AntitrustConnect Blog

You Would Cry Too If It Happened To You (and You Were a Bundling Plaintiff)

Steven J. Cernak (Bona Law PC) · Thursday, February 11th, 2016

In 2009, It's My Party, Inc. (IMP) sued Live Nation (LN) in federal district court in Maryland alleging anticompetitive tying, bundling, and other forms of monopolization. In February 2015, the court granted Live Nation's second summary judgment motion. IMP appealed, surely thinking that it was LN's turn to cry. Instead, in February 2016, the Fourth Circuit affirmed summary judgment in a strongly- and broadly-worded opinion extolling the virtues of bundling, even by companies with market power.

Both parties offer promotional services to performers and operate venues where those performers perform. LN offers these services nationally, including through an amphitheater near Washington, D.C., while IMP runs a single amphitheater in the Washington, D.C. area. IMP's allegations against LN included monopolization, tying, exclusive dealing and, at least according to the Fourth Circuit, being "the largest promoter in the world."

IMP made two different tying claims. First, if a performer wanted to use LN's promotional services, then it had to perform at LN's Washington-area amphitheater ("venue to promotion"). Second, if a performer wanted to perform in LN's other venues across the country, then it had to choose LN's amphitheater for any Washington-area performances ("venue to venue").

The district court granted LN's summary judgment motion on both market definition and monopolization grounds. The Fourth Circuit affirmed on both grounds, and then expounded on the weakness of IMP's claims and the misuse of antitrust suits for anticompetitive purposes.

To support the allegations that LN monopolized a promotions market and tied promotional services to venues, IMP needed to define both a promotion market and a venue market. It characterized the promotion market as national and limited the venue market to major amphitheaters. The court found both definitions "gerrymandered" and "without due regard for market realities." Such precise definitions were "plainly designed to bolster IMP's monopolization and tying claims by artificially exaggerating LN's market power."

The court also strongly rejected IMP's allegations of anticompetitive conduct. The court focused on IMP's two tying claims, especially the "venue to promotion" claim. The court referred to tying claims as bundling or packaging and explained that such practices can be anticompetitive only if the dominant seller coerces the consumer into buying the tying product. If the consumer can resist such coercion, effectively telling the seller "you don't own me," then such bundling is merely "ordinary market behavior," even by a seller with market power.

The court explained that IMP's view of tying improperly ignored this coercion requirement:

> IMP argues that tying occurs any time a seller who has market power over product A offers it for sale together with product B. But merely offering two products in a single package, allowing each to enhance the appeal of the other, is not itself coercive. Otherwise, the seller would be guilty of anticompetitive conduct even if buyers in fact preferred and freely chose to buy product A and product B together… To allow tying doctrine to swell to the point of prohibiting such legitimate means of competition would make antitrust law its own worst enemy.

Even if IMP had properly pled coercion, the evidence for it was insufficient. According to the court, IMP's "cherry-pick[ed] excerpts" of LN's emails with performers during negotiations never said that performers must buy both products from LN. Also, several agents for performers testified that they were not forced to purchase both. IMP claimed that such testimony was "shaded" because of fear of LN's power. The court rejected this explanation: "But if pure speculation by a competitor were enough to prove the opposite of what consumers describe is happening in the market, then antitrust defendants should surrender every time a rival files a complaint."

Moreover, the court found ample evidence of the lack of coercion and tying. Fourteen percent of the performers who used LN's promotional services used *IMP's venue* when performing in the Washington, D.C. area. IMP's expert did a regression analysis purporting to show performers disproportionately using LN's promotional service when performing at LN's Washington venue. The court rejected the analysis because it ignored a host of other reasons why LN's venue might have been chosen: LN's greater compensation to the performers; the performers' greater efficiency when using the venues owned by the promoter; and the potential superiority of LN's venue. As the court explained, "intrinsic superiority of the 'tied' product would convince freely choosing buyers to select it over others without any coercion from the seller."

IMP's venue to venue claim failed for the same reasons. In fact, the evidence showed that more than 25% of the performers who performed in an LN venue in another region where LN had the only venue still performed in *IMP's venue* when in the Washington, D.C. area.

IMP also claimed that LN's "size and scope … and exclusive access to venues [was] so dominant that the network itself deters entry into the industry and unfairly disadvantages localized competitors like IMP." The court responded with several quotes from Supreme Court cases explaining that absolute size and large shares do not constitute monopolization. The court then offered a long general defense of bundling, even by those with market power:

> Offering an 'attractive package,' however, becomes indistinguishable from anticompetitive conduct under IMP's conception of coercion-less tying. If that view carries the day, no seller could combine related goods or leverage its competitive advantage in related markets without risking antitrust charges.

According to the court, "It is paternalistic for either a competitor or the court to just assume that taking two products together is not the result of independent decision-making." Finally, and most colorfully: "It is not wholly fantastical to wonder if even ketchup and mustard, salt and pepper, forks and knives will have to bid each other adieu, doomed to solitary existences along the grocery aisle."

The court also alluded to another potential motive for IMP's case. In emails turned over in discovery, IMP's top executive complained that LN was "paying way too much money" to performers and there were "too many shows" for either to make any money. The executive suggested that LN sell to IMP its Washington-area venue or "'work together' to stop bidding against each other" for Washington, D.C. area performances. As the court saw it, "After failing to collude with LN or expel it from the market, plaintiff turned to the next best option—antitrust law."

The court's emphatic rejection of its theories and factual assertions surely left IMP feeling "gored." For LN—and any other seller with market power accused of anticompetitive bundling—such an opinion can only be compared to sunshine, lollipops and rainbows.

This entry was posted on Thursday, February 11th, 2016 at 4:48 pm and is filed under Tying Arrangements
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