Shipman & Goodwin LLP

Developments in Antitrust Law

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Important Antitrust News

IN THE LAST TERM, THE UNITED STATES SUPREME COURT HANDED DOWN THREE MAJOR DECISIONS THAT INFLUENCED THE DIRECTION OF ANTITRUST LAW IN THE AREAS OF PRICE DISCRIMINATION, JOINT VENTURE PRICING PRACTICES, AND "TYING" CLAIMS INVOLVING PATENTS.

IN SUMMARY:

PRICE DISCRIMINATION IN COMPETITIVE BIDDING

VOLVO V. REEDER-SIMCO

First, it delivered a major ruling on price discrimination affecting all manufacturers, distributors and dealers that engage in competitive bidding. Our new partner, Allan Hillman, a well-known antitrust and franchise law counselor and litigator, wrote the lead article on this case, *Volvo v. Reeder-Simco*, for the *Antitrust and Trade Regulation Report,* the weekly national publication most read by antitrust lawyers. Allan's summary of the case is below.

PERMISSIBLE PRICING PRACTICES IN JOINT VENTURES

TEXACO V. DAGHER AND SHELL V. DAGHER

Second, in *Texaco v. Dagher* and *Shell v. Dagher,* the Supreme Court handed down a major decision on the right of companies in joint ventures to make price agreements – a decision crucial to any company that engages in a business venture with a competitor or potential competitor

TYING ARRANGEMENTS INVOLVING PATENTED PRODUCTS

ILLINOIS TOOL WORKS V INDEPENDENT INK

Finally, in *Illinois Tool Works v. Independent Ink,* the Supreme Court issued its most important decision since 1992 on the subject of "tying arrangements" – arrangements that require a party to buy a product or service that it does not want in order to get a product or service that it does want.

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ROBINSON-PATMAN: PRICE DISCRIMINATION IN COMPETITIVE BIDDING

(Volvo Trucks, North America v. Reeder-Simco, GMC, Inc.)

The Robinson-Patman Act generally prohibits a seller from selling commodities of like grade and quality to competing buyers at different prices. It was enacted in 1936 in response to the growth of large chain retailers, who could use their buying power to demand price concessions from manufacturers and distributors, and then could take advantage of their lower costs to undersell the "mom and pop" stores with which they competed in local markets. Consequently, the principal conduct prohibited by the Robinson-Patman Act is "secondary line" discrimination, where a supplier sells commodities of like grade and quality at approximately the same time to competing buyers, but at different prices. (There are certain recognized justifications for such discrimination, such as "meeting competition" and "cost justification," but these defenses were not at issue in *Volvo*).

To show a "secondary line" injury, a plaintiff must show that:

- relevant sales were made in interstate commerce;
- the products sold were of "like grade and quality";
- the seller discriminated in pricing by giving a favored purchaser a lower price than the one the plaintiff received; and
- the effect of the discrimination might be to "injure, destroy, or prevent competition" by giving a competitive advantage to the favored buyer.

Until the *Volvo* decision was issued, a plaintiff could show injury to competition by showing that it competed in the same economic and product market and that the effect of the differential in price was generally to allow the favored buyers to draw business away from the disfavored buyers.

In *Volvo,* however, the Court held that price discrimination would not be found unless the favored buyer and disfavored buyer are in head-to-head competition for the same transaction.

In the situation at issue in *Volvo,* Reeder, a Volvo dealer, competed with other Volvo truck dealers to be chosen by a prospective customer to be the sole Volvo bidder competing with dealers of other brands to sell trucks to the customer. Only the Volvo dealer chosen by the customer would then ask Volvo for a price concession to enable the dealer to submit the hoped-for winning bid. And only if that dealer won the auction to sell the trucks to the customer would it purchase the trucks from Volvo, on special order. Its purchase price usually would be lower than the normal price charged by Volvo to other Volvo dealers in non-bidding situations, but because Volvo dealers were not competing with each other for sales to the same customer at the time of the purchase from Volvo, there were not "two" purchasers, and competition was not prevented. This ruling limits the concept of secondary line discrimination to circumstances in which a dealer orders products for inventory to resell in the normal course of competition with other dealers of the same brand.

