F.3d 456 (D.C. Cir. 2008). The alleged monopolizing conduct was Rambus' failure to disclose the existence of its patents that covered technology that was included in a standard developed by a trade organization (the "JEDEC"). The Court found that the FTC's decision failed to conclude that Rambus' alleged deceptive behavior altered the actual outcome of the standard-setting process in a manner that excluded competitors. Relying on previous Supreme Court decisions holding that deceptive conduct does not constitute monopolization unless it harms competition, the D.C. Circuit's reversal constitutes a significant setback for an important FTC initiative in the standards setting arena.

The FTC's complaint in *Rambus* was filed four years ago alleging that Rambus participated in the JEDEC's standard setting process without disclosing that it possessed or expected to possess patents covering certain elements of the standard under consideration by the organization. Only after Rambus' technologies had been adopted by the JEDEC did Rambus disclose its patent positions and demand royalties. The FTC found that Rambus' omissions constituted unfair competition under Section 5 of the FTC Act and unlawful monopolization under Section 2 of the Sherman Act and mandated certain licensing remedies.

The key to the Court's reversal was the FTC's inability to prove that but for Rambus' non-disclosure of its patent rights JEDEC would have adopted a different standard that did not rely on Rambus' patented technology. Absent such proof, the FTC was left with the argument that Rambus' non-disclosure denied JEDEC the opportunity to demand a reasonable licensing commitment from Rambus. Under this argument, the only effect of Rambus' conduct was that Rambus could charge higher royalties. Relying on the Supreme Court's previous decision in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), the Court found that

higher royalties, even if achieved through deception, would not likely exclude rivals or decrease competition and could not constitute the "exclusionary" conduct required for monopolization. The exclusion was the result of Rambus' lawfully obtained patents, not its non-disclosure during the standard setting process.

The Court's opinion is important in two respects. First, it reaffirms that conduct violates Section 2 of the Sherman Act only if it is exclusionary. Second, the opinion emphasizes the need for all standards setting organizations to clarify and proactively monitor member disclosure obligations.

Fifth Circuit Upholds FTC's Use of "Inherently Suspect" Standard

The Fifth Circuit upheld the Federal Trade Commission's finding that the activities of an organization of independent physicians and physician groups constituted horizontal price-fixing. *North Texas Specialty Physicians v. FTC*, 2008 WL 2043040, No. 06-60023 (5th Cir., May 14, 2008). The FTC stopped short of applying the *per se* rule, employing instead an "inherently suspect" standard. The Fifth Circuit upheld this approach, equating it to a "quick-look" rule of reason analysis.

North Texas Specialty Physicians (NTSP) is a non-profit organization of independent physicians and physician groups that negotiates and reviews contracts between its members and "payors," such as insurance companies, HMOs, PPOs, and self-insured employers. As part of NTSP's process of negotiating fee-for-service arrangements between the payors and its member physicians, NTSP polls its physicians to determine the minimum rate each would accept in a contract, calculates the mean, median and mode based on those polls, and then uses a minimum contract fee based on those calculations. The FTC issued an administrative complaint in September 2003, challenging NTSP's conduct as a form of a horizontal price-fixing among its member physicians.

The FTC utilized an "inherently suspect" analysis in finding that the challenged practices were unlawful. The "inherently suspect" standard requires more proof than the *per se* rule, but stops well short of a full-blown rule of reason. Under the standard, the burden is on the defendant to proffer a plausible pro-competitive justification for the challenged practice. Only if the defendant provides such a justification does the burden shift back to the plaintiff, or FTC, to prove that the practice has had an actual anticompetitive effect. In this case, FTC concluded that NTSP failed to provide a plausible pro-competitive justification for its negotiating practices and, therefore, FTC banned the practices without proof of their actual anticompetitive effect.

The Fifth Circuit found no error in the FTC's analytical framework, finding that the "net anticompetitive effects of certain of NTSP's practices were obvious," and the pro-competitive justifications offered by NTSP were not plausible. This case signals that the FTC will continue to look for shortcuts in proving that practices are anticompetitive and that appellate courts will be receptive to these efforts in appropriate cases. It can be expected that private plaintiffs will try to use the "inherently suspect" standard in cases that do not come within the *per se* rule."

