AntitrustConnect Blog

Antitrust in Distribution Law: Back in Vogue or Just Hanging On?

John Arden (Wolters Kluwer Law & Business) · Wednesday, December 15th, 2010

Attendees at this fall's American Bar Association Forum on Franchising meeting should be forgiven if they left San Diego a bit confused about antitrust trends in the practice area. That's because two major sessions presented different views on the future of antitrust issues in franchise and distribution law.

An antitrust workshop ("Antitrust Issues: Back in Vogue") pointed to the leniency of antitrust enforcement of vertical agreements during the last 30 years, but predicted a change due to the pro-enforcement stance of the Obama administration. "In many ways, the pendulum has now begun to swing in the other direction."

A contrary view was expressed during the Annual Franchise and Distribution Law Developments plenary session, which characterized antitrust as "just hanging on" in the franchise and distribution law practice.

Pro-Enforcement Agency Leadership

In their written presentation for the antitrust workshop, Steven B. Feirman of Nixon Peabody and Allan P. Hillman of Kern & Hillman LLC emphasized how the new leadership at the Department of Justice Antitrust Division and the Federal Trade Commission has made the agencies "more vigilant and more creative than ever."

For instance, the FTC has brought "unfair competition" cases under Section 5 of the FTC Act against conduct that might not technically violate any other antitrust laws. "By invoking Section 5, the FTC is able to circumvent potentially unfavorable judicial precedent that developed during the Bush years."

The Department of Justice has "articulated a marked shift in policy" from the "passive" antitrust enforcement of the previous administration; has promised energetic enforcement in areas including intellectual property; and has expressly repudiated the Bush administration's lenient policy on the enforcement of Section 2 of the Sherman Act.

The agencies' new Horizontal Merger Guidelines suggest that the agencies "will have more tools with which to challenge mergers, that they can issue broader requests for documents and data, and that they are posed to challenge a greater number of

transactions than in the past."

Legislation

Things are changing in Congress as well, according to Feirman and Hillman. Many members of Congress have expressed support of legislation that would overturn the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (**2007-1 Trade Cases ¶75,753**) and reinstate the *per se* illegality of resale price maintenance. Other pending bills would restore the less stringent pleading standard that existed prior to *Bell Atlantic Corp. v. Twombly* (**2007-1 Trade Cases ¶75,709**) and provide the FTC with authority to challenge "pay-for-delay" drug patent licenses.

Maryland has enacted legislation declaring resale price maintenance to be *per se* illegal under the state antitrust law, and existing laws in 15 states could be interpreted as making resale price maintenance *per se* illegal.

American Needle

The U.S. Supreme Court issued its first pro-plaintiff antitrust decision in 25 years in *American Needle Inc. v. National Football League* (**2010-1 Trade Cases ¶77,019**), which has implications for franchisors and franchisees. The decision held that National Football League teams were capable of unlawfully conspiring with one another because they compete for apparel sales, ticket sales, and players (among other things).

The Court articulated a new functional test for identifying concerted conduct—whether the conduct joins together separate decision makers pursuing separate economic interests such that the agreement deprives the marketplace of independent centers of decision making.

"The *American Needle* decision is of special interest to franchisors that may claim that they and their franchisees are a single entity or part of a common enterprise," the authors said. "The Court's new standard for concerted conduct, 'separate economic actors,' means that franchisor will be less likely to prevail on a single entity argument; and the franchisor/franchisee cases based on *Copperweld* . . . have been severely undermined by *American Needle*."

Not Dead Yet

In the book that accompanies the Annual Franchise and Distribution Law Developments session, Bethany L. Appleby of Wiggin & Dana LLP and William K. Whitner of Paul Hastings Janofsky & Walker LLP write that antitrust law in the franchise context has traditionally concerned tying arrangements and vertical price fixing. Such actions have become rare, "prompting some commentators to opine that the claims are issues of the past."

However, several recent decisions "suggest that perhaps antitrust claims in franchising are not quite dead yet," they observed.

Their take on *American Needle* is not as expansive as the workshop speakers' analysis.

However, they write that, based on the decision, "joint ventures and other highly coordinated activities which could implicate a franchise relationship face continuing potential to be judged under the 'Rule of Reason' . . . "

Although tying claims in a franchise context have almost always been decided in the franchisor's favor, a multi-unit franchisee recently was found to have adequately pled a tying claim under a lock-in theory (*Burda v. Wendy's International, Inc.,* **2009-2 Trade Cases ¶76,806**).

The action alleged that the franchisor used its control over franchises (the tying product) to force the franchisee to buy buns (the tied product) from a single supplier (a subsidiary of the franchisor) pursuant to an approved purchaser requirement in the franchise agreement.

The federal district court in Columbus, Ohio, held that there was nothing in the contractual provision requiring purchase from approved sellers that would put a potential franchisee on notice that the franchisor would be able to eliminate all competition by naming an exclusive supplier or imposing a surcharge on other approved suppliers.

"While *Burda* was decided in the franchisee's favor, the decision still suggests that tying claims have little chance of success against a careful franchisor," the authors asserted. "As long as clear disclosure is made of potential tying arrangements in the franchisor's disclosure documents, franchisors are likely to be safe."

There is one issue on which all the presenters agreed—that franchisors and distributors need to carefully and continuously review their ongoing activities to remain free from antitrust scrutiny.

"The reach of antitrust in franchising is less today than it was twenty-five years ago, but antitrust enforcement has made a big comeback during the past few years," Feirman and Hillman concluded. "In 2010, antitrust is back in vogue, and the franchising industry must take notice and adjust to this new reality."