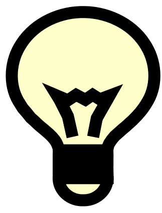

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The Antitrust Counselor

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The Newsletter of the ABA Section of Antitrust Law's Corporate Counseling Committee

Challenging A Competitor's Comparative Advertising

By Rick Kurnit

Many major advertisers have resorted to comparative claims of product superiority in an effort to stretch shrinking marketing budgets. In advertising, sales kits, and especially on websites of business-to-business marketers, more aggressive claims are being made. You should anticipate your marketing department coming to you (the trade regulation and competition lawyer in your legal department) with demands for immediate legal action to stop your competition from denigrating your product or service. As the lawyer familiar with your industry's codes and trade association, as well as marketing practices such as coop advertising (and, e.g., Robinson-Patman issues) – or maybe just the smartest lawyer left in your down-sized legal department – you're it. And oh yes, since the object of the exercise is to force a competitor to enter into an agreement with you to limit its competitive activities, perhaps you want to be consulted. So what should you tell them?

The Competitor's Claim

Any claim made in advertising about a product or service must be substantiated. The tricky part is that an advertiser must have substantiation for each of the meanings taken away by would-be purchasers exposed to an ambiguous claim. Thus, the competitor may have substantiation for the intended message or may be relying on an inadequate disclaimer to correct the "misunderstanding" of the claim. So, the first inquiry is: "Is it a good ad?" Your marketing people – or your CEO – who are no doubt outraged by the competitor's denigration of your beloved product or service should be counseled to consider whether forcing the competitor to fix what is wrong with its communication is the best course. Remember, they will not stop advertising; they will merely correct their advertising.

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How Do Consumers Understand the Competitor's Claim?

Some claims are literally false. No evidence of consumer perception is necessary. More often, however, it is the implication of the message that is at issue. You need to determine whether there is a potential evidentiary problem which requires a consumer perception test to determine what is communicated to the audience to whom the advertising is directed. A preliminary test may be helpful to determining whether a full consumer perception test will be useful. (Consider having outside counsel commission any of these tests, as attorney work product privilege may shield unhelpful test results from discovery).

Cease and Desist?

It is distinctly possible that your competitor has published unsubstantiated claims without consulting their legal department. (I know it is shocking that a marketing department would fail to consult its own legal department – but they sometimes can refer to their lawyers as the "Sales Prevention Department"). It is also possible that the competitor is trying to gauge how far they can push the envelope, and is hoping that all they will suffer is a cease and desist letter to which they plan to accede. So, before going to war (over an advertising claim that might be easily fixed), consider a cease and desist letter to the CEO or General Counsel. Frequently the response is: "while we disagree, the advertising in question has completed its schedule and will not be used in the future." Case closed. Problem solved. Minimal expenditure of resources. Battle lines not yet drawn.

What Next?

Now you have three choices: industry self-regulatory proceedings, complain to the government, or bring a lawsuit.

What Next?

Now you have three choices:

1) Industry self-regulatory proceedings,

2) complain to the government,

3) bring a lawsuit.

NAD

The National Advertising Division of the Council of Better Business Bureaus provides a ready means to mediate comparative advertising disputes. Well-trained lawyers well-versed in advertising substantiation and claims stand ready to mediate your dispute. They will determine the claims made without the need for a costly consumer perception survey. They will evaluate the advertiser's substantiation and the challenger's objections to that substantiation. They will render an intelligent and understandable opinion as to what modifications, if any, are necessary for the advertising to be continued. There is no opportunity for invasive discovery. The proceeding will likely take months, but certainly not years. The legal fees should be proportional to the matters at issue and in all likelihood your competitor will ultimately comply. Best of all, the proceedings will not get beyond your control. They will not explode in terms of unintended consequences, adverse publicity, runaway legal fees, or start a war with your competitor that goes on for thirty years and many many millions of dollars in legal fees. At a minimum, you do not want to go to government regulators or Federal Court without at least mentioning this alternative to your CEO.

The Government Is Your Friend?

