Antitrust Update

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Recent Developments in Antitrust Law

There have been a number of significant U.S. antitrust law developments already in 2006, including three important decisions by the U.S. Supreme Court and an initiative by the Federal Trade Commission (the "Commission" or the "FTC") to reduce the burdens of complying with Second Requests. The following are some brief highlights.

Supreme Court Upholds Joint Venture's Ability to Set Prices

A legitimate joint venture among competitors can set prices for the products it sells without incurring per se antitrust liability, the U.S. Supreme Court held in *Texaco Inc. v. Dagher* (decided February 28, 2006).

The case involved a joint venture between Shell and Texaco pursuant to which the two oil companies combined their refining and sales operations in the western United States. The venture maintained separate Shell and Texaco brands, but set a uniform price for the oil it sold.

The Ninth Circuit held that this arrangement amounted to a per se violation of the antitrust laws. The Supreme Court unanimously reversed the Ninth Circuit, explaining that "the price policy challenged here amounts to little more than price setting by a single entity-albeit within the context of a joint venture-and not a pricing agreement between competing entities with respect to their competing products."

The Supreme Court's holding is largely consistent with established antitrust precedent and enforcement agency guidance on joint ventures. Had the Court affirmed the Ninth Circuit, it would have created significant uncertainty about how joint ventures can operate and price their products without incurring antitrust liability.

Tying Arrangements Involving Patented Products No Longer Subject to Market Power Presumption

The Supreme Court held in Illinois *Tool Works Inc. v. Independent Ink, Inc*. (decided March 1, 2006) that the mere ownership of a patent does not create a presumption of market power such that an arrangement tying the sale of a patented product to the purchase of an unpatented product is per se unlawful. Instead, a per se tying claim involving a patented product "must be supported by proof of power in the relevant market."

The plaintiff alleged that Illinois Tool Works (ITW) required its customers to purchase only ITW's brand of unpatented ink (the tied product) for use with its patented printing technology (the tying product). The Federal Circuit, citing an older line of Supreme Court cases, held that there was a rebuttable presumption that ITW possessed market power over the tying product by virtue of its patents. The Federal Circuit further held that ITW failed to rebut this presumption and therefore was liable for illegally restraining competition in the market for ink.

The Supreme Court unanimously reversed, holding that mere possession of a patent creates no presumption as to the existence of market power. The Court pointed in part to Congress's 1988 Patent Code amendments, which eliminated the market power presumption in the context of patent misuse claims, as well as to the dominant view among economists, commentators, and the antitrust enforcement agencies that patents do not necessarily confer market power.

The Court's decision in *Illinois Tool Works* resolves a long-standing tension between the law of tying and patent misuse and clarifies an important area of antitrust law where older Supreme Court precedent appeared inconsistent with current economic learning.

Supreme Court Further Restricts Scope of Robinson-Patman Act

The Supreme Court has further narrowed the scope of the Robinson-Patman Act ("RPA"), which, under certain circumstances, bars a seller from engaging in price discrimination among competing purchasers of a product.

In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc*. (decided January 10, 2006), the Court considered an RPA claim arising from a "customer-specific competitive bidding process" for Volvo trucks. The Court held that if the RPA applies at all to the kind of bidding involved in the case (a question it did not reach), then (1) the requisite competitive injury may only be shown through price discrimination between purchasers in "actual," "head-to-head" competition for the "same retail customer," and (2) the competitive injury must be "substantial."

In the market for heavy-duty Volvo trucks, an individual retail customer conveys its desired product specifications to one or more dealers. Each dealer then secures price concessions from Volvo for the custom manufacture of the ordered truck, and then submits its bid to the customer. Reeder, a Volvo dealer, alleged that Volvo violated the RPA by offering superior concessions to competitor dealers.

