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Supreme Court Turns Away Another Petition for Review in an Antitrust Case

Jeffrey May (Wolters Kluwer) · Tuesday, March 22nd, 2016

The U.S. Supreme Court's denial of the petition for *certiorari* in the *McWane* case on Monday dashed the hopes of many antitrust practitioners that the Court might provide some much-needed clarity on the antitrust implications of using exclusive dealing arrangements. The denial also makes it highly unlikely that the High Court will be issuing any antitrust decision in 2016. During the current term, the Court has already denied petitions for review in more than a half dozen antitrust cases, including the high-profile Apple e-books case. But some antitrust petitions remain pending.

McWane v. FTC. In the *McWane* case (*McWane, Inc. v. FTC*, Dkt. 15-706), the Supreme Court was asked to enunciate the proper standard for evaluating competitive harm caused by exclusive dealing arrangements. Left standing is a decision of the U.S. Court of Appeals in Atlanta, upholding an FTC determination that McWane, Inc.—the largest supplier of ductile iron pipe fittings in the United States—used these vertical restraints to unlawfully maintain its monopoly power.

The Commission in 2014 concluded that McWane unlawfully monopolized the domestic pipe fittings market through its Full Support Program, which generally required distributors to purchase all of their domestic fittings from McWane in order to receive rebates and avoid being cut off. The Commission's opinion and order directing McWane to stop requiring exclusivity from distributors were upheld by the Eleventh Circuit. According to the appellate court, the FTC's determination that the exclusivity program harmed competition was supported by substantial evidence in the record and was owed a deferential standard of review. The Commission's legal conclusions were supported by the governing law.

In its petition for review, McWane argued that the successful entry and expansion of a competitor that took advantage of exceptions to exclusivity in the Full Support Program foreclosed a finding of monopoly power. It contended that, in the face of actual and successful entry, a partial exclusive dealing arrangement could not amount to unlawful monopolization. Moreover, McWane took issue with the Eleventh Circuit's rejection of its business justifications for the conduct. The question presented was whether McWane's partial exclusive-dealing arrangement was unlawful under antitrust principles as implemented in Section 5 of the FTC Act, notwithstanding the successful entry of a competitor in the relevant market during the period at issue and notwithstanding the company's nonexclusionary business justifications for the conduct.

Some antitrust scholars, including former FTC Commissioner Joshua Wright, had urged the

Supreme Court to take the case. Wright had dissented from the FTC's decision finding liability against McWane for unlawful monopolization when he was a member of the Commission. While the Full Support Program harmed a rival, it did not harm competition, in Wright's view.

In calling for review, the former commissioner suggested that the FTC's opinion and the opinion of the Eleventh Circuit were in conflict with modern antitrust law and economic analysis. The petition had presented the Court with "a unique and timely opportunity for the Supreme Court to bring exclusive dealing law in line with modern antitrust law and economic analysis, to recalibrate the doctrine to focus on harm to competition, and to provide guidance to lower courts with respect to the application of rule of reason analysis in cases involving exclusive dealing arrangements," Wright contended.

Business also hoped for some clarity from the Court in the area of vertical restraints. The U.S. Chamber of Commerce and National Association of Manufacturers supported Supreme Court review.

Pending antitrust petitions. A Supreme Court antitrust decision in 2017 is not out of the question. Petitions in antitrust cases remain pending on the Court's docket. Three of them were filed within the last two weeks. Below are a number of the questions presented:

Black & Decker U.S. Inc. and other tool companies are seeking review of a decision by the U.S. Court of Appeals in Richmond, which found that SD3, LLC—a safety technology developer—adequately alleged that the petitioners engaged in a group boycott of SD3's "active injury mitigation technology." They argue that the Fourth Circuit's decision conflicts with the pleading standard in *Bell Atlantic v. Twombly*, 550 U.S. 544 (*Black & Decker U.S. Inc. v. SD3, LLC*, Dkt. 15-942).

Visa Inc. and MasterCard Inc. are seeking High Court review of a decision by the U.S. Court of Appeals in Washington, D.C., which revived price fixing claims that were brought by automatic teller machine (ATM) operators, as well as consumers who purportedly paid excessive fees when using these machines. They question whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act (*Visa Inc. v. Osborn*, Dkt. 15-961; *Visa Inc. v. Stoumbos*, Dkt. 15-962).

Drug makers SmithKline Beecham Corporation and Teva Pharmaceutical Industries Ltd. ask the Court to review a Third Circuit decision, holding that a settlement agreement between the firms resolving a patent dispute over the prescription anti-seizure drug Lamictal was subject to antitrust scrutiny. They question whether the decision of the appellate court's decision that a patentee's grant of an exclusive license as part of a patent settlement agreement must undergo antitrust scrutiny was consistent with the U.S. Supreme Court's 2013 decision in *FTC v Actavis, Inc*. (*SmithKline Beecham Corp. v. King Drug Company of Florence, Inc*., Dkt. 15-1055).

A supermarket operator defending an antitrust action brought by a developer asks for review of a Third Circuit decision. It asks: (1) whether an antitrust plaintiff that is neither a competitor nor a consumer in an alleged market has standing under the antitrust laws, particularly when there are other potential plaintiffs that would be more likely to have antitrust standing; and (2) whether the "objectively baseless standard for the sham exception to *Noerr-Pennington* immunity applies to a "series" of underlying cases and, if not, whether four proceedings, each challenging the same

construction project, can constitute such as "series" of cases (*Village Supermarkets, Inc. v. Hanover 3201 Realty, LLC*, Dkt. 15-1156).

In a criminal action, a former executive of a Puerto Rico freight carrier whose conviction for conspiring to fix prices for maritime freight services between the continental United States and Puerto Rico was upheld by the First Circuit asks: (1) whether Puerto Rico is a state for purposes of the Sherman Act and (2) whether a "preponderance heavily against a verdict" or an "effect the verdict" is the proper standard in harmless error analysis of a prosecutor's repeated improper argument and questioning that followed a prosecutor's assurances to a trial court that such arguments would not be made (*Peake v. U.S.*, Dkt. 15-1134).

Student-athletes who challenged National Collegiate Athletic Association (NCAA) rules that prohibited student-athletes from being paid for the use of their names, images, and likenesses are seeking review of a decision of the Ninth Circuit. They are asking the Court whether: (1) in determining an appropriate remedy for a violation of Section 1 of the Sherman Act under the "Rule of Reason," a court may treat the restraint itself—an agreement among the NCAA and its members prohibiting college athlete compensation, or what the NCAA calls "amateurism"—as a legitimate procompetitive effect; and (2) a court is restricted, after finding a violation of Section 1 of the Sherman Act under the Rule of Reason, to awarding relief that the plaintiff proves is "virtually as effective" as the restraint in serving its alleged purposes, "without significantly increased cost" (*O'Bannon v. National Collegiate Athletic Assn.*, Dkt. 15-1167).

Word from the Supreme Court on the status of these petitions will follow in the coming months.

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