ATM Interchange Fees Subject to Rule of Reason

Delving into an area of antitrust law it characterized as "unsettled, unclear, unwieldy, and unequivocally complex," the Northern District of California recently ruled that the rule of reason – not the *per se* rule – should apply to a joint venture's setting of ATM interchange fees. *In re ATM Fee Antitrust Litigation*, 2008 U.S. Dist. LEXIS 22901 (March 24, 2008). The court determined that the rule of reason should apply for two reasons, each of which was individually sufficient to avoid *per se* treatment: (1) fee-setting was a "core activity" of the joint venture, and (2) the fee was reasonably ancillary to the legitimate cooperative aspects of a joint venture.

A class of ATM users brought suit against the Star ATM network, alleging that the network violated Section 1 of the Sherman Act by setting a network-wide interchange fee that governs the amount paid by the bank issuing the ATM card to the bank owning the ATM when the ATM is used by the issuing bank's customer. Plaintiffs

claimed that the uniform interchange fee was horizontal price fixing and a *per se* violation of Section 1. Defendants countered that the fee compensates ATM owners for making their machines available to the banks' customers and provides an incentive for the deployment of ATMs.

The court recognized that horizontal price-fixing agreements are subject to *per se* condemnation. However, the court noted that joint ventures are often pro-competitive, by offering products or services that no individual member of the venture could offer on its own. In analyzing the Star ATM network's interchange fee, and relying on the analysis of the Supreme Court's recent decision in *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), the court employed the "core function" test: whether the setting of an interchange fee is the "core activity" of the Star network. The court found that the uniform interchange fee was a core activity because the joint venture had to put a price on the service it was offering. Therefore, the challenged price setting had to be judged under the rule of reason. The court further held that even if the interchange fee were not a core activity, the rule of reason would apply because the fee is reasonably ancillary to the joint venture's legitimate business purpose.

Cardholders Have Standing to Sue Credit Card Issuers Over Non-Price Terms

The Second Circuit in *Ross et al. v. Bank of America, N.A. (USA) et al.*, 624 F.3d 217 (2d Cir. 2008), reinstated a putative class action by individual credit cardholders against a group of card-issuing banks over the dispute resolution provisions of their credit card agreements. The District Court dismissed the complaint, holding that the plaintiffs lacked standing because the alleged conspiracy by issuing banks to include in the cardholder agreement arbitration clauses and prohibitions against class actions had caused no present injury to the cardholders.

The Second Circuit disagreed, finding that the plaintiffs had adequately alleged injury by claiming that the banks' actions had reduced cardholders' choices and the quality of the credit services available to them in at least two respects. First, by prohibiting class actions, the Court ruled that the banks effectively denied cardholders the services of class action attorneys in monitoring the legality of the banks' actions. Second, the Court believed that by requiring arbitration clauses, the banks forced less valuable cards upon cardholders than those which permitted a choice of court action or arbitration to resolve disputes.

The Second Circuit also declined to apply the Supreme Court's recent *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) heightened pleading standard for antitrust conspiracies to the question of constitutional standing, stating that "plausibility is not at issue at this point, as we are considering only Article III standing."

Antitrust Group Obtains Dismissal of RICO Claim

A team of Antitrust Group lawyers, including Scott Mendel, Michael Martinez, Kara Elgersma and Jason Marks, successfully obtained dismissal with prejudice of a federal RICO claim asserted against Deere & Company in a proported class action involving all purchasers of lawnmowers in the United States since 1994. The plaintiffs claimed that the lawnmower industry has misrepresented the horsepower of lawnmower engines and sought to certify a nationwide class under RICO. The District Court for the Southern District of Illinois found that the plaintiffs had not alleged the elements required to state a RICO claim and that no amendment of the complaint could cure its deficiencies.

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The Antitrust and Trade Regulation Group of Bell, Boyd & Lloyd LLP offers a comprehensive range of antitrust services to clients. Our attorneys assist clients in managing the antitrust dimensions of mergers and acquisitions, joint ventures, strategic alliances, e-commerce initiatives, patent and intellectual property licensing, research collaborations, distribution and franchise relations, and retail selling and advertising practices. The Antitrust Group also regularly represents clients in antitrust litigation and government investigations, including grand jury proceedings. Current engagements by the Antitrust Group involve clients in diverse industries, including pharmaceuticals and pharmacy benefit management, financial futures, heavy equipment, consumer goods, transportation and office supplies.