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Freeborn's Annual Review of Antitrust Decisions in the Seventh Circuit: January 2016 Part B – District Court Decisions

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

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Dear Reader,
As I noted in my introduction to Part A of the Antitrust Practice Team's 2015 annual review of antitrust decisions in the Seventh Circuit, both the court of appeals and the district courts have been very active in this area of the law. Consequently, we decided to release our annual review in two parts – Part A consisting of antitrust decisions by the Seventh Circuit during the past year and Part B consisting of antitrust decisions of the district courts within the Seventh Circuit. This release reviews the antitrust decisions by the district courts.

Some of the highlights of these decisions are as follows:

Fidlar Acquisitions Co. v. First American Data Tree LLC
This decision addressed whether the state action immunity doctrine applied to an exclusive arrangement with a sub-state government unit.

P&M Distributions, Inc. v. Prairie Farms Dairy, Inc.
The court addressed the important issue of whether a plaintiff need only plead the rough contours of a relevant market and market shares when there is direct evidence of anticompetitive effect.

In re Evanston Northwestern Corporation Antitrust Litigation
This decision addressed the outstanding issues involved in class certification following remand from the important Seventh Circuit decision in *Messner v. NorthShore University Health System*.

House of Brides, Inc. v. Alfred Angelo, Inc.
This case addressed the legality of resale price maintenance and price discrimination by a manufacturer which was also a competing distributor.

Rocha v. FedEx Corp.
This decision addressed the interesting issue of whether an employment agreement could be a tying product or, if it was, whether the defendant could have market power in such a product.

Weber-Stephen Products LLC v. Sears Holding Corp.
Insufficient facts of anticompetitive behavior resulted in the dismissal of monopolization and attempted monopolization claims.

American Needle, Inc. v. New Orleans Louisiana Saints
Upon remand after several appellate reviews, including the important Supreme Court decision addressing the application of the antitrust laws to a joint venture, the district court addressed the issue of whether direct evidence of anticompetitive effect can obviate the need for proving the relevant market and market shares. This is the second district court in the Seventh Circuit to do so in the past year.

In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation
This decision focuses on some of the key issues involved in approving a class action settlement.

Slep-Tone Entertainment Corp. v. Teddy O'Brien Inc.
This decision involved issues of antitrust standing and antitrust injury.

Avnet, Inc. v. Motio, Inc.
The court considered the appropriateness of amendments adding Walker Process and sham litigation counterclaims.

Woodman's Food Market, Inc. v. Clorox Co.
This case is one of the rare decisions addressing price discrimination under the Robinson-Patman Act.

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Fidlar Acquisition Co. v. First Am. Data Tree LLC, slip op. 4:12-cv-04099, 2014 WL 1281562 (C.D. Ill. March 28, 2012)

by Jeffery M. Cross and Tina Wills

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

A county recorder of deeds entered into an exclusive arrangement with a compiler of public records. One of that compiler's competitors filed a lawsuit against the recorder. The complaint alleged the recorder's contract with a software provider violated antitrust laws, because it granted a software provider the exclusive right to deliver the recorder's public records. Under this contract, the public could only get records by purchasing access from the software provider. Judge Sara Darrow of the Central District of Illinois heard the case.

The court denied the motion to dismiss the plaintiff's claim, citing Section 1 of the Sherman Antitrust Act. The court identified the elements of a Section 1 claim as: 1) a contract, combination, or conspiracy; 2) unreasonable restraint of trade in a relevant market; and 3) an accompanying injury. Judge Darrow found the complaint satisfied all three.

On the first element, the complaint alleged a contract between the recorder and the software provider. The second element was satisfied, because the contract did grant the software provider exclusive rights to disseminate the public records. The court found a reasonable inference could be drawn that this eliminated competition in the first-sale market of these records, which could be an unreasonable restraint on trade. For the third element, the complaint alleged that the plaintiff was charged higher rates than it would have been charged without the exclusive contract.

Notably, the court rejected the recorder's argument that it is immune from antitrust liability under the state action exemption. This exemption provides immunity for the imposition of market restraints by a state's legislature, judiciary, or executive branch, under principles of federalism. However, the court found that the recorder is a *sub*-state governmental entity—not the legislature, judiciary, or executive branch. Immunity only applies if the anticompetitive effects of the recorder's actions were a foreseeable result of a *law* or other *express authorization* by the state legislature.

Next, the court analyzed the state's statutes permitting the recorder of deeds to grant access to its public records for a charge. Because state action immunity is disfavored, the court closely scrutinized the relevant statutes. It wasn't clear if the recorder was authorized to grant exclusive rights to disseminate the public records to any entity. As a result, the court wouldn't consider state action immunity at the motion to dismiss stage.