Of note, Reeder proved that Volvo had engaged in price discrimination during 1996-98 involving $280,000 in purchases for resale of 102 heavy-duty trucks, but its proof concerning transaction-specific discrimination was minimal. Reeder presented admissions that Volvo dealers competed with each other; that Volvo did not prohibit its dealers in one territory from competing with its dealers in other territories; and that Reeder was sometimes in competition, even in the bidding instances, with other Volvo dealers, at least at the pre-order stages of customer acquisition. This proof, however, was insufficient for the Court majority, in part because the evidence showed that when two Volvo dealers were competing for the right to submit a bid to a customer, Volvo's policy was to offer the same price concessions to the competing dealers. In these circumstances, the Court held that there was no violation of the Act.

PERMISSIBLE PRICING PRACTICES IN JOINT VENTURES

(Texaco, Inc. v. Dagher and Shell Oil Co. v. Dagher)

Texaco, Inc. and Shell Oil Co. collaborated in a joint venture, Equilon Enterprises, to market gasoline in the western United States under the two companies' original brand names. After Equilon set a single price for both brands, various Texaco and Shell service station owners brought suit alleging that, by unifying gas prices under the two brands, petitioners had violated the per se rule against price-fixing long recognized under § 1 of the Sherman Act, which makes "horizontal price-fixing" – agreements between competitors to charge the same prices for their competing products – automatically illegal. The Supreme Court held, however, that it is not a violation of § 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products. This case did not present a horizontal agreement, because Texaco and Shell did not compete with one another in the relevant market – i.e., in gasoline sales to western service stations – but instead participated in that market jointly only through Equilon. The Court stated that when those who would otherwise be competitors pool their capital and share the risks of loss and opportunities for profit, they are regarded as a single firm competing with other sellers in the market. As such, Equilon's pricing policy might have been price-fixing in a literal sense, but was not price-fixing in the antitrust (legal) sense. Here, there was simply one entity, and central to it was a pricing strategy. On the other hand, had the joint venture not been viewed as a single entity, but as a subterfuge for price-fixing between two companies which were actually competing in the geographic area, the pricing policy would have been illegal.

TYING ARRANGEMENTS INVOLVING PATENTED PRODUCTS

(Illinois Tool Works v. Independent Ink, Inc.)

In a "tying" arrangement, the seller of a "desired" product forces a buyer to buy a second product in order to get the desired product, even though the buyer might prefer to buy the second product elsewhere (often for a lower cost).

Long ago, the Supreme Court believed that "tying" arrangements were inherently unlawful because they restrained competition. It also believed that it was inherently anticompetitive for a patent-holder to condition the sale of a patented product on the purchase of a second, unpatented product, because such a condition tended to expand the monopoly provided by the patent.

Over time, the Court came to recognize that a tying arrangement was not always anticompetitive. The competitive impact of a tying arrangement, it came to hold, depends on whether the seller has market power with regard to the desired "tying" product. Until this year, however, it had not reexamined its presumption that a patent necessarily gives the patent-holder market power. In *Illinois Tool*, it took a fresh look at its old presumption and concluded it was not a valid presumption.

Illinois Tool manufactures and markets printing systems that include a patented printhead and ink container. It also manufactures ink which is unpatented. Illinois Tool would only sell its patented products to original equipment manufacturers who agreed to purchase ink exclusively from it and also agreed not to refill the patented containers with ink of any other manufacturer. Independent Ink developed ink with the same chemical composition as Illinois Tool's ink, and sued, claiming that Illinois Tool's patents were invalid on the ground that Illinois Tool had engaged in illegal "tying" and monopolization in violating of §§ 1 and 2 of the Sherman Act.

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The Supreme Court disagreed. It took note of changes in its "tying" cases outside the patent context. It also noted that Congress had amended the patent laws to do away with a presumption that a patent in and of itself creates "market power." Consequently, the Supreme Court overruled its older cases and held that, as in any other "tying case," a plaintiff who claims that a defendant has misused a patent by tying it to an unpatented product will have to show that the patented product has market power in the relevant product market.

For more information on these cases or other antitrust matters, please contact a member of the Shipman & Goodwin Antitrust Group.

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This newsletter is for informational purposes only. It is not intended as legal advice. How the cases and principles described here will apply in a particular case depends on the facts of that case.

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