Reeder submitted little direct evidence, however, of price discrimination in situations where it competed directly against other dealers for the same retail customer. Instead, Reeder relied mainly on proxies for such data (such as concessions Volvo granted in *unrelated* sales transactions). The Court "decline[d] to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality." In the two instances of head-to-head competition Reeder did provide, the Court found that the price discrimination there, if any, "was not of such a magnitude as to affect substantially competition between Reeder and the 'favored' Volvo dealer."

In conclusion, the Court noted that it would strive to interpret the RPA in a manner consistent "with broader policies of the antitrust laws" and would "resist interpretations [of the RPA] geared more to the protection of existing *competitors* than to the stimulation of *competition*."

Volvo Trucks underscores the significant hurdles that plaintiffs face in advancing RPA claims, as well as the Court's ongoing efforts to reconcile the RPA with the other provisions of the U.S. antitrust laws.

FTC Announces Simplification of the HSR Second Request Process

On February 16, 2006, the FTC announced reforms to the merger review process under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"). The reforms, effective February 17, 2006, seek to streamline the Second Request process and reduce the burdens associated with compliance. Highlights of the reforms include:

Number of Custodians. Presumptively, the FTC will not require document searches of more than 35 of a party's employees, provided that the recipient of the Second Request agrees to certain terms, including: (1) an initial meeting between FTC staff and an employee of the party knowledgeable about the transaction and the party's products and services; (2) an initial meeting between FTC staff and an employee of the party knowledgeable about the party's electronic data; (3) production of all responsive materials 30 days before formally certifying substantial compliance or entry into a mutually acceptable "rolling" production agreement; and (4) in the event of litigation challenging the merger, the submission of a joint proposal to a court of a scheduling order containing at least a 60-day discovery period. The presumptive limitation on the number of custodians will not apply to requests for information found in general "corporate" or "central" files. If necessary, and following a meeting with the affected parties, the Director of the Bureau of Competition may authorize a larger search group.

Two-Year Relevant Time Period. The Commission will initially presume a two-year relevant time period for documents requested in a Second Request, down from the previous three-year standard. The two-year limitation does not apply to production of data. If necessary, the FTC's staff may enlarge this time period.

FTC Announces Simplification of the HSR Second Request Process *(cont.)*

Empirical Data. Staff will inform the parties about the competitive effects theories it is considering, as well as the empirical analyses it will find useful. The FTC encourages the parties to provide: (1) a written description of their collection, maintenance, and use of the requested data; (2) a proposal to limit the FTC staff's request; and (3) access to employees knowledgeable about the parties' data. A party may obtain a meeting with certain senior FTC officials if it believes the staff's requests still remain too broad.

Backup Tapes. Presumptively, a party can elect to preserve backup tapes for only two calendar days identified by staff, and the FTC will request production of documents from backup tapes only if responsive documents are not more readily accessible from other sources.

Privilege Log. Rather than produce a full privilege log for all responsive documents, as required by the Model Second Request ("MSR"), a party may now produce a partial privilege log for all custodians in the party's search group, along with a complete privilege log for a small subset of custodians (five individuals or 10% of the total number of custodians searched, whichever is greater). The partial log need only contain each custodian's name and the number of privileged documents in each custodian's files.

Electronic Production and De-Duplication. The FTC has learned that parties have used de-duplication software to eliminate multiple copies of "essentially identical" e-mails and documents without giving prior notice to the FTC. The reforms now require parties to discuss the use of such software with FTC staff during negotiations regarding the Second Request.

Additional Reforms. MSR Specification 1(b): The Second Request will be presumptively modified to require a list only of agents involved with the transaction and relevant market(s), rather than a list of all agents and representatives of a company. MSR Specification 4: Information about facilities used by a party in the sale or manufacture of its products will be reduced in scope on a case-by-case basis. MSR Definition of "Documents": The FTC will presumptively exclude certain documents required by the MSR definition that do not otherwise further the FTC's analysis of potential antitrust violations (for example, tax and other regulatory documents).

If you have any questions regarding the above, do not hesitate to call any of the persons listed below.

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