The court also refused to dismiss the complaint based on the recorder's affirmative defense. The recorder argued that it could not have a monopoly over its own product: the county's public records. Judge Darrow reasoned that this argument did not address the claims in the complaint. Instead, it provided an affirmative defense. As a result, the court found it procedurally improper to consider this argument at the motion to dismiss stage.

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P&M Distributions, Inc. v. Prairie Farms Dairy, Inc., slip op. No. 11-3145, 2013 WL 5509191 (C.D. Ill. October 4, 2013)

by Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

Judge Richard Mills, of the Central District of Illinois, addressed whether an antitrust complaint contained enough facts to satisfy the *Twombly/Iqbal* standard on a motion to dismiss.

The case involved an alleged conspiracy among defendants. Prairie Farms operated a dairy production and supply business. It sold milk and other dairy products to schools and nursing homes through distributors—some of which it partially owned. The plaintiff was P&M Distributions, a distributor selling milk and other dairy products from the defendants. The complaint claimed a conspiracy to fix the price of milk sold to schools and nursing homes in markets controlled by the defendants. They allegedly did this by prohibiting their distributors and sub-distributors from bidding, or requiring them to submit inflated bids.

One of the first issues raised in Prairie Farms' defense was that it could not legally conspire with its main distributor, Muller-Pinehurst Dairy, Inc., under the *Copperweld* doctrine established by the Supreme Court. This doctrine had held that a parent and wholly owned subsidiary are a single entity for antitrust purposes. An agreement in restraint of trade requires two or more independent entities. Some lower courts had applied the *Copperweld* doctrine to situations where the parent had owned less than 100 percent but more than 50 percent of the subsidiary. Judge Mills noted, however, that the plaintiff had alleged that Prairie Farms owned only 50 percent of Muller-Pinehurst. This means its ownership would not bar an allegation of concerted action.

P&M alleged the defendants conspired to keep prices for certain nursing homes and school districts high by prohibiting it from submitting lower bids. For example, the plaintiff had alleged that the president of one of the main defendant distributors had told a P&M representative that another sub-distributor was to get the business and P&M could not bid, as this would drive down the price.

The plaintiff also alleged that one sub-distributor submitted a false bid at an inflated price. P&M also stated that, on another occasion, it was told to submit a false bid at a high price so another distributor would receive the business. In addition, the plaintiff alleged that it was given a list of prices it could not bid below for the nursing home business. Judge Mills concluded that the plaintiff had adequately alleged concerted action.

Prairie Farms argued that P&M failed to plead relevant antitrust markets. The defendants said that the markets asserted by plaintiff—sales to certain elementary and high schools in a four-county area, and nursing homes owned by a single corporation—were not properly defined. Prairie Farms also asserted that the alleged geographic markets ignored commercial realities.

Judge Mills referenced Seventh Circuit precedent, to conclude that the plaintiff only needed to show the rough contours of a relevant market and prove that the defendant commanded a substantial share of that market. If so, then direct evidence of anticompetitive effects could establish Prairie Farms' market power in lieu of the usual approach of a precisely defined relevant market and a monopoly market share.

Judge Mills also noted that, at the motion to dismiss stage, it wasn't known if the plaintiff's characterizations of the relevant market would prove accurate. However, he denied the motion to dismiss and accepted the plaintiff's allegations.

Finally, Prairie Farms argued that P&M had failed to allege an injury of the type that the antitrust laws were designed to prevent, for example, an injury to competition as a whole, out of which the plaintiff's injury flowed. Judge Mills disagreed. He found the plaintiff had alleged that the school district was damaged because it had to pay higher prices than it would have if there had been no conspiracy. The judge concluded that these allegations were sufficient to establish consumer injury and the standing of the plaintiff for this injury.

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In re Evanston Northwestern Corporation Antitrust Litigation, slip op. No. 1:07-CV-4446, 2013 WL 6490152 (N.D. Ill. December 10, 2013)

by Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

This decision, by Judge Edmond Chang of the Northern District of Illinois, involved certification of a class in an antitrust case.

Evanston Hospital was alleged to have violated Section 2 of the Sherman Act, and Section 7 of the Clayton Act, when it acquired Highland Park Hospital. District Court Judge Joan Lefkow had originally denied class certification. The plaintiffs then appealed to the Seventh Circuit, which reversed the trial court in a significant decision for class actions in antitrust cases: *Messner v. Northshore University Health System*, 669 F.3d 802 (7th Cir. 2012). Upon remand, the case was assigned to Judge Chang. The plaintiffs renewed their motion for certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure. They sought to certify a class of end-payors who purchased inpatient or outpatient care directly from the defendant hospitals.

