AntitrustConnect Blog

Three Supreme Court Petitions to Watch

Jeffrey May (Wolters Kluwer) · Wednesday, November 11th, 2015

After the first Monday in October, there were few petitions involving antitrust and trade regulation disputes pending on the U.S. Supreme Court's docket. However, within just one month, the Court has been asked to review three high-profile antitrust decisions. Word on whether the Court will take up any of the cases is unlikely before next year.

The Court on October 5 dispensed with two antitrust petitions. One involved the the 92-year old baseball antitrust exemption and the City of San Jose's effort to revive antitrust claims challenging Major League Baseball's franchise relocation policies that have thwarted the city's efforts to land an MLB club. The other matter concerned whether General Motors LLC's "Bump the Competition" program with auto parts dealers constituted predatory pricing.

Since that time, Apple Inc. has given the Court the opportunity to take another bite at the application of the *per se* rule; pay TV and Internet service provider Cox Communications, Inc. has asked the Court to revisit arbitration in the class action context; and pharmaceutical giant Allergan plc has questioned a federal antitrust duty imposed on it in a New York State "product hopping" case.

The *per se* rule and Apple's conduct in the e-books market. The appropriate standard for analyzing vertical agreements that facilitate horizontal collusion is the issue raised in Apple's October 28 petition for review. The technology company is questioning the application of *per se* scrutiny to its agreements with publishers in the e-book market after the company launched its iPad and iBookstore in 2010. At issue is a decision of the U.S. Court of Appeals in New York City upholding a finding that Apple orchestrated a price fixing conspiracy among major publishing companies to raise the prices e-books. The appellate court rejected Apple's contentions that its conduct should not be subject to *per se* condemnation.

According to Apple, rule of reason analysis was appropriate for reviewing its conduct because the vertical agreements with e-book publishers "included commonplace provisions that are often procompetitive and unquestionably served Apple's legitimate business objectives in offering consumers a new e-books platform." The panel majority declined to follow the Supreme Court's 2007 decision in *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, which instructed that such vertical conduct must be analyzed under the rule of reason, Apple asserted.

"The Second Circuit's approach creates intolerable uncertainty over how courts will assess vertical conduct accused of having horizontal effects," Apple argued. The Court was asked to "grant the petition, confirm that vertical activity, undertaken for bona fide, potentially procompetitive

purposes, is not transformed into *per se* illegal conduct merely because it also has been found to facilitate collusion, and overturn the court of appeals' erroneous application of the *per se* rule."

Apple asked specifically whether vertical conduct by a disruptive market entrant, aimed at securing suppliers for a new retail platform, should be condemned as *per se* illegal under Section 1 of the Sherman Act, rather than analyzed under the rule of reason, because such vertical activity also had the alleged effect of facilitating horizontal collusion among the suppliers.

The Justice Department and state attorneys general have until January 4, 2016, to respond to the petition (*Apple Inc. v. U.S.*, Dkt. 15-565).

Arbitration waiver. Cox filed a petition for writ of *certiorari* on October 13, asking the Supreme Court to review an appellate court decision upholding a ruling that Cox waived its right to arbitrate a class action antitrust suit filed by its customers. The U.S. Court of Appeals in Denver held that Cox waived the right to compel arbitration against at least 140,000 customers. Cox's failure to inform the district court about the presence of the arbitration agreements until after class certification was held to be inconsistent with an intent to arbitrate. In its petition, Cox asserted that the Tenth Circuit's decision undermines the national policy favoring arbitration outlined in the Federal Arbitration Act.

Three questions were raised: (1) whether, in a putative class action, a defendant waives its right to compel arbitration of the claims of absent class members by not filing its motion to compel arbitration until after the court certified the class; (2) whether a defendant waives its right to compel arbitration by filing a motion for summary judgment simultaneously with a motion to compel arbitration, or a defendant may file alternative motions to compel arbitration or for judgment on the merits; and (3) whether a reduction in the size of a class constitutes prejudice to plaintiffs sufficient to support a waiver of the defendant's arbitration rights with respect to absent class members.

The respondent has until December 4 to file a response (*Cox Communications, Inc. v. Healy*, Dkt. 15-466).

Antitrust duty. In a petition for *certiorari*, filed on November 4, Allergan is questioning the Second Circuit's decision to affirm a preliminary injunction in a monopolization action brought by the State of New York that requires the drug maker to continue selling an earlier version of an Alzheimer's drug nearing the end of its patent protection in order to facilitate the use of "bioequivalent" generic drugs.

In September 2014, the State of New York sued Actavis plc, now Allergan, in an effort to prevent the company from "forcing Alzheimer's patients to switch medications as part of an anti-competitive strategy designed to maintain high drug prices." According to the State, as Namenda IR—a twice-daily drug designed to treat moderate-to-severe Alzheimer's disease—neared the end of its patent exclusivity period and was about to face generic competition, the defendant planned to withdraw it from the market and to force patients to switch to a once-daily version of the drug with a longer patent—Namenda XR. The alleged conduct undermined generics' ability to compete, the state alleged. In December 2014, the federal district court in New York City issued a preliminary injunction prohibiting the defendant from discontinuing sales of Namenda IR until 30 days after the generic equivalent would first become available in July 2015.

In an expedited appeal, the appellate court explained the case raised a novel question of under what

circumstances conduct by a monopolist to perpetuate patent exclusivity through successive products, commonly known as “product hopping,” violates the Sherman Act. The appellate court concluded: “the combination of withdrawing a successful drug from the market and introducing a reformulated version of that drug, which has the dual effect of forcing patients to switch to the new version and impeding generic competition, without a legitimate business justification, violates § 2 of the Sherman Act.” The drug maker unsuccessfully argued that the mere exercise of patent rights was categorically immune from antitrust scrutiny and that product hopping was not anticompetitive or exclusionary under § 2. The preliminary injunction was upheld.

The questions presented are: (1) whether exercising rights granted by the Patent Act—in particular, not selling one patented product and selling a different patented product instead—can violate the Sherman Act; and (2) whether drug manufacturers have a federal antitrust duty to facilitate the operation of state drug substitution laws to maximize competitors’ sales.

Allergan contended that the appellate court’s decision could not be reconciled with long lines of cases that antitrust liability cannot arise from the mere existence of rights granted by the Patent Act and that a patent owner’s rights include the right to refuse to use, sell, or license the invention, while excluding competitors. The drug maker also argued that the Second Circuit “invented an expansive new antitrust duty” that “[b]rand manufacturer must continue to sell outdated drugs so that state drug laws can encourage or even force patients to buy generic substitutes.”

Currently, the state’s response is due by December 7 (*Allergan plc v. State of New York,* Dkt. 15-587).