Pricing Discussions and Allegations of Agreements: 2015 Cases Not Involving Contact Lenses

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All antitrust lawyers (and, we hope, all our clients) understand the dangers of price discussions with competitors. But even vertical price discussions—those with suppliers or retailers—can later raise antitrust issues. The most recent vivid examples are the cases Johnson & Johnson is defending against Costco and others after it imposed a *Colgate* program following discussions with various resellers. (See here for more details.) But two other, smaller cases decided this year illustrate the danger of vertical price discussions. While the defendants prevailed in both, the years of litigation necessary to achieve those victories show the dangers of price discussions with third parties.

Hannah's Boutique, Inc. v. Surdej, et. al.

In *Hannah's Boutique, Inc. v. Surdej, et. al.*, (2015 WL 4052404, 7/2/15 ND Ill.) a new Chicago-area retailer of prom dresses (Hannah's) sued its larger, older rival (Peaches) under various state and federal antitrust theories, including group boycott and vertical price fixing. According to the complaint, Peaches had repeatedly called individual dress designers to request that each of them not supply other Chicago retailers, sometimes including Hannah's. Peaches also organized a meeting of several designers at a 2012 convention. At the meeting,

Peaches distributed a handout entitled “Prom Industry Concerns” that covered several “items of interest for discussion,” including “stopping discounting on current products before 5/15 date” and “manufacturer suggested internet retail price.” Shortly after the meeting, two designers implemented a new internet pricing policy that required retailers to sell dresses at a higher mark up. Also, several designers declined or only partially filled orders from Hannah’s.

The court found insufficient evidence of a horizontal agreement among the designers orchestrated by Peaches. There was no evidence of the designers talking to one another or that they sought assurances from Peaches that other designers were taking similar actions. The designers’ reactions to the calls from Peaches also were not uniform: Some did not respond. Others gave vague verbal assurances while taking no action. Those that did take action did not always take the same action. Because there was insufficient evidence of a horizontal agreement, the court granted defendant’s summary judgment motion as to the group boycott claim.

A finding of no horizontal agreement meant that any price fixing claim would be judged as a vertical price agreement under the rule of reason. As part of the reasonableness analysis, the court found that Peaches had no market power, as evidenced by its single digit share of a market with low barriers to entry. With no such power, Peaches’ actions could not be unreasonable. As a result, the court also granted summary judgment on the vertical price fixing claim.

In re Musical Instruments and Equipment Antitrust Litigation

In *In re Musical Instruments and Equipment Antitrust Litigation*, (798 F.3d 1186), the Ninth Circuit affirmed a dismissal of a putative class action against several guitar manufacturers, the largest guitar retailer, and a trade association. The complaint alleged a hub-and-spoke conspiracy orchestrated (pun intended) by the retailer, Guitar Center, and aided by speeches made and meetings organized by executives at the National Association of Music Merchants (NAMM). The alleged conspiracy was to ensure that all the manufacturers adopted and maintained a minimum advertised price (MAP) policy.

The court focused on the “rim” of the alleged “hub-and-spoke” conspiracy: the alleged horizontal agreement among the guitar manufacturers. Plaintiffs used the usual method of showing a horizontal agreement, alleging parallel action and “plus

factors" to explain why the action was more likely the result of an agreement than independent decisions. While the court was skeptical that the complaint contained proper allegations of parallel conduct—all the manufacturers did adopt MAP policies, but only over the course of several years—it focused more on the alleged "plus factors."

First, plaintiffs alleged that each manufacturer's adoption of a MAP was against its self-interest unless it knew the others would adopt a similar policy. The court accepted that possibility but found it contradicted by other parts of the complaint that alleged "pressure by Guitar Center" to adopt a MAP policy and each manufacturer's acquiescence "in exchange for Guitar Center's agreement to purchase large volumes." Such action made it more likely that each manufacturer adopted its MAP policy to please a key retailer, not as part of an agreement with its competitors.

Second, plaintiffs pointed to Guitar Center's and NAMM's public advocacy for MAP policies at NAMM meetings over the years. The court found that "mere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement," as such activity is "standard fare for trade associations." Because the court could not find a properly-pled agreement among the guitar manufacturers, it affirmed dismissal of the complaint.

All antitrust compliance programs warn of the dangers of price discussions with competitors. These two 2015 cases show that similar discussions with suppliers or retailers can also raise antitrust issues. While these discussions often can be explained away (as they were in these cases), the safer antitrust advice is to minimize such discussions in the first place.