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HIGHLIGHT

U.S. Supreme Court Addresses Manufacturer Price Discrimination

The U.S. Supreme Court has issued a ruling rejecting a distributor's allegations of illegal price discrimination by a manufacturer. Reeder-Simco GMC, Inc., a seller of heavy duty trucks manufactured by Volvo, won a $4 million jury award on its claim that Volvo had illegally favored other distributors by offering them larger discounts than the discounts offered to Reeder-Simco. The jury agreed that Volvo's discounts violated the federal Robinson-Patman Act. The appeals court affirmed the verdict, reasoning that Reeder-Simco had presented enough evidence for the jury to conclude that it would have sold more trucks and made higher profits if it had received the larger discounts. The Supreme Court overturned the jury's award, holding that Volvo could offer different discounts to different distributors as long as the distributors were not competing for the same customers and lacked market power. The court stated that while the Robinson-Patman Act targets "perceived harm to competition occasioned by powerful buyers" who use their leverage to secure low prices not available to their competitors, it does not apply to cases in which "there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands." *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*

RECENT DEVELOPMENTS

Joint Venture Pricing Scrutinized In January, the U.S. Supreme Court heard oral arguments in a case involving a pricing agreement between joint venture partners. After Texaco and Shell began to jointly refine and market gasoline, with the approval of the Federal Trade Commission and several state attorneys general, the joint venture partners decided to sell both brands at the same price. The Ninth Circuit Court of Appeals ruled that the price coordination was a *per se* violation of Section 1 of the Sherman Act. The Supreme Court's decision, when issued, may provide useful guidance on the difficult question of when pricing and other agreements restricting competition between joint venture partners are reasonably related to the procompetitive goals of the joint venture. *Texaco Inc. v. Dagher; Shell Oil Co. v. Dagher.*

Supreme Court Rules on Patent Tying A manufacturer of patented printheads used to print bar codes on boxes required its patent licensees to also purchase ink from the manufacturer. The United States Court of Appeals for the Federal Circuit in Washington, D.C., allowed a lawsuit against the manufacturer to go forward on the theory that the patent could be presumed to give the manufacturer market power in the market for the printheads, and therefore the ability to illegally tie sales of printheads to sales of ink. The U.S. Supreme Court reversed the appeals court, holding that market power could not be presumed from the existence of the patent. The decision overturns a long-established presumption and gives patent holders new protection from expensive antitrust litigation. *Illinois Tool Works v. Independent Ink, Inc.*

Drug Companies Sued Over Generic Access The Federal Trade Commission has sued two drug manufacturers over an alleged agreement not to compete. According to the FTC complaint, Barr Laboratories planned to introduce a generic version of a branded oral contraceptive sold by Warner Chilcott. Facing imminent competition, Warner Chilcott allegedly offered to pay Barr $20 million to refrain

from selling its approved generic version of the contraceptive for five years and to supply Warner Chilcott if Warner Chilcott so requested. The FTC claims that Barr's agreement with Warner Chilcott is a naked restraint of trade. *FTC v. Warner Chilcott Holdings Co. III, Ltd.* (U.S. District Court for the District of Columbia).

Hospitals Sued Over Agreement The Justice Department announced in February that it had filed a lawsuit alleging that an agreement between two hospital corporations illegally allocated a regional market for cardiac surgery services. According to the complaint, the operator of the sixth largest cardiac surgery program in the United States persuaded a potential competitor to enter into an agreement that prevented the competitor from opening a new cardiac surgery facility nearby. In return, the potential competitor was promised support for unrelated programs elsewhere. The hospitals agreed to a proposed consent decree canceling their market allocation agreement. *United States v. Charleston Area Medical Center, Inc.*

FTC Finds Doctors Fixed Prices The Federal Trade Commission recently issued an order requiring a physicians group to cease and desist from certain conduct the FTC held illegally enhanced the collective bargaining power of the group's members. The conduct included taking polls on prospective fees and communicating the results to individual physicians; exercising a right of first negotiation with payors and inhibiting separate negotiations by individual doctors; and refusing to forward payor offers that the group considered unacceptable. The order also requires the group to terminate affected contracts with payors. *Matter of North Texas Specialty Physicians.*

U.S. Pursues Case Against Realtors The Justice Department filed a brief in February in support of its lawsuit against the National Association of Realtors. The suit alleges that the NAR has illegally restrained trade by allowing individual brokers to impose restrictions on the ability of competing brokers to offer multiple listing service information over the internet. The NAR has moved to dismiss the Justice Department's complaint, arguing that there is nothing illegal about allowing individual members of the association to keep their listings off the internet. *United States v. National Association of Realtors.*

Package Licensing Allowed The Court of Appeals for the Federal Circuit recently held that a package license tying essential and nonessential patents is not unlawful unless there is evidence of actual foreclosure of competing technologies for the tied patents. In *U.S. Philips Corporation v. International Trade Commission*, the ITC determined that Philips used an illegal tying arrangement because it required potential licensees of Philips' patents for the manufacture of compact disks to license both essential and nonessential patents as a package, rather than allowing them to choose individual patents and pay a corresponding royalty. The Federal Circuit disagreed, stating that "[i]f there are no commercially practicable alternatives to the allegedly nonessential patents, packaging those patents together with so-called essential patents can have no anticompetitive effect in the marketplace, because no competition for a viable alternative product is foreclosed." The court also observed that package licensing may promote efficiency where innovative technology is involved because it avoids future disputes about whether the "licensee's technology infringes certain ancillary patents owned by the licensor that are not part of the groups elected by the licensee."

Patent Settlement Approved The U.S. Court of Appeals for the Second Circuit recently rejected arguments that an agreement settling patent infringement litigation relating to the drug tamoxifen illegally suppressed competition from generic drug manufacturers. The settlement included a substantial reverse payment from the patent holder to the alleged infringer. The court held that a reverse payment by itself did not make the agreement unlawful, and focused on the question of whether the settlement expanded the scope of the patent or restricted the marketing of unrelated products. The settlement agreement was lawful, according to the court, because it included "nothing that would place it beyond the legitimate exclusionary scope" of the existing patent. *In re Tamoxifen Citrate Antitrust Litigation.*

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