You can always complain to the Federal Trade Commission or the State Attorney General. This is the seemingly low cost option. Your tax dollars at work. The only problem is that once stirred to action, they usually will listen to your competitor's assertion of the need for a "level playing field"

requiring whatever applies to them should apply to you. And, of course, consumer protection sits next to antitrust – both at the FTC and the state Attorney General. Once you have brought scrutiny to your industry, will that generate interest in the state of competition in your industry? This is another reason you, as the antitrust watchdog in the legal department, want to know at the outset what your company is doing in attacking your competitor's marketing practices.

Making A Federal Case Out of It

The Lanham Act provides fabulous remedies for false advertising by a competitor: TRO, preliminary injunction, treble damages, attorneys' fees. To stop false advertising immediately, go to Federal Court. However, TROs are rarely granted against speech. (There is that tricky First Amendment). So you should plan for a preliminary injunction hearing. You may need a fifty-thousand dollar consumer perception survey and an expert witness to defend it in order to prove the false implication. Counterclaims are the best defense to a false advertising claim. (In my first defense of a truthful advertising claim thirty years ago after a five-day hearing, the judge interrupted the summation with "Counselor, your client wouldn't have spent all this money on advertising just to tell the truth"). Advertising loses in Federal Court. No judge wants to be perceived as so gullible as to believe advertising is true. So, expect a counterclaim and protracted discovery. Before going to court, review your own advertising, marketing materials and website. Warn your marketing department about discovery. Also, point out the costs of consumer perception surveys, expert witnesses and litigation fees. Whose budget is covering this? If your marketing budget is bigger (a smaller percentage going to legal costs), if your advertising substantiation is in order, and if your CEO really cares about stopping the competitor in his tracks, AND if you have the will to litigate all the way to damages, the Lanham Act is a beautiful piece of legislation. Just remember, like all litigation, a settlement short of driving your competition into bankruptcy (yes it has been accomplished) is likely. That settlement is an agreement between your company and its competition potentially in restraint of trade…shouldn't you want to be there to make sure it is done in compliance with the antitrust laws?

In Sum

Hold off and evaluate your competitor's objectionable communication. Is this one that it makes sense to go after? In most circumstances, a cease and desist letter is the best way to begin. Give careful consideration to industry self-regulatory proceedings. Think twice about going to the FTC or the State A.G. Evaluate your own marketing communications before going to Federal Court. If you start a lawsuit, how will it ever end?

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Rick Kurnit is a Vice-Chair of the Antitrust Section's newest Committee, the Private Advertising Litigation Committee.

Section members can join this new Committee at no cost and will receive timely and relevant announcements of developments in this area.

For more information, please visit the PAL committee's website at: http://www.abanet.org/dch/committee.cfm?com=AT311570 or contact Amy.Mudge@aporter.com

Ninth Circuit Leaves Open Difficult Questions Regarding Bundled Discounts

By Daniel A. Sasse and Thy B. Bui

Bundling is commonly understood in the antitrust context as the practice of offering two or more products together that could be sold separately. A bundled discount occurs when a bundle of products is sold for a lower price than that which the seller would charge for those products when purchased individually. Bundling can raise antitrust issues when a monopoly firm offers a discount on a bundle that includes a monopoly product from one market with a non-monopoly product from a different market. This type of claim, sometimes known as monopoly leveraging, alleges that a firm had used its monopoly power in one market as a "lever" to secure a competitive advantage in another market.

Over the last few years, the Ninth Circuit has shed light on the rules to be applied in determining whether bundled discounts can violate antitrust laws. In *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), the court held that a claim under Section 2 of the Sherman Act, with respect to bundled discounts, could not be sustained unless the discounts resulted in prices that are below an appropriate measure of the defendant's costs. Recently, in *Doe v. Abbott Laboratories*, 571 F.3d 930 (9th Cir. 2009), the Ninth Circuit was presented with an opportunity to further clarify this standard. In *Abbott,* the court was confronted with the question of whether the holding in *PeaceHealth* applied to industries like the pharmaceutical industry, where the fixed costs of research and development are high, but the incremental costs for manufacturing the product is very low.

Rather than answer this question directly, the court resolved the case on narrower grounds. The Ninth Circuit applied recent Supreme Court precedent from *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109 (2009), and found that because Abbott's conduct was the functional equivalent of the price squeeze complained of in *linkLine*, plaintiffs could not state a Section 2 claim without an allegation of a refusal to deal or below-cost pricing. The court declined to answer the difficult issue of how to measure costs where there is an allegation of below-cost pricing.

