Antitrust Law Blog
Current Antitrust News & Regulatory Developments
Presented By SheppardMullin

Antitrust Law Blog

June 16, 2011 by Helen Cho Eckert

Ninth Circuit Rejects Consumer Antitrust Challenge To Cable Television Bundling

The Ninth Circuit recently affirmed the dismissal of a consumer class action challenging the television programming industry's practice of exclusively offering multi-channel cable packages. *Brantley v. NBC Universal, Inc.* No. 09-56785 (9th Cir. June 3, 2011). In so holding, the Court affirmed that allegations regarding widespread harm to consumers (either through increased prices, reduced choice, or both) -- without some separate, cognizable injury to competition -- fail to state a Section 1, Sherman Act claim.

Brantley involved a putative nationwide class of consumers suing two groups of industry participants: (1) programmers in the upstream market who sell television channels and programs to distributors; and (2) distributors in the downstream retail market who sell the programming to consumers. Plaintiffs alleged that programmers exploit market power derived from "must-have," high-demand channels by bundling or tying them with less desirable, low-demand channels for sale to distributors, forcing distributors in turn to sell only higher-priced, multi-channel packages to consumers. Plaintiffs alleged that in the absence of such bundling, distributors would offer "a la carte programming" to meet consumer demand, thereby allowing consumers to purchase only those channels they wish to watch. Defendants' vertical restraints thereby reduce consumer choice, raise prices, and limit competition between distributors. Indeed, plaintiffs cited to third party findings (including from the FCC) that the average cable subscriber is forced to pay for 85 channels that he does not watch to obtain the 16 he does, and that defendants' bundling results in a net consumer welfare loss of $100 million.

In affirming dismissal, the Ninth Circuit held that given plaintiffs' conscious decision not to allege any foreclosure of competitors, plaintiffs could not plead the requisite injury to competition.1[1] Courts have identified horizontal collusion and foreclosure of rivals as the two types of injury to competition sufficient to state a Section 1 claim. While vertical restraints *may* result in foreclosure of rivals, they do not necessarily do so. The two types of vertical restraints implicated here -- tying and bundling -- may result in such injury to competition if: (1) for tying, the seller leverages its market power in the tying product to exclude other sellers of the tied product; or (2) for bundling, the bundler is able to use discounting, for example, to exclude rivals who do not sell as great a number of product lines. Applied to the facts of this case, the Court found neither allegations that programmers' practice of tying "must-have" with low-demand channels excluded other sellers of low-demand channels from the market, nor allegations that defendants' bundling excluded competitors from either the upstream or downstream markets.

Plaintiffs urged the Court to adopt an alternative theory of injury to competition. That is, defendants' conduct harms consumers by: (1) limiting the manner in which distributors compete with one another; (2) reducing consumer choice; and (3) increasing prices. The Court, however, rejected each argument in turn. Relying on *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 US 877 (2007), it explained that limitations on distributors' ability to compete, without proof of competitive harm, fails to state an antitrust claim. With respect to harm to consumers, it explained that price increases and reduced choice are perfectly consistent with a free, competitive market, and, without more, fail to state an antitrust claim. While the alleged harm to consumers may establish *antitrust injury*, it does not establish any cognizable *injury to competition*. Even if consumers are forced to purchase multi-channel packages that include unwanted channels for a higher price, the antitrust laws do not interfere with the ability of businesses to choose the manner in which they do business, absent an injury to competition.

By Helen Cho Eckert

2[1] While a prior iteration of plaintiffs' complaint specifically alleged that defendants' conduct foreclosed independent programmers from entering the market for programming channels, after preliminary discovery on this issue, plaintiffs amended their complaint to delete all such allegations, and instead sought an affirmative ruling from the trial court that plaintiffs need not allege such foreclosure.