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Antitrust Compliance: Leveraging Lessons from the Apple Ruling to Mitigate Liability and Damages

TUESDAY, AUGUST 13, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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SQUIRE SANDERS

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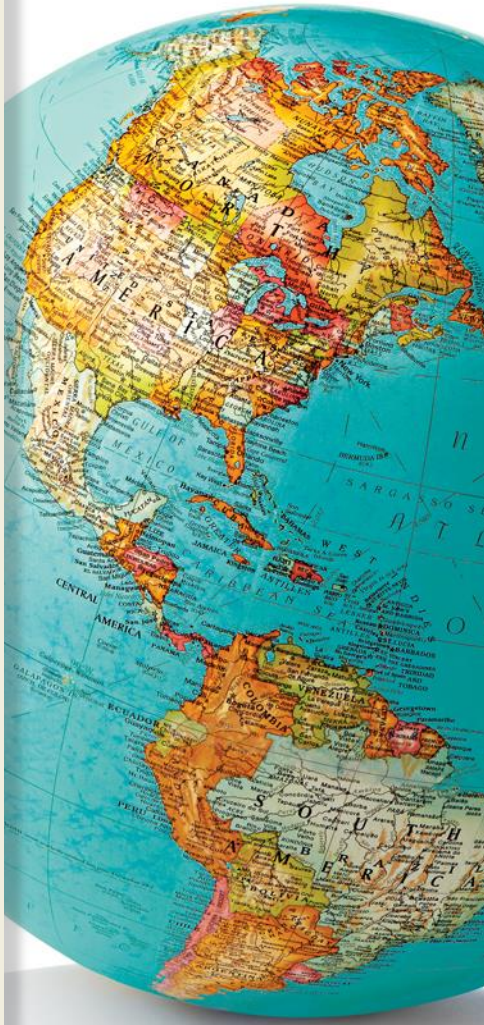

Potential Antitrust Liability

- "[T]his Court finds by a preponderance of the evidence that Apple conspired to restrain trade in violation of Section 1 of the Sherman Act . . . ." Op. at 159
- "The state attorneys general and private plaintiffs suing Apple Inc. and five major publishers for fixing the price of e-books may be seeking nearly $500 million in damages from the iPad maker . . . ."

  Melissa Lipman, "Apple May Face A $500M Bill On E-Books," Law360, July 25, 2013, http://www.law360.com/articles/459774

Proposed Injunctive Relief

Proposed by DOJ, *inter alia*:

- Restrictions on use of MFNs
- Restrictions on use of agency arrangements
- Allow e-book retailers to sell e-books directly from their apps
- Limits on Apple's conduct with respect to content other than books (e.g., music, movies)
- Outside monitor, and internal Antitrust Compliance Officer

Legal Framework for the Decision

- Section 1 of the Sherman Act
  - "[C]ontract, combination . . . , or conspiracy, in restraint of trade or commerce . . . ."
- Court found Section 1 violation under either a *per se* or rule-of-reason standard. Op. at 120-21
- Publishers are horizontal competitors
- Apple described as a "vertical" participant
  - "Where a vertical actor is alleged to have participated in an unlawful horizontal agreement, plaintiffs must demonstrate both that a horizontal conspiracy existed, and that the vertical player was a knowing participant in that agreement and facilitated the scheme." Op. at 112-13
  - *Toys "R" Us* and *Interstate Circuit* line of cases

Legal Framework for the Decision

- Proof of concerted action
  - "A plaintiff may rely on either direct or circumstantial evidence to establish that a defendant entered into an agreement in violation of the antitrust laws." Op. at 108
  - Inferences fairly drawn from behavior
  - For vertical player: "[D]irect or circumstantial evidence must be present that 'tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Op. at 126-27 (citing *Monsanto*)

Selected Factual Findings

- "On a fairly regular basis, roughly once a quarter, the CEOs of the Publishers held dinners in the private dining rooms of New York restaurants, without counsel or assistants present, in order to discuss the common challenges they faced, including most prominently Amazon's pricing policies. . . . [T]hey felt no hesitation in freely discussing Amazon's prices with each other and their joint strategies for raising those prices." Op. at 19-20

Selected Factual Findings

- “Understanding the impropriety of this exchange of confidential information with a competitor, Young advised Nourry that ‘it would be prudent for you to double delete this from your email files when you return to your office.’” Op. at 22