> The Ninth Circuit applied recent Supreme Court precedent from *linkLine* and found that because Abbott's conduct was the functional equivalent of the price squeeze complained of in *linkLine*, plaintiffs could not state a Section 2 claim without an allegation of a refusal to deal or below-cost pricing.

In *Abbott*, certified classes of HIV patients and their medical plans alleged that the defendant, Abbott Laboratories, violated Section 2 of the Sherman Act by bundling HIV drugs. Abbott manufactures the protease inhibitor Norvir, which is mainly used as a "booster" to increase the effectiveness of other protease inhibitors. Abbott also produces Kaletra, a "boosted" protease inhibitor that combines Abbott's Norvir with its other protease inhibitor, lopinavir. Abbott was accused of leveraging its monopoly power in the "booster" market, which allegedly consists only of Norvir, to seek a monopoly in an alleged "boosted" market, comprised only of drugs intended for use with Norvir as a booster. Specifically, the plaintiffs alleged that Abbott engaged in anticompetitive conduct by keeping the price of Kaletra constant, while increasing the wholesale price of standalone Norvir by 400 percent, after two other protease inhibitors were introduced to the "booster" market. However, under the Ninth Circuit's standard in *PeaceHealth*, Abbott was not selling Kaletra below-cost. After the allocation of the bundled discount, the price of lopinavir, $1.64, was still above Abbott's incremental cost of producing each pill, which was likely only a few cents.

Abbott moved for dismissal and summary judgment on this basis and other various grounds. Abbott argued that the plaintiffs' allegations did not state a claim under Section 2, since plaintiffs failed to allege that Abbott sold Kaletra below-cost, as required by the bundling standard in *PeaceHealth*. The District Court, however, disagreed with Abbott and held that the *PeaceHealth* standard did not apply in the pharmaceutical context. The parties then entered into a conditional "high/low" settlement, and the District Court certified, among other issues, the interlocutory appeal of the decision to decline to apply the *PeaceHealth* standard in this case.

Instead of directly addressing the application of *PeaceHealth* in the pharmaceutical context, the Ninth Circuit held that the plaintiffs' monopoly leveraging claims could not be sustained in light of the Supreme Court's recent decision in *linkLine*. *linkLine* concerned allegations of a "price squeeze," which occurs when a manufacturer of a product has a monopoly over a key input for a product, and the manufacturer sells the input to competitors at a higher price at the wholesale level, compared to the low price of manufacturer's finished product at the retail level. A price squeeze thus makes it very difficult for competitors to match the price of the manufacturer's retail product.

In *linkLine*, the Supreme Court held that a price squeeze claim under Section 2 cannot be maintained where the defendant firm was under no antitrust obligation to sell the input to its competitors. In doing so, the court reiterated that Section 2 does not prevent a firm from charging high prices where it has a legitimate monopoly, and does not bar a firm from charging low prices in a related market where the price remains above-cost. The court stated that "if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that rivals find commercially advantageous."[1]

The Ninth Circuit believed that the Supreme Court's logic in *linkLine* applied in *Abbott*. Since the plaintiffs did not allege any refusal to deal or below-cost pricing, the plaintiffs' resulting argument for relief under Section 2 relied solely on the discrepancy between the standalone price of Norvir and its bundled price. Consequently, the Ninth Circuit found that "Abbott's conduct is the functional equivalent of the price squeeze the [Supreme] Court found unobjectionable in *linkLine*" and held that, in light of *linkLine*, plaintiffs failed to state a claim under Section 2.[2]

Because of the Ninth Circuit's decision in *Abbott*, there is now additional guidance regarding when bundled discounts rise to the level of a Section 2 violation. The Ninth Circuit joins the Seventh Circuit in holding that where bundled discounts remain above cost, there is no antitrust liability.[3] However, in-house and antitrust counsel should be aware that there are limits to this decision. For example, the bundled products involved in this case, with respect to the "boosted" market, were complementary – Norvir as a booster and some other standalone protease inhibitor. In other words, Norvir was a required input into competitors' products, at least according to the plaintiffs' market definition, which permitted the *Abbott* court to analogize to the price squeeze rationale of the *linkLine* decision to resolve the plaintiffs' claims in Abbott's favor. Antitrust counsel should take

[1] *Abbott*, 571 F.3d at 934.

