

RIM Defeats Sherman Act Section 2 Claims At Pleading Stage

December 28, 2011 by Thomas D. Nevins

In “the latest installment in a contentious litigation”, defendant Research In Motion recently obtained an order granting its motion to dismiss plaintiff Eaton’s claims that RIM violated Section 2 of the Sherman Act and equivalent portions of New York’s Donnelly Act. *Eatoni Ergonomics, Inc. v. Research In Motion Corp.*, No. 08-Civ. 10079 (WHP) (S.D.N.Y. Dec. 5, 2011), Memorandum and Order, p. 1 (Pauley, J.).

The course of this litigation began with RIM filing an action in 2005 for a declaratory judgment that it had not infringed Eaton’s ‘317 patent for a “reduced QWERTY” keyboard and supporting software. That case settled with Eaton granting a license to the ‘317 patent to RIM and a release of all claims of infringement. Further disputes resulted in an arbitration that led to RIM agreeing to collaborate with plaintiff on the development of a mutually agreed upon product. RIM’s management rejected the resulting joint design. Eaton then filed this suit in 2008.

Infringing A Patent As Maintenance Of Monopoly Power

Eatoni alleged that RIM’s alleged infringement of plaintiff’s ‘317 patent constituted an antitrust violation. Plaintiff’s theory of liability was contained in a treatise stating that “in some limited circumstances, the costs of intellectual property infringement . . . on intellectual property owners can create significant barriers to entry, facilitating maintenance of monopoly power.” *Op. at 5*, quoting H. Hovenkamp, et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* 11-59 (2d ed. 2010).

The court found that plaintiff had not alleged facts supporting such a contention. *Op.* at 5 (“Eatoni has not plausibly alleged that RIM’s purported infringement imposed substantial costs or barriers to entry”). In addition, the court stated that no court had ever adopted such a theory, and refused to do so itself. *Op.* at 5 (“the court has not found any case in which patent infringement has been considered anticompetitive conduct”).

Even assuming that the infringement of a patent could present sufficient foreclosure opportunities to constitute exclusionary power, in the court’s view the claim was defeated by plaintiff having given defendant a license to the ‘317 patent and a “full and complete release” of claims, including “any past, current, or future claims” for patent infringement. *Op.* at 6. Plaintiff’s allegation that RIM infringed the ‘317 patent was precluded by the license and release.

Refusal To Deal

Eatoni also asserted Section 2 liability based on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 427 U.S. 585 (1985). Plaintiff described *Aspen Skiing* as standing for the proposition that a monopolist’s refusal to deal is anticompetitive when the parties were previously engaged in a “cooperative venture.” *Opinion* at 6-7. Eatoni argued that RIM’s refusal to develop a joint product with plaintiff facilitated defendant’s willful maintenance of monopoly power.

The court noted that *Aspen Skiing* is “at or near the outer boundary of § 2 liability.” *Op.* at 7, quoting *Verizon Communications v. Trinko*, 540 U.S. 398, 409 (2004). A unilateral refusal deal is typically lawful. *Op.* at 6 (citing cases). That rule applied here. No duty to deal had arisen here because the unique facts in *Aspen Skiing* were absent – there was no lengthy commercial relationship causing dependence like *Aspen Skiing*. *Op.* at 7. Nor does it appear that plaintiff sufficiently alleged facts supporting an inference that defendant’s motives were exclusionary, such as the allegation of forfeiture of short term gains in *Aspen Skiing*, or that the rejection of the joint design was without a procompetitive justification.

Combination Of Lawful Acts As Unlawful

Plaintiff also asserted that unilateral acts that were lawful individually could be “aggregated into an unlawful ‘course of conduct.’” *Op.* at 8. Plaintiff relied on *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962) (antitrust plaintiff “should be given the full benefit of [its] proofs without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each”).

The court restricted the language from *Continental Ore*, which concerned evaluating unlawful acts in the context of related facts, “to ‘evaluating the character and effect of a conspiracy.’” *Op.* at 8, quoting *Continental Ore*, 370 U.S. at 699. The court rejected the argument that the Supreme Court held that lawful conduct could be combined with other lawful conduct to violate the antitrust laws. One cannot create something by adding nothing to nothing. *Op.* at 8. “[T]he sum of zero and zero is zero” *Id.*

Essential Facility

Eatoni’s final liability theory was that RIM’s proprietary Blackberry platform was an essential facility for plaintiff’s keyboard technology. The court did not address whether the essential facility doctrine survived *Trinko*, 540 U.S. 398. Instead, it rejected plaintiff’s theory on two grounds: the antitrust laws did not require RIM to share its intellectual property (*Op.* at 9, citing *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1204 (2d Cir. 1982)); and RIM’s platform was not essential to plaintiff, there being a number of companies that manufactured smart phones, such as Samsung, Motorola and Nokia. *Id.*