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U.S. Court of Appeals Rejects Antitrust Challenge to Tiered Bundling of Cable Networks

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It has long been the subject of fierce debate whether cable television and DBS distributors should be forced to unbundle their program tiers and sell channels to subscribers on an "*a la carte*" basis, and in turn whether major programmers should be forbidden from conditioning the licensing of their most popular, "must-have" networks on cable and DBS operators' carriage of their less popular ones. While most often fought on a policy basis before the Federal Communications Commission, the issue also has played out in the courts.

On June 3, 2011, in *Brantley et al. v. NBC Universal, Inc. et al.*, a three judge panel of the United States Court of Appeals for the Ninth Circuit, in San Francisco, issued a unanimous opinion holding that consumer plaintiffs who brought a class action to force the unbundling of cable and DBS operators' program tiers had failed to adequately plead an antitrust claim against either the operators or programmers named as defendants in the suit. The plaintiffs have vowed to seek rehearing of the panel's decision by the full Court of Appeals, *en banc*, and if necessary to seek *certiorari* review by the U.S. Supreme Court.

The plaintiffs' complaint

The Plaintiffs, ten cable and DBS subscribers, brought a class action suit against major cable network owners, including Disney, Fox Entertainment Group, NBC Universal, Time Warner, Turner Entertainment Group and Viacom (Programmers) and multi-channel distributors, including Cablevision Systems, Comcast, Cox, DirecTV, EchoStar and Time Warner Cable (Distributors). Plaintiffs alleged that Programmers' practice of forcing distributors to carry unwanted, less desirable networks in order to be allowed to distribute "must-have" channels, and Distributors' practice of requiring consumers to subscribe to large, bundled tiers of networks, violated Section 1 of the Sherman Act. Programmers' control over the must-have networks, Plaintiffs asserted, gave them market power to force Distributors to sell content in large bundles that include unwanted channels, thereby precluding Distributors from purchasing, and then distributing to subscribers, only the must-have programming. Plaintiffs contended that, in the absence of Programmers' bundling practice, Distributors would offer individual channels on an *a la carte* basis, which would allow subscribers to order only those channels that they wished to watch, instead of limiting Distributors' method of doing business, reducing customer choice, and raising prices to subscribers. Plaintiffs sought not only treble damages, but an injunction ordering Programmers to make their channels available on an individual, unbundled basis.

Injury to consumers not enough

Paying homage to the well established principle that the antitrust laws protect competition, not competitors, the Court outlined Plaintiffs' burden in the face of the Defendants' motion to dismiss: to show that the complaint (which had been amended three times) pleaded facts that, if proved, would establish not only that the challenged practices injured competitors and/or consumers (antitrust injury), but also that they caused "injury to competition", an essential element to a Section 1 antitrust claim. Indeed, as the Court noted, competitors may be hurt by practices that are the consequence of vigorous competition, and consumers may benefit even when a competitor is injured. While showing such antitrust injury is a necessary element of an antitrust plaintiff's case (to establish the litigant's standing to assert an antitrust claim), an antitrust plaintiff must also assert, and ultimately prove, that *competition* has been injured by the challenged practices. Reviewing Plaintiffs' allegations, the Court found that they came up short of the mark.

Plaintiffs' allegations fall short of the mark

Although Plaintiffs attempted, early in the litigation, to satisfy the injury to competition element by asserting that Programmers' practice of selling bundled cable channels foreclosed independent programmers from entering and competing in the market for programming channels, they abandoned that position after preliminary discovery. Thereafter, they contended instead that the sale of multi-channel packages harms consumers by (1) limiting the manner in which Distributors compete with one another because they are unable to offer *a la carte* programming, (2) thereby reducing customer choice, and (3) consequently increasing prices.

But the Court held that these allegations addressed only the issue of antitrust injury and not injury to competition, and therefore did not make out a Section 1 claim. First, the Court said that limitations on the way Distributors compete with one another do not alone necessarily constitute injury to competition; more must be alleged. "Although plaintiffs may be required to purchase bundles that include unwanted channels in lieu of purchasing individual cable channels, antitrust law recognizes the ability of businesses to choose the manner in which they do business absent an injury to competition."

Second, in a statement that already has some consumer bloggers fuming, the Court stated that allegations regarding harm to consumers, either in the form of reduced choice or increased prices, do not suffice absent some further showing because increased prices and lessened consumer choice may be fully consistent with competition. "…[T]he plaintiffs here have not explained how competition (rather than consumers) was injured by the widespread bundling practice." The Court distinguished Plaintiffs' allegations from the facts in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), where the Supreme Court held that "block-booking" and "tying" practices of major movie studios, which not only forced theater chains to buy unwanted movies to get hit movies but also *forced them to forego purchasing movies from other distributors*, resulted in harm not just to consumers but *to competition*, the element that the Court of Appeals

found wanting in the *Brantley* plaintiffs' claims.

Finally, the Court addressed Plaintiffs' assertion that most or all of Programmers and Distributors engage in bundling, which the Court referred to as "current market practice". Noting that Plaintiffs' third amended complaint contained no allegation that Programmers' sale of channels in bundles has any effect on other programmers' efforts to produce competitive programming channels, or on Distributors' competition on cost and quality of service, the Court concluded that Plaintiffs' allegations, while alleging harm to consumers, failed to show how such practice injured competition, a *sine qua non* for Plaintiffs' Section 1 claim. Absent that allegation, wrote Judge Ikuta, the case was nothing more than "a consumer protection class action masquerading as an antitrust suit."

The future of bundling

Plaintiffs have vowed to continue their fight, although the case seems an unlikely candidate for *en banc* reversal or Supreme Court review. While others may seek to challenge bundled tiers in different judicial circuits, and on new legal theories, the opinion comes at a time when the marketplace and technology may do more than legal challenges to promote new forms of choice in video programming.

For more information on this important decision, or its potential impact on your business, please contact your DWT attorney.