[2] *Id.* at 935.

[3] *See Schor v. Abbott Laboratories*, 457 F.3d 608 (7th Cir. 2006).

note that there is a possibility of a different result where bundled products are not key inputs in competitors' products.

Also, the Ninth Circuit's decision left open an important question – whether the substantial fixed costs of research and development in high-tech industries should be accounted for when measuring the incremental cost of production, to determine whether there can even be an allegation of below-cost pricing in the first place. Accordingly, antitrust counsel in high-tech industries should continue to carefully consider whether their bundled discounts are lawful under the Sherman Act, where competitors can still potentially argue that a product's bundled price is actually below-cost, once fixed research and development costs are allocated to the cost of production.

The Ninth Circuit's decision left open an important question – whether the substantial fixed costs of research and development in high-tech industries should be accounted for when measuring the incremental cost of production, to determine whether there can even be an allegation of below-cost pricing in the first place.

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Is Your Company the Victim of A Secret Price-Fixing Conspiracy?

By Jason Hartley and Merril Hirsh

Subscribers to *The Antitrust Counselor* know the importance of making sure that their own companies comply with antitrust laws. They develop in-house protocols to guide their sales staffs about what is and what is not legal. They conduct seminars. They keep an open door when employees have questions, and try to instill a culture of competition and compliance with the antitrust laws. But while they talk with their sales staff about what *the company* should not be doing, it is also prudent to talk with their purchasing staff about what *the company's vendors* should not be doing.

It is relatively rare, but not unheard of, for large companies typically used to defending antitrust claims to pursue them as plaintiffs in the right circumstances. There are myriad incentives for using the antitrust laws in an affirmative way, such as the promotion of fair competition among suppliers to obtain the lowest input costs, and the potential to turn an in-house legal department into a money-making department. By being aware and informed, corporate counsel may be able not only to pursue a claim, but also to spot suspicious anticompetitive behavior before incurring millions of dollars in damages.

There are a number of ways in-house counsel can be proactive about protecting competition in the markets in which their company purchases. Counsel should maintain a close relationship with the company's senior purchasing agent, inquire and think critically about vendors' bids and pricing behavior, understand the law, and recognize tip-offs to collusive conduct. Some large companies

have already recognized the importance of vigilance with respect to monitoring their purchases. A proactive legal department generated many tens of millions of dollars in recoveries for Coca-Cola (a large purchaser, for example, of high fructose corn syrup) and, perhaps, still greater savings from obtaining competitive prices for the raw materials the company purchases moving forward. Other publicly traded companies that have actively pursued antitrust claims include Payless ShoeSource, Smithfield Foods, Johnson & Johnson, Jacuzzi Brands, Masimo and others.

By being aware and informed, corporate counsel may be able not only to pursue a claim, but also to spot suspicious anticompetitive behavior before incurring millions of dollars in damages.

What Vendors? What Products?

Not all of the company's purchases or inputs are likely to be subject to illegal price fixing conspiracies. Although there are a number of factors that make price fixing more or less likely, a few factors are especially worth thinking about as you review the products you buy. Generally, the products must compete with each other and be substitutable among the different manufacturers. Price-fixing does not usually work unless the products are substitutable. For example, a supplier of mechanical stapling machines used in printing is unlikely to gain much by agreeing to raise prices along with a supplier of hand staplers use by schoolchildren, because an increase in the price of one would not have an impact on the prices or sales of the other. Thus, there isn't much of an incentive for them to agree to set prices. But if two suppliers of steel who normally compete agreed to raise prices together, that is much more likely to benefit them both by allowing each to charge higher prices. When it comes to potential price fixing agreements, companies should pay particularly close attention to their purchases in product markets where a number of vendors sell products that are easy to substitute for each other.

The number of competing vendors selling the product is also important. A conspiracy is more likely to arise in a market with relatively few sellers, such as five or fewer. When there are too many sellers, it is hard to police a conspiracy and difficult to keep all of the conspirators from cheating on the conspiracy by doing things like unilaterally reducing prices to gain market share (in other words, competing). When there are few sellers, the illicit agreement to raise prices rather than to compete for business with lower prices is much easier to initiate and to enforce.