Selected Factual Findings

- "[Apple's] Cue wrote six essentially identical emails. Only the introduction varied. For the three Publishers with whom he had talked in late December, Cue began his emails with, 'As we discussed.' For the other three, he began with the following comment: 'After talking to all the other publishers and seeing the overall book environment, here is what I think is the best approach for ebooks." Op. at 45
- "He emphasized that 'to sell e-books at realistic prices . . . all resellers of new titles need to be in agency model.'" Op. at 46

Selected Factual Findings

- “[Apple] advocated for an industry-wide adoption of the agency model as ‘the only way’ to ‘move the whole market off 9.99.’” Op. at 47
- “As Cue put it bluntly to Hachette, the agency model proposed by Apple was ‘the best chance for publishers to challenge the 9.99 price point.’” Op. at 52

Selected Factual Findings

- "To change the price of e-books across the industry, however, the Publishers would have to raise Amazon's prices. This is where the MFN [Most Favored Nation clause] became such a critical term in Apple's contracts with the Publisher Defendants. It literally stiffened the spines of the Publisher Defendants to ensure that they would demand new terms from Amazon. Thus, the MFN protected Apple from retail price competition as it punished a Publisher if it failed to impose agency terms on other e-tailers." Op. at 55

Factual Conclusions

Publishers

- “There is overwhelming evidence that the Publisher Defendants joined with each other in a horizontal price-fixing conspiracy.” Op. at 113
- “[T]he agency Agreements represented an ‘abrupt shift’ from the past model for the distribution of e-books . . .; in adopting a model that deprived each of them of a stream of expected revenue from the sale of e-books on the wholesale model, the Publisher Defendants all acted against their near-term financial interests; and each of the Publisher Defendants acted in identical ways even though each was also afraid of retaliation by Amazon.” Op. at 120

Factual Conclusions

Apple

- “The Plaintiffs have shown through compelling evidence that Apple violated Section 1 of the Sherman Act by conspiring with the Publisher Defendants to eliminate retail price competition and to raise e-book prices.” Op. at 113
- “Apple not only willingly joined the conspiracy, but also forcefully facilitated it.” Op. at 113.

Factual Conclusions

Compare *Interstate Circuit*:

- "Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits. . . .

  It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance."

  Interstate Circuit v. United States, 306 U.S. 208, 222-23 (1939)

Compliance Protocols

- Cartel-like behavior is focus of most antitrust compliance training
- Common compliance training lessons
  - An “agreement” need not be in writing
  - Agreements include – a “gentlemen’s agreement,” a “handshake,” or even a “knowing wink”

Compliance Protocols

- Agreements may be inferred from circumstantial evidence
  - Beware “opportunities to agree”
    - When you meet, particularly in undocumented settings, followed by substantially parallel conduct, a court or prosecutor may infer an agreement
    - Quick Lesson: Without antitrust advice, do not even discuss commercially sensitive subjects with competitors and document any meeting
  - Beware conduct that only makes economic sense if engaged in by an entire industry
    - Acting against your independent economic self-interest is a red flag

Compliance Protocols

- Mere exchange of sensitive price information with competitors can give rise to an inference of illegal agreement
- Thus, be very careful when dealing with competitors
- Consult with counsel and document such communications, if they occur
  - Date, time, identity of participants, subject matter

Compliance Protocols

- What you cannot do directly, you also cannot do indirectly
  - May not use an agent (such as a distributor or consultant) to facilitate an antitrust conspiracy
- Example: Marine Hose matter
  - Conspirators had little or no direct interaction
  - Coordinated their conduct through an “outside consultant”
  - All held criminally liable

Compliance Protocols

- Requesting information on competitor activity creates risk
  - "Ask first" policy: check with the company's counsel before making such a request
- If a customer/distributor gives you competitive information:
  - Document the source of that information immediately (date and contact person)
- Safe Course: Never ask or suggest a customer/distributor to pass along Company information to competitors or other customers/distributors

Compliance Protocols

- Examples of language in documents that can be misunderstood and taken out of context and thus, absent careful consideration, should be avoided:
  - Language suggesting guilt
    - “read and destroy”
  - Words of aggression or competitive exclusion such as
    - “dominate the market”
    - “kill the competition”
    - “get rid of the discounters”
  - Statements or speculation regarding the legality or legal consequences of any action of two firms or of a trade association

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