ANTITRUST AND TRADE REGULATION BRIEFING

By
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HIGHLIGHT

Supreme Court To Revisit Minimum Resale Price Maintenance, Address IPO Practices

On December 7, 2006, the U.S. Supreme Court agreed to hear arguments in a case questioning whether minimum resale price maintenance agreements should continue to be treated as automatically, or *per se*, illegal. Minimum resale price maintenance agreements have been illegal *per se*, regardless of whether they are shown to harm competition, for nearly 100 years. The Supreme Court's ruling in the case could produce a major change in the law.

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* the plaintiff retailer alleged that the defendant manufacturer had illegally insisted that plaintiff not lower its price for certain goods below a minimum level. Plaintiff won at trial and on appeal without having to prove that the resale price maintenance had increased prices to consumers or caused some other competitive injury. The appeals court noted that "because the [Supreme] Court has consistently applied the *per se* rule to such agreements," it was bound to find that the minimum resale price maintenance was automatically illegal under the antitrust laws.

The defendants argued that minimum resale price maintenance should no longer be considered *per se* illegal in light of modern antitrust developments. They cited other recent Supreme Court cases which have limited the application of long-standing but increasingly criticized antitrust rules, such as the presumption of market power in patent-tying cases and the rule of *per se* illegality for maximum resale price agreements. The Supreme Court's decision to hear the case suggests that it may approve a more flexible test for minimum resale price agreements, aimed at assessing their economic impact.

The *Leegin* case brings the number of antitrust cases before the Supreme Court this term to four. The Supreme Court recently announced that it would also decide a case alleging an "epic Wall Street conspiracy" among leading U.S. underwriters of initial public stock offerings to "grossly inflate[ ] the price of the securities after the IPO's." In *Billing v. Credit Suisse First Boston*, the appeals court decided that the defendants could not claim implied immunity from the plaintiffs' antitrust claims based on federal securities law. The defendants had argued that because the Securities Exchange Commission has the power to regulate the allegedly illegal conduct, parallel antitrust actions should be foreclosed.

The Supreme Court is already considering two other antitrust cases. One involves alleged predatory bidding by a company hoping to drive up its rivals' costs for raw materials. The other involves whether a plaintiff alleging an antitrust conspiracy must allege facts establishing that parallel conduct is the result of an agreement. Both cases were argued in late November 2006, with opinions to issue in 2007.

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Lawsuit Against Realtors To Proceed

A federal judge has ruled that a government lawsuit against the National Association of Realtors can go forward. The lawsuit filed by the Antitrust Division of the U.S. Department of Justice alleges that the NAR has illegally adopted rules that discourage brokers from offering lower cost Internet-based services and passing on the savings to consumers in the form of reduced commissions or discounts. The NAR rules prohibit any broker participating in a multiple listing service from conveying a listing to his or her customers via the Internet unless the listing broker agrees. As a result, a traditional real estate broker could prevent a competitor from providing over the Internet the same multiple listing service information that could be provided to a customer in person or by any other non-Internet means. The NAR rules also permit multiple listing services to degrade the quality of the data stream provided to brokers in a way that would undercut efforts to provide enhanced customer service over the Internet.

The NAR argued that the lawsuit should be dismissed because the rules theoretically leave member brokers free to act independently. The court disagreed, finding that "the NAR regime is backed up by sanctions and further is alleged to promote, inter alia, express and tacit anti-competitive collusion and to provide a NAR-created mechanism to punish overly aggressive competition from any Internet-based broker."

The suit against the NAR is part of a larger effort by the government to prevent anti-competitive conduct in the real estate industry. Separately, the Federal Trade Commission recently filed administrative complaints against two large real estate groups alleging that they illegally agreed to prevent nontraditional listings from being transmitted from the multiple listing service to the Web.

Antitrust Modernization Report To Issue To Congress

The Antitrust Modernization Commission established to consider recommendations for updating and improving U.S. antitrust law and enforcement agency practices is scheduled to issue its report in April 2007. The report is expected to include specific suggestions to Congress for important statutory amendments. One area where significant changes are likely to be recommended is in the Robinson-Patman Act, which prohibits sellers from discriminating in price between different buyers of similar goods. The Robinson-Patman Act is widely considered to be an out-of-date ban on conduct that may benefit competition, and has been only minimally enforced by the government in recent years. The Antitrust Modernization Commission may recommend repealing the Robinson-Patman Act outright, or making less sweeping adjustments aimed at limiting the law's scope.
The Antitrust Modernization Commission's report may also recommend changes in the law that would make it easier for indirect purchasers – purchasers who bought from a middleman – to sue a manufacturer for damages arising out of antitrust violations. Under federal law, and the law of many states (including Rhode Island), such indirect purchaser suits are barred. Many other states allow indirect purchasers to sue for damages, however, and allowing such suits at the federal level could help protect companies from having to defend multiple indirect purchaser suits in different state courts around the country.

Supreme Court Lets Revocation Of Corporate Leniency Stand

The Supreme Court recently declined to hear the case of a company that entered into a conditional leniency agreement with the Antitrust Division, pursuant to the corporate leniency program that encourages self-reporting of potential antitrust violations to the government. After the company provided information that aided the government's prosecution of other companies and their executives, the government revoked the agreement, asserting that the company had not done enough to terminate its own anti-competitive activities when they were first brought to the company's attention. A federal court initially ruled that the company had not breached the conditions of the leniency program and could not be prosecuted, but an appeals court reversed, holding that the courts lacked jurisdiction to enjoin the criminal prosecution. The Supreme Court's inaction means that the prosecution of the company can proceed.

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