A market with high entry barriers is also more conducive to price fixing. When there are no high barriers to entry, such as the need for a large distribution network or the investment in expensive machinery to manufacture the product, it is easier for new entrants (not part of the conspiracy) to start competing. Thus, we have seen conspiracies arise in the chemical industry where expensive machinery or patent licenses are necessary to manufacture chemicals or inputs are hard to get, but we have not seen conspiracies among coffee shops, which are quite easy to open and relatively cheap to run.

Price-fixing is more likely when industries are experiencing bad times. When life is good and the phone is ringing, there is less incentive to fix prices. When times are bad (and in most industries, that's now), companies become more desperate, competition gets called "ruinous," and "cooperation" looks more attractive. Many price fixing conspiracies begin not as an effort to raise prices, but as one to keep prices from falling while demand is dropping. Conspiracies to stabilize prices (even ones to keep prices from going down as much as they would otherwise) are every bit as illegal as those to raise prices.

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Tip-Offs

Vendors can artificially and illegally manipulate the market in a number of ways, including by agreeing to fix the prices of the products they sell, by agreeing to limit output, by allocating customers or geographic markets, or by bid-rigging. There are a number of things conspirators might do to show their conspiratorial hand. These are some of the things that a company should look for when evaluating suspicious behavior between two or more vendors. An illicit conspiracy could be the true explanation when different vendors have similar prices, identical credit terms, identical terms of sale, identical discounts or rebates, or agreed-upon price differentials between types, sizes or quantities of products.

It is not illegal for competing vendors to decide on their own to match each other's prices – what *is* illegal is for them to do it by agreement rather than independently. Look for activity that might suggest more than just coincidental agreement. In some markets, it may be a red flag that all the vendors raise their prices by exactly the same amount. Timing can make price increases even more suspicious. If all the competitors raise prices on the same day, or repeatedly on sequential days, or in the same order, or (conversely) seem always to take turns -- and all follow regardless of the opportunities to use a competitor's price increase to increase market share -- it is worth wondering about. Examine the price increase announcements from competing vendors. If they use identical language, typeface, or stationery then they might be conspiring. In at least one real life instance, several vendors somehow managed to have *the same typo* in their price increase letters. Increasing prices that do not relate to increases in raw material costs would also be suspicious. In fact, raw material prices are often helpful in identifying a conspiracy even if prices are not increased. Like declining demand, declining raw material prices is a reason why prices would be expected to drop in a competitive market. If, instead, prices stay the same, it may show that a force outside the market is working.

Vendors could also tip off a conspiracy by restricting the output of the product, by limiting production (such as idling a plant during a time that demand has not decreased), or even limiting research and development. When supply is limited, and demand is static or increasing, prices will rise.

Allocating customers (sometimes called "sacred cows") among the vendors is another way prices can be artificially stabilized or increased. This might be the explanation when a vendor refuses to bid or sell product to a company that is already being serviced by a competing vendor. Geographic markets might be allocated when co-conspirators agree that only one of them can serve a particular region in exchange for another exclusively serving another region. Allocation can also exist among products within a market or quality levels of a certain product as well.

Finally, conspirators sometimes attempt to put on a façade of competition by submitting bids that are in fact rigged. If one vendor's bid is wildly different from its competitor (or, conversely, consistently just a little bit more), it might be a "complementary bid," which is meant to ensure the competitor got the business from that allocated customer. Bid-rigging can also include bid suppression and bid allocation, where the profits over a number of bids are shared. Be on the look-out for instances where the same companies solicit business while others do not.

Longtime Conduct

That vendors have priced a certain way for years does not make it legal. Explanations from clients that "it's always been done that way" might explain why the suspicious behavior went unnoticed, but it does not tell you whether it was legal. Many antitrust cases result in certified class periods in excess of ten years. The statute of limitations for civil antitrust claims under federal law is four years, but if the conspiracy was secret and explanations for price increases were fraudulent, then the statute may be stayed due to fraudulent concealment by the sellers. In those cases, the conspiracy period could go back a decade or more.

The odds of identifying a potential antitrust claim or reducing the chance of victimization increase by being intimately familiar with the purchasing side of your company's business.

