General Counsel Corner

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A Potpourri of Recent Antitrust Developments

Three recent antitrust decisions could impact independent dealers for good or ill.

At first glance, *State of New York v. St. Francis Hospital*, 2000-1 Trade Cas. ¶72,860 (S.D. N.Y. 2000), in which a federal court entered summary judgment finding two hospitals guilty of price fixing, would appear to be far removed from the petroleum industry. But looks may be deceiving.

In *St. Francis Hospital*, two institutions successfully petitioned the state to form a joint venture, and then unified substantially all of their operations in a joint entity, which negotiated with third-party payers to establish the level of payments that both hospitals would receive.

The state attorney general contended that the hospitals' joint price negotiations constituted *per se* illegal price fixing in violation of the Sherman Act and New York's state antitrust law. The hospitals responded that their joint activity should be evaluated under the "rule of reason," and only condemned if it were shown to have an anticompetitive effect in the overall market.

Applying a *per se* standard to find the hospitals guilty of price fixing, the court stressed that the "efficiencies and benefits" claimed by the hospitals did not directly relate to their joint price negotiations. Rather, their "rule of reason" theory rested on "the impermissible premise that competition itself is unreasonable."

So how does the hospital case apply to the petroleum industry?

Some months ago we wrote about *Dagher v. Saudi Refining*, which alleges that the Shell-Texaco-Saudi joint venture is nothing more than an illegal price-fixing agreement masking as a benign joint venture arrangement. The oil companies' raised an identical "rule of reason" justification to seek dismissal of the suit, but their motion was denied by the district court.

The hospital case takes the joint venture scenario a large step further. Not only was the state's *per* se theory recognized to be viable, but judgment was entered finding the joint venturers liable for a *per se* antitrust violation. This is not the sort of news that Shell and Texaco wanted to hear.

Shell fared far better in a preliminary decision in the mass dealer litigation pending in federal court in Texas, *Chwala v. Shell Co.*, 75 F. Supp. 2d 626 (S.D. Tex. 1999), which dealt with Shell's motion to dismiss a number of the dealers' antitrust claims.

The dealers contended that Shell had entered into illegal tying arrangements, pursuant to which they coerced the dealers to lease island card readers ("ICRs") from Shell and to use a bank chosen by Shell to process credit card transactions.

Dismissing those claims, the court held that the dealers had failed to show that Shell had sufficient market power to effectuate an illegal tie. The court rejected as a matter of law the dealers' contention that Shell branded gasoline alone could be held to constitute a relevant market.

Likewise, the court rejected the dealers' claim that they had been "locked in" to Shell's ICR policy to order to continue to obtain a supply of Shell gasoline. Applying the Third Circuit's reasoning in *Queens City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3rd Cir. 1997), the court broadly rejected the imposition of tie-in liability in the franchise context.

The court also rejected the dealers' antitrust conspiracy claim that Shell had conspired with its jobbers to restrain competition, and limited the dealers' price discrimination claims to sales actually occurring in interstate commerce.

On another front, the Third Circuit reached a much happier result in *Pace Electronics, Inc. v. Canon Computer Systems, Inc.*, 2000-1 Trade Cas. ¶72,908 (3rd Cir. 2000). The court held that a dealer who is terminated for selling below the retail price dictated by its supplier is entitled to obtain triple damages.

In the past, we have complained that the federal courts in recent years have tended to ignore antitrust injuries inflicted on independent dealers. Hopefully, this case signals a change in approach.

Pace Electronics involves the exceedingly fuzzy concept of "antitrust injury". The supplier, which allegedly had terminated the dealer for selling the supplier's products at prices below what the supplier considered to be acceptable, contended that the dealer was required to show that its termination resulted in "an actual, adverse economic effect on competition and a relevant interbrand market." That standard, of course, is almost impossible to satisfy.

Rejecting the supplier's contention, the court emphasized that the case involved allegations of *per se* illegal vertical price fixing. The supplier should be held responsible, therefore, for any injury that was the proximate result of any such illegal conduct. The court held:

> The issue, thus, is not whether the plaintiff's alleged injury produced an anticompetitive result but, rather, whether the injury claimed resulted from the anticompetitive aspect of the challenged conduct.

If all this sounds esoteric, it is. But it is also important. The concept of "antitrust injury" has too long served as a refuge for suppliers who have damaged antitrust's stepchild, the independent dealer. Hopefully, that refuge is now being bulldozed.

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