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Supreme Court Agrees to Consider Sufficiency of Antitrust Conspiracy Allegations in the Context of Business Associations

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Last week, the U.S. Supreme Court wrapped up its regular business for the October 2015 term, but not before deciding to put an antitrust case on the docket for the next term. In addition, a few antitrust petitions remain on the docket that could potentially lead to additional antitrust issues being addressed by the Court next year.

On June 28, the Court agreed to review a decision of the U.S. Court of Appeals in Washington, D.C., which revived price fixing claims that were brought against Visa, MasterCard, and affiliated banks by automatic teller machine (ATM) operators, as well as consumers who purportedly paid excessive fees when using these machines.

The plaintiffs allege a conspiracy among ATM networks and their member banks to fix access fees that a cardholder pays to a bank ATM operator. Visa and MasterCard access fee rules that do not allow ATM operators to charge higher access fees to cardholders for transactions routed over Visa and MasterCard, respectively, than for those over another network, are alleged to violate Section 1 of the Sherman Act.

The Court will consider whether allegations that members of a business association—such as an ATM network—agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead a conspiracy for purposes of a Sherman Act, Section 1 claim. According to the petitioners—Visa, MasterCard, and the affiliated banks—the District of Columbia Circuit's decision created a split among the circuits on the issue.

The District of Columbia Circuit's decision squarely conflicts with a Ninth Circuit decision involving largely the same defendants and virtually identical conspiracy allegations, it was argued. In *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), the U.S. Court of Appeals in San Francisco affirmed dismissal of conspiracy claims brought by merchants that accepted credit cards against MasterCard and Visa and member banks for engaging in a scheme to fix interchange fees or merchant discount fees.

The petitioners also argue that the District of Columbia Circuit's decision conflicts with decisions of the Third (*In re: Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (2010)) and Fourth (*SD3, LLC v. Black & Decker U.S. Inc.*, 801 F.3d 412 (2015)) Circuits. In addition, they contend that the plaintiffs improperly seek to infer misfeasance from the banks' active participation in a

business association.

Denied petitions. The Supreme Court turned away a number of closely-watched antitrust cases during the October 2015 term. Notably, the Court rejected a petition from Apple Inc. for review of a decision of the U.S. Court of Appeals in New York City, upholding a trial court's finding that Apple orchestrated a price fixing conspiracy with five major e-book publishers. Also left standing was a decision of the U.S. Court of Appeals in Atlanta, affirming an FTC determination that McWane, Inc.—the largest supplier of ductile iron pipe fittings in the United States—used exclusive dealing arrangements to unlawfully maintain its monopoly power. The petition questioned the proper standard for evaluating competitive harm caused by exclusive dealing arrangements.

The Court also denied review of the Fourth Circuit's decision in *SD3, LLC v. Black & Decker U.S. Inc*., which was cited by the petitioners in the ATM fee case. Black & Decker U.S. Inc. had questioned the appellate court's holding that SD3, LLC—a safety technology developer—adequately alleged that Black & Decker and other tool companies engaged in a group boycott of SD3's "active injury mitigation technology" that prevents some hand and finger injuries caused by table saws. The appellate court also held that SD3 failed to plausibly allege two separate but related conspiracies with regard to private standard-setting.

Pending petitions. There are a few petitions remaining on the docket that could generate another antitrust opinion from the Court next year. The Court's request for the views of the U.S. Solicitor General suggests that a Third Circuit decision in a "no-AG" patent settlement agreement challenge could be up for review. Drug makers SmithKline Beecham Corporation and Teva Pharmaceutical Industries Ltd. asked the Court to review the decision of the U.S. Court of Appeals in Philadelphia, holding that a settlement agreement between the firms resolving a patent dispute over the prescription anti-seizure drug Lamictal was subject to antitrust scrutiny. The issue before the Third Circuit was whether the Supreme Court's *FTC v. Actavis* decision covered, in addition to reverse cash payments, a settlement in which the patentee drug manufacturer agrees to relinquish its right to produce an "authorized generic" of the drug (no-AG agreement) to compete with a first-filing generic's drug during the generic's statutorily guaranteed 180 days of market exclusivity under the Hatch-Waxman Act as against the rest of the world.

Also pending are petitions, questioning a Ninth Circuit decision, which upheld a finding that National Collegiate Athletic Association rules prohibiting student-athletes from being paid for the use of their names, images, and likenesses were unreasonable restraints of trade.

Another pending petition asks the Court to consider whether a steel maker's decision to no longer deal with a newly-formed distributor, following threats from established distributors, should be condemned as *per se* unlawful. At issue is a decision of the U.S. Court of Appeals in New Orleans, upholding a $150 million judgment against the petitioning manufacturer.

Word on these pending petitions could come as early as the first Monday in October.

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