One of the first issues confronting Judge Chang was what parts—if any—of Judge Lefkow's prior class ruling were still in play. In plaintiffs' view, Judge Lefkow's prior decisions on the typicality and adequacy requirements of Rule 23(a) should be followed. (The parties had previously agreed that Rule 23(a)'s requirements of numerosity and commonality were satisfied). It also argued that because the Seventh Circuit had determined that the plaintiffs had met Rule 23(b)'s requirement that common questions predominate—the only issue remaining was Rule 23(b)'s superiority requirement. The defendants asserted that the Seventh Circuit's vacation of Judge Lefkow's entire ruling meant that typicality, adequacy and superiority were all at issue.

Judge Chang concluded that Judge Lefkow's decision on typicality and adequacy was valid. Because the Seventh Circuit only addressed the predominance issue, its vacation of Judge Lefkow's decision had nothing to do with the merits of the prior order's analysis of these issues. Consequently, Judge Chang concluded that the only issue was whether a class action was superior to other methods for fairly and efficiently adjudicating the controversy.

Judge Chang noted that Rule 23(b) provides a non-exhaustive list of factors relevant to the superiority issue. He found this list implies that superiority is closely intertwined with predominance: the more that common issues predominate, the more likely a class action is the best vehicle for deciding an issue.

The defendant's chief argument against the superiority of class actions was that it had a right to arbitrate disputes on Managed Care Organizations (MCOs), with which it had contracts for health care services. The defendant also asserted that it had the right to arbitrate disputes raised by self-insured subscribers, whom it alleged were bound by the MCO contracts by equitable estoppel and agency. (The self-insureds would often use the MCOs as plan administrators).

Judge Chang rejected the defendant's argument. He found neither the MCOs nor the self-insureds were actual parties but only putative class members. As non-parties, they did not have the ability to make an adversarial presentation to the court on the arbitration issue. Judge Chang found he could address the merits of defendant's assertion that arbitration was superior to class litigation under two circumstances. First, if it was clear that the MCOs and self-insureds were required to arbitrate. Second, if it was clear that this arbitration could undermine class certification by knocking out a sizeable number of putative class members. However, he concluded that neither was the case.

The judge found there was substantial disagreement on whether the arbitration clauses applied to antitrust claims—or even if all of the MCOs had arbitration clauses. So Judge Chang concluded that the sensible course was to decide whether to certify the class without resolving the arbitration issues. After certification, the MCOs and self-insureds could be brought into the case to decide the arbitration issues. He noted that, if a significant number of MCOs and self-insureds are required to arbitrate, he could always decertify the class or create sub-classes later.

The defendant raised another argument on the superiority of proceeding as a class. This was whether several of the larger MCOs and self-insureds would want to individually control the litigation. Judge Chang recognized this might be *theoretically* possible, but that was not enough to prevent class certification.

Finally, the defendant argued that a certified class would be unmanageable, because there would be hundreds of mini-trials analyzing individual MCO contracts. Judge Chang rejected that argument, remarking that the Seventh Circuit had already rejected this.

The judge found that the Seventh Circuit had credited the testimony of the plaintiffs' expert economist. That meant he could use common evidence and a common methodology to show that all of the putative class members had suffered some impact or fact of damage. The Seventh Circuit reasoned that the expert's proposed methodology—a difference-in-differences analysis—would allow him to determine the antitrust impact on all plaintiffs covered by insurer contracts. This could be done by plugging in the price increases imposed by the contracts.

The Seventh Circuit had recognized that some contracts might require multiple difference-in-differences analyses. That could happen because price increases might not be uniform across all the services covered by the contracts, even those multiple analyses required only common evidence in the contract setting out the price increases. Judge Chang concluded that the Seventh Circuit's analysis obviated the need for multiple mini-trials. This made class certification superior to re-litigating liability in multiple individual proceedings.

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House of Brides, Inc. v. Alfred Angelo, Inc., slip op. No. 11 C 07824, 2014 WL 64657 (N.D. Ill. January 8, 2014)

by Verona M. Sandberg and Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

This decision by Judge John Tharp of the Northern District of Illinois addressed the pleading requirements for allegations of resale price maintenance and price discrimination. Judge Tharp granted defendant's motion to dismiss both alleged antitrust violations under Federal Rule of Civil Procedure 12(b)(6) for failure to allege sufficient facts to make the claims plausible under the *Twombly/Iqbal* pleading standard.

The plaintiff (House of Brides, or HOB) was a well-established brick and mortar and online retailer of bridal dresses. The defendant (Alfred Angelo, or AA) was a bridal dress manufacturer. HOB had carried AA's dresses for over 40 years. AA decided to begin selling dresses through its own retail outlets. AA imposed a minimum resale price maintenance policy on all of its other retailers. It established a minimum price policy (MPP) for sales through brick-and-mortar stores and a manufacturer's suggested retail price (MSRP) for online sales.

