Three Antitrust Petitions Pending on the High Court's Docket

AntitrustConnect Blog
April 30, 2017

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Please refer to this post as: Jeffrey May, 'Three Antitrust Petitions Pending on the High Court's Docket', AntitrustConnect Blog, April 30 2017, http://antitrustconnect.com/2017/04/30/three-antitrust-petitions-pending-on-the-high-courts-docket/

With just two months left in the U.S. Supreme Court's current term, it's a good time to take a look at the handful of petitions in antitrust cases that remain on the docket. Since the first Monday in October 2016, the Court has yet to grant any petitions for review in antitrust cases. However, three petitions remain on the docket that could make for interesting decisions that would provide needed guidance to antitrust practitioners.

Exclusive Dealing

The most recent antitrust petition, presented to the Court on April 21, raises issues of exclusive dealing under the Bank Holding Company Act. The plaintiffs are attempting to allege that Rabobank used exclusive dealing arrangements—with more than 50 percent of the Chapter 7 Bankruptcy Trustees in the United States—to eliminate the bank's need to compete for over a billion dollars of banking deposits of Chapter 7 estates. The petition for *certiorari* seeks review of a decision of the U.S. Court of Appeals in Chicago, which held that the challenged conduct did not amount to an exclusive dealing arrangement. The petitioner asserted that the Seventh Circuit decision conflicted with previous Supreme Court decisions on exclusive dealing arrangements under the Clayton Act. The relevant provisions of the Bank Holding Company Act and the Clayton Act were functionally identical, it was argued, and they both conditioned the decision about whether an exclusive dealing arrangement existed on the practical consequences of the

agreements. The Seventh Circuit failed to recognize that requirement, it was suggested. A response in that matter is due on May 25 (*McGarry & McGarry v. Rabobank N.A.*, No. 16-1277).

Comity

The Court may be reluctant to step into a price fixing case against Chinese vitamin C manufacturers. The case raises questions of federal court jurisdiction when a foreign state contends that the challenged conduct was compelled by foreign law. Yet the petitioners argue that Supreme Court guidance is need to clear up a circuit split.

American importers of vitamin C asked the Court to review a decision of the U.S. Court of Appeals in New York City that vacated a district court judgment against Chinese vitamin C manufacturers for fixing prices on comity grounds, arguing that the decision could not be reconciled with rules followed by other circuits. The district court found that the manufacturers conspired to fix prices and retrain supply in violation of the Sherman Act over objections by the manufacturers that Chinese law had compelled their conduct. On appeal, the Second Circuit held that the district court's failure to abstain from exercising jurisdiction was reversible error based on the insistence by the Ministry of Commerce of the People's Republic of China that the cartel was compelled by Chinese law. The deadline for responding has been expended to June 5 (*Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, Dkt. 16-1220).

Summary Judgment Standard

Word could come any day on the fate of a petition raised in a boycott case. A polystyrene products recycler asked the Court in March to review a decision by the U.S. Court of Appeals in Boston, finding that a conspiracy involving the five largest converters of polystyrene products and their trade association to boycott a recycling business model could not be reasonably inferred from the evidence presented by the complaining recycler. Although the First Circuit had revived the antitrust claims of Evergreen Partnering Group, Inc., when it first addressed the case in 2013, the court later affirmed summary judgment in favor of the defendants.

In its petition for *certiorari*, the recycler contends that the decision of the First Circuit conflicts with several other circuit courts of appeal, highlighting a significant

circuit split regarding the proper interpretation and application of Federal Rule of Civil Procedure Rule 56 on summary judgment in antitrust cases. In this case, according to the petition, the appellate court's decision offers the High Court an opportunity to correct significant legal error and provide further guidance on this recurrent evidentiary issue in antitrust cases and limit further consumer harm resulting from this error.

The respondents in this matter have waived their right to respond. On April 21, a group of antitrust professors filed an *amicus* brief, supporting the petitioner and asking the Court to address whether the Rule 56 standard of *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 US 451, 112 SCt 2072, 1992-1 Trade Cases ¶69,839, or the more stringent "tends to exclude the possibility of independent action" standard articulated in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 US 574 106 SCt 1348, 1986-1 Trade Cases ¶67,004, applies where the alleged conduct, unlike in *Matsushita*, is not inherently procompetitive and is not economically or otherwise irrational (*Evergreen Partnering Group, Inc. v. Pactiv Corp.,* Dkt. 16-1148).