

Antitrust Advisory: Failure to Prove Relevant Market Ends Tenants' Challenge to AT&T Exclusive MDU Agreements

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On February 22, 2010, the U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of a proposed antitrust class action against a telecommunications company for its alleged illegal restraint on trade and attempt to monopolize the market, holding that an apartment complex does not constitute a relevant geographic market for antitrust purposes. *Wampler v. Southwestern Bell Tel. Co.*, No. 09-50208-cv (5th Cir., Feb. 22, 2010).

Background

Pursuant to a contract with the owner of an apartment building, AT&T was granted exclusive rights to provide video, voice, and broadband Internet (“Triple Play”) services to the residents of that building, and exclusive access to the copper wire, coaxial, and fiber optic cables entering the building. In exchange, AT&T paid a “door fee” to the building owner. Plaintiffs, residents of the apartment building, alleged that AT&T violated §1 of the Sherman Act by entering into the exclusive agreement which allegedly limited their access to alternate sources of Triple Play services. The proposed class spanned five states and included residents of multiple dwelling units (MDUs) where AT&T and the MDU owners had entered into similar exclusive Triple Play contracts.

On February 10, 2009, the district court granted Defendants’ motion to dismiss.

The Fifth Circuit’s Decision

On appeal, the Fifth Circuit affirmed the district court’s dismissal, holding that a single MDU is not so segregated as to be economically significant, and therefore does not represent a plausible geographic market for antitrust purposes.

Citing the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Fifth Circuit found that in order to survive a motion to dismiss, plaintiffs asserting a Sherman Act §1 violation must allege (1) a conspiracy, (2) a restraint on trade resulting from the conspiracy, and (3) that trade was restrained in the relevant market (which itself is a function of the relevant product market and the relevant geographic market).

Citing the Supreme Court and its own prior decisions, the Fifth Circuit noted that the relevant geographic market is defined as the area of effective competition in which a seller operates and to which buyers can practicably turn for supplies. The Fifth Circuit also cited the Supreme Court’s holding that the proposed market must be economically significant and correspond to the commercial realities of the industry.

The district court, in reaching its decision to dismiss, relied exclusively on the Fifth Circuit's decision in *Apani Sw. Inc. v. Coca-Cola Enters.*, 300 F.3d 620 (5th Cir. 2002). In *Apani*, the Fifth Circuit held that a proposed market has economic significance if it is "largely segregated from, independent of, or not affected by competition elsewhere." In that case, the Fifth Circuit held that a bottled-water business on a city-owned facility was not a plausible relevant market because the "bottled-water was not limited by its size, cumbersomeness, or perishability to just the facilities owned by the city... [and that the] bottled-water business on those facilities was not economically segregated or insulated from the sale of bottled-water elsewhere in the city."

Affirming the district court in the instant case, the Fifth Circuit held that "there are too many competitive forces bearing on [the AT&T contracts] for a single MDU to be sufficiently isolated and thus economically significant." Specifically, (1) MDU owners have an incentive to provide the lowest-cost and highest-quality Triple Play services because MDUs compete with each other to attract tenants, (2) it is in the interest of telecommunications service providers to provide lower-cost and higher-quality Triple Play services because they compete with each other for contracts with the MDUs, and (3) the cost and quality of Triple Play services may be a factor when tenants choose between MDUs because tenants have the opportunity to inquire about such services when signing leases. The Fifth Circuit further concluded that even when a Triple Play contract is entered into by an MDU owner in the middle of a particular tenant's lease, that tenant is usually locked-in to the services for only a brief time since most leases rarely last more than one year.

The Fifth Circuit therefore affirmed the dismissal for failure to properly allege a relevant geographic market as required to state a Sherman Act §1 claim.

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