Things You Can Do

Because these conspiracies are usually secret, companies are generally unknowing victims. In order to go from unknowing to suspicious, identify the tip-offs to a conspiracy mentioned above. The odds of identifying a potential antitrust claim or reducing the chance of victimization increase by being intimately familiar with the purchasing side of your company's business. You can help protect yourself from price fixing by expanding your list of bidders. Maintain procurement records so you can compare past behavior with current behavior to uncover suspect changes. Chart the pattern of bidding over time, comparing the various terms to uncover tip-offs to a conspiracy. If anything you find raises questions, ask the vendors and listen to their answers. At best it might be an accounting error that was unknown to both sides; at worst it might make the vendor participants to a conspiracy nervous and encourage them to abandon it. Meet with your purchasing agents and make them aware of the signs of a potential conspiracy. Develop or work with outside counsel on a checklist they can use to detect price fixing. Teach detecting price fixing as effectively to the purchasing department as you advise the sales department on how to avoid antitrust violations. After all, the purchasing agents are the ones on the front lines who know the vendors and the market best.

Finally, be aware of the vendors' market. Familiarity with that market will help you call out vendors' claims of raw material price increases when those prices might actually be falling. Price fixing conspiracies tend to hit related markets at the same time, particularly when there is an overlapping supplier. For example, a criminal investigation of the rubber chemicals market eventually yielded civil antitrust class actions in the plastic additives, rubber chemicals, urethanes, NBR, and EPDM markets, all of which shared a common defendant supplier. Understanding one market with suspicious pricing behavior might lead you to other markets served by one or more of the same vendors. By the same token, it is a good idea to monitor the investigations at the DOJ, FTC and even your state Attorney General's office if it is active in antitrust enforcement. (Some particularly active state Attorney General offices include California, New York, Connecticut and Florida). Criminal liability usually gives rise to civil liability and damages for the victims of the anticompetitive conduct.

Do Unto Others….

It should go without saying, but will be repeated here nonetheless, that conduct giving rise to an antitrust claim could also give rise to antitrust liability. The conduct identified above as red flags to anticompetitive behavior apply just as well to conduct within your own company. It is a good idea

for sales staff to be aware of what can lead to antitrust claims and try to avoid even the appearance of impropriety.

Conclusion

It may take some extra effort, but the benefit to understanding and making your purchasing agents understand a potential antitrust claim could save the company a lot of money and help them negotiate the best prices from their vendors. By following some of these directions and discussing suspicious behavior with your outside antitrust counsel, you too may be able to turn an in-house legal department into a money making department.

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Don't Miss the Corporate Counseling Committee's Upcoming CFIUS Program!

The Most Important Merger Filing You May Never Have Done:
Committee on Foreign Investment in the United States (CFIUS) Fundamentals

Date/Time: Thursday, October 22, 2009, 12:00 p.m. – 1:00 p.m. ET

Location: Jones Day, 51 Louisiana Avenue, NW
Washington, DC 20001-2113

CFIUS is an inter-agency committee authorized to review transactions that could result in control of a U.S. business by a foreign person, to determine the effect of the transaction on U.S. national security. Evaluating whether to submit a notice to CFIUS (sometimes referred to as an Exon-Florio filing) often occurs at the same time, and can overlap with, the Hart-Scott-Rodino Act and market analysis done by antitrust counsel, and it can have just as significant an impact on whether a transaction is viable. The CFIUS process has been the subject of significant reforms over the past several years.

The program features both experienced government attorneys who will provide an inside view of the regulatory parameters and process, as well as seasoned practitioners who have evaluated the regulatory risks and developed successful filing strategies.

To RSVP please e-mail Paula Martucci at paula.martucci@wal-mart.com

Canada Modernizes Its Resale Price Maintenance Rules

By Neil Campbell and Larry Markowitz

Following the recommendations of the 2008 Competition Policy Review Panel,[1] the March 2009 amendments to the Canadian *Competition Act* repealed the criminal offence of price maintenance.[2] In its place, a new, non-criminal price maintenance provision has been introduced which allows the Competition Tribunal to review and prohibit such a practice.[3] This brings the treatment of vertical price restrictions into line with vertical non-price restrictions[4] and modern economic thinking.[5]

The Canadian Competition Act no longer prohibits price maintenance unless it has had, is having or is likely to have, an "adverse effect on competition" in a market.

