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U.S. Consent Decree with Three Publishers over E-Book Pricing Approved

Jeffrey May (Wolters Kluwer) · Friday, September 7th, 2012

The federal district court in New York City yesterday approved a U.S. consent decree that resolves U.S. Department of Justice allegations against three publishers for participating in a conspiracy to fix prices for electronic books or "e-books." The consent decree with Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc. was found to be in the public interest.

The government alleged that the three settling publishers and two non-settling publishers–MacMillan and Penguin Group–acted collectively to switch to a new sales model for e-books known as the "agency model" and entered into functionally-identical agreements with non-settling defendant Apple, Inc., which distributes e-books through its iBookstore. Under the agency model, publishers sold titles to consumers directly at prices set by the publishers with retailers serving as the publishers "agents" and receiving a percentage of each sale as commission. Previously, the publishers sold e-books using the "wholesale model" meaning they sold titles to retailers at a wholesale price or discount off the price listed on the physical edition of the book or "list price." Retailers were then free to sell titles to consumers at retail prices of their choosing. The agency model purportedly led to rising prices for newly released and best-selling e-books.

The proposed judgment secured a remedy that was closely related to the violations alleged in the government's complaint, the court ruled. The final judgment disallowed unlawful communications and prohibited the use of the agency model for at least two years and price-based "most-favored nation" (MFN) clauses for five years. The decree was directed narrowly towards undoing the alleged price fixing conspiracy, ensuring that price fixing would not immediately reemerge, and ensuring compliance. Based on the factual allegations in the government's complaint and competitive impact statement, it was reasonable to conclude that the remedies would result in a return to the pre-conspiracy status quo. In a straightforward price fixing case such as this, no further showing was required to approve the consent decree, according to the court.

The court noted that more than 90 percent of the 868 public comments received in response to the government's request for feedback opposed entry of the proposed final judgment. "[T]he sheer volume of comments opposing entry of the proposed Final Judgment and the significant harm that these comments fear may result" prompted "hesitation." However, the court considered and rejected the four broad categories of criticism directed at the proposed final judgment: (1) the proposed final judgment would actively harm third-party industry stakeholders, such as brick-and-mortar bookstores, e-book retailers, independent publishing houses, and authors; (2) the decree itself was overbroad in that it went too far in disallowing practices held to be legal under the

antitrust laws, and involved the Justice Department in the "regulation" of the e-books market; (3) the government failed to establish a sufficient factual basis for its conclusions regarding the competitive impact of the decree; and (4) the defendants' collusive behavior had substantial pro-competitive effects and the decree would have manifestly anticompetitive effects by facilitating retrenchment of monopoly practices by third-party,
e-book retailer Amazon.

The court moved rather swiftly in signing off on the consent decree. Approval of the final judgment came less than five months after the filing of the government's complaint. In another recent, high-profile antitrust case in which some of the defendants agreed to a consent decree, the federal district court in Brooklyn, New York, took more than nine months to enter a final judgment resolving conspiracy allegations against MasterCard and Visa over network rules that allegedly restricted price competition at the point of sale. The case remains pending against American Express Company.

The court decided it was not necessary to hold an evidentiary hearing before approving the final judgment against the settling publishers. The Tunney Act allows, but does not require, a court to conduct an evidentiary hearing. However, a hearing would serve only to delay the proceedings unnecessarily, in the court's view. In addition to detailed factual allegations in the government's complaint, there were voluminous submissions from the public and the non-settling parties, which described and debated the nature of the alleged collusion and the wisdom and likely impact of settlement terms in great detail.

Apple's Concerns

The court rejected Apple's assertion that the consent decree unfairly singled out Apple by requiring termination of the settling defendants' agency agreements within seven days. Any imposition on Apple's contractual rights was de minimis and provided no reason to deny entry of the final judgment.

The court also refused to wait to enter the proposed final judgment until after a trial against the remaining, non-settling defendants in 2013. Pursuant to Federal Rule of Civil Procedure 54(b), the consent decree could be entered before trial "only if there is no just reason for delay."

The interests of judicial administration and the equities involved weighed heavily in favor of immediate entry of the judgment, according to the court. The settling defendants had elected to settle this dispute and save themselves the expense of engaging in discovery. They were entitled to the benefits of that choice and the certainty of a final judgment. Moreover, the orderly, efficient management of discovery required that the settling defendants have a defined role in the ongoing litigation. Waiting for the trial would leave the settling defendants in a state of legal limbo, forced to participate in discovery and defend the action at trial for fear that their settlement might be thrown out. Most importantly, according to the court, the government alleged substantial ongoing harm as a result of the settling defendants' illegal activity. Consumers were entitled to experience the significant anticipated benefits of the decree without waiting for the trial, according to the court.

The September 6, 2012, opinion in *U.S. v. Apple, Inc.*, 12 Civ. 2826 (DLC), will be published at **(CCH) 2012-2 Trade Cases ¶78,041**.

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