Overview of the Changes

Previously, price maintenance was a *per se* offence. The Act explicitly prohibited attempts to influence prices upwards, whether by way of agreement, promise, threat, or other similar means. It also prohibited refusals to supply or discrimination motivated by the customer's low pricing practices. The penalty was a fine in the discretion of the court (no maximum) and/or five years' imprisonment. The Act also provided for a private right of action for injured parties to recover damages.

The Act no longer prohibits price maintenance unless it has had, is having or is likely to have an "adverse effect on competition" in a market. This test already existed under the refusal to deal provision of the Act,[6] and is easier to prove than the "substantial lessening or prevention of competition" test applicable in the other civil reviewable provisions of the Act.[7] However, the

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[1] Competition Policy Review Panel, "*Compete to Win,*" Final Report, June 2008, at http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html.

[2] Formerly *Competition Act*, RSC 1985, c. C-34, s. 61. This amendment was included as part of the Federal Government's 2009 Budget Implementation Act (Bill C-10), which overhauled numerous provisions in the *Competition Act*. Among other changes, the amendments also repealed the criminal offences of predatory pricing and price discrimination. Such activities are no longer problematic unless undertaken as part of an abuse of a dominant position. For a detailed discussion of the amendments, see Campbell, N. and O'Carroll, S., "The Americanization of Canada's Competition Act," *Canadian Business Law Journal*, December 2009 (forthcoming).

[3] *Competition Act*, s. 76, as amended by Bill C-10.

[4] See the reviewable practices of Refusal to Deal, Tied Selling, Exclusive Dealing, Market Restriction and Abuse of Dominance in Part VIII of the *Competition Act*.

[5] See *e.g.* Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002), Chapters Six and Seven. The United States Supreme Court also noted in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 127 S. Ct. 2705 (2007) that, "Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance […] The few recent studies documenting the competitive effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule."

[6] *Competition Act*, para. 75 (1)(e).

[7] See *B-Filer Inc. et al. v. The Bank of Nova Scotia.,* 2006 Comp. Trib. 42, in which the Tribunal stated (at paras. 207 and 211) that in a competitive market, although a refusal to deal removes one potential supplier from the marketplace, the effects may be negligible, since one less firm selling a product may go unnoticed or may allow for a profitable opportunity for entry by a new firm. On the other hand, if remaining market

Competition Tribunal has interpreted the test as requiring the creation, maintenance or enhancement of market power in the market in which the customer refused supply was operating, not merely an elimination or impairment of the customer's ability to compete. The same approach is likely to be applied to the new price maintenance provision.

The amendments make two other changes which also reduce the situations in which the price maintenance provision will apply. The Act now provides that the person must actually have engaged in the conduct; mere attempts to influence prices upward are no longer problematic. In addition, the new provision only applies to supplier-customer situations (*i.e.* "resale price maintenance"), whereas the prior criminal offence also covered horizontal interactions (*e.g.* one competitor pressuring another to raise its prices).

The new provisions also allow a private party to seek leave from the Competition Tribunal to start a private action.[8] In practice, we expect that the Commissioner of Competition will only initiate proceedings where a broad market impact is observable and that most proceedings will be brought by customers who have been terminated. This has been the experience under the Refusal to Supply provision since a private right of action was introduced in 2002. If the Tribunal determines the respondent has engaged in price maintenance, it may order the respondent to stop engaging in the practice and/or continue to supply the customer on usual trade terms. However, the Tribunal has no authority to impose fines or award damages.

Suggested Resale Prices

The new civil regime continues to make available a defence for a supplier that suggests a resale price or minimum resale price for its product. The defence will be available if the supplier makes it clear that the reseller is under no obligation to accept the suggestion and that their business relations would in no way suffer if the suggestion is not followed.

Implications for Business

The amendments to Canada's price maintenance rules provide suppliers with substantial new flexibility in their pricing decisions. Manufacturers will be able to impose actual or minimum prices on their wholesalers,[9] retailers and other resellers unless and until prohibited on the basis of demonstrated adverse effects on competition. When combined with the recent removal of rigid price discrimination / promotional allowance offences, it is timely for firms to take a fresh look at

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participants are placed in a position of created, enhanced or preserved market power, then the effect may be considered "adverse", even if not "substantial." Thus, the difference between an adverse effect on competition and a substantial effect is the degree of the effect. This approach was confirmed and elaborated in *Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited v. Groupe Westco Inc. and Groupe Dynaco, Coopérative Agroalimentaire and Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc.*, 2008 Comp. Trib. 7. For a brief commentary on this decision, see McMillan Competition Group, "Tribunal decision affirms market power required in order to succeed in 'refusal to deal' case," September 2009. Available online at: <http://www.mcmillan.ca/Upload/Publication/Tribunal_Decision_Affirms_Market_Power_0909.pdf>.

[8] *Competition Act*, s. 103.1. The other reviewable practices in the *Competition Act* for which a private right of action is available with leave are Refusal to Deal, Exclusive Dealing, Tied Selling and Market Restriction.

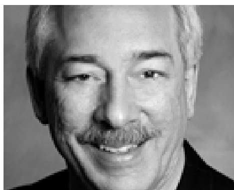
[9] Maximum prices have historically been and will continue to be lawful under Canadian competition law.

their Canadian pricing strategies. While firms with a substantial market share should still note that there are large fines for violations of the abuse of dominance provision of the Act,[10] that provision requires evidence of a predatory, exclusionary or disciplinary "practice of anti-competitive acts,"[11] and price maintenance (or price discrimination) will rarely have such effects.

North American Pricing Strategies

The conversion of price maintenance from "*per se*" to "rule of reason" conduct by the United States Supreme Court in the *Leegin case*[12] provided suppliers with considerably more scope to set resale prices in the US (subject to various continuing state law restrictions). This resulted in a different standard between Canada and the United States that required firms selling into Canada and their Canadian subsidiaries to operate continental distribution chains carefully because of the stricter laws in force in Canada.

The recent amendments to Canada's *Competition Act* more closely align U.S. and Canadian standards by removing price maintenance practices from the criminal law and placing them in a context where such practices are dealt with by the Tribunal only in the rare cases where anti-competitive effects result. This allows for greater flexibility in crafting pricing programs on a North American basis. For example, unilateral minimum advertised pricing policies (MAPPs) may now be used in Canada, unless and until prohibited by the Competition Tribunal on the basis of adverse effects on competition. Such policies have long been used in the United States, but would have been caught under the previous Canadian price maintenance rules.



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[10] *Competition Act*, s. 79.

[11] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] 2 F.C.R. 3 at para. 77.

[12] In *Leegin, supra* note 5, the United States Supreme Court overturned a nearly century-old ban on setting minimum resale prices. The Court stated that a manufacturer's agreement with a retailer to sell products of the manufacturer at or above a specified minimum price is no longer *per se* illegal. Instead, minimum resale price agreements are to be evaluated on a case-by-case basis under the "rule of reason," which allows potential benefits to competition to be weighed against potential anti-competitive effects.

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Nothing contained in this Newsletter is to be considered to be the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel.

You may also contact us by emailing our editor, Eric Stock at ejstock@hhlaw.com

The Corporate Counseling Committee is Sponsoring the First of a Six Part Program on Mergers from Strategy to Hearing: "The Urge to Merge -- Antitrust Counseling on the Decision to Merge"

Date/Time: Thursday, October 29, 2009, 12:00 p.m. – 1:00 p.m. ET

Location: A call-in brown bag

This first program will focus on the role of antitrust counsel in making the decision if and how to enter into a merger, joint venture other collaboration. Issues include: (1) doing the initial antitrust analysis, including assessing overlaps and vertical concerns and determining whether and where the transaction triggers notification requirements; (2) counseling when the transaction is not notifiable; (3) antitrust counsel's role in the negotiations and drafting of agreements; (4) considerations that go into making the go/no-go decision and risk assessment; (5) counseling on document creation and control; (6) due diligence/gun jumping concerns related to information-sharing during preliminary stages; (7) considering potential remedies up front, identifying assets that may have to be divested; and (8) when and how to retain and use experts.

To RSVP please e-mail Aryeh Friedman at friedma@wyeth.com