AA sought HOB's agreement to the new policies, but the retailer refused. As a result, AA ended its agreement with the plaintiff. HOB then alleged three things. First, its relationship was terminated because of complaints from other retailers. Second, AA and its other retailers were discounting dresses below the MPP and MSRP. Third, AA had set the MSRP for online sales higher than the MPP for brick-and-mortar stores. This meant HOB couldn't compete successfully online against brick-and-mortar stores.

On the allegation that the resale price maintenance policy violated Section 1 of the Sherman Act, Judge Tharp noted the Rule of Reason was the presumptive standard. He also concluded that the defendant was in a dual distribution arrangement with its retailers. AA was in a vertical relationship with its retailers—as the manufacturer of bridal dresses. It also was in a horizontal relationship—because AA sold dresses at retail. Judge Tharp concluded that the Rule of Reason applied to a dual distribution arrangement.

Judge Tharp noted that, to adequately allege a Section 1 violation, a plaintiff must allege, among other elements, an unreasonable restraint of trade in a relevant market. He held that the plaintiff failed to adequately plead sufficient facts to plausibly allege a relevant product market.

HOB asserted that AA's brand was the relevant product market. It alleged that the defendant's products were "highly differentiated" and "unique." It further characterized products carrying defendant's brand as having "an inelasticity of demand, and little cross-elasticity of demand between [AA's] products and demand for competing products." HOB also asserted that many customers "do not consider other accessories suitable substitutes." In addition, customers would not substitute other accessories for defendant's products: even in the face of a "significant, non-transitory increase in price" of AA's brand products.

Judge Tharp found these allegations conclusory. They fell short of plausibly drawing the boundaries of the relevant product market around a single brand. As for the Robinson-Patman Act price discrimination claims, Judge Tharp concluded the plaintiff was alleging a "secondary-line" claim: that HOB was treated differently than AA's favored purchasers. Central to the plaintiff's claim was that other distributors had not complied with the MSRP or the MMP, as had defendant.

Judge Tharp found these allegations fell short of stating a claim for a Robinson-Patman Act violation. To him, allegations that competitors had not complied with the resale price maintenance policy said nothing about whether the competitors paid a different price to purchase defendant's products than HOB did.

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Rocha v. FedEx Corp., 15 F. Supp. 3d 796 (N.D. Ill. January 27, 2014)

by Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

This decision involved allegations brought by an independent contractor against FedEx Corp., its various entities and employees. The plaintiff's complaint included allegations of a conspiracy in violation of Section 1 of the Sherman Act, and of tying in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. Chief Judge Ruben Castillo of the Northern District of Illinois dismissed the complaint. He concluded that it failed to allege a conspiracy to restrain trade because, 1) as a matter of law, employment as an independent contractor was not a tying product; and 2) even if employment *was* a tying product, there was no allegation that the defendant had sufficient market power in the tying product to force purchases of the tied product.

Rocha delivered packages for FedEx's Chicago terminal both as an employee and as an independent contractor. As an independent contractor, the plaintiff alleged he was required to enter into a Standard Operating Agreement. He stated the agreement allowed FedEx to take these actions: 1) approve or disapprove the independent contractors' vehicles, driver or helpers, and vehicle sales; 2) to assign pick-up and delivery stops to specific drivers; 3) to require the purchase of specific insurance plans; 4) to require drivers to perform service at certain times; and 5) to determine many other conditions of a contractor's employment. Rocha also alleged that independent contractors were required to buy various bundled products and services as part of the Business Support Package. This included scanners, vehicle washing services, locks, uniforms, driver's screenings, vehicle inspections, and auditing and mapping software services.

Chief Judge Castillo dismissed the plaintiff's allegations on a conspiracy to restrain trade. He found that any conspiracy among employees of FedEx and FedEx-owned entities failed as a matter of law. This was because an antitrust conspiracy among officers and employees of the same firm does not provide the plurality of actors among independent economic entities necessary for a violation of Section 1 of the Sherman Act. The plaintiff's complaint also alleged a conspiracy between FedEx and "dominant"

contractors and other manufacturers, vendors, suppliers, and service providers. Chief Judge Castillo found that the complaint's base assertion of conspiracy was accompanied by conclusory allegations of agreement, which were inadequate. First, the complaint did not allege with sufficient specificity who the so-called "dominant contractors" were, nor did it state the manufacturers, vendors, suppliers, and service providers involved. Second, the complaint failed to specify when the conspiracy allegedly took place.

Chief Judge Castillo also dismissed plaintiff's tying claim. He defined tying as an agreement by a party to sell one product, but only on the condition that the buyer also purchases a different or tied product. Although the Chief Judge noted that the Seventh Circuit had not addressed the question of whether an *employment agreement* could be a tying product, he found that the Second Circuit Court had. He cited the Second Circuit as reasoning that it was implausible to regard employment—which is a service that a plaintiff provides to a defendant, and for which the plaintiff is paid by the defendant—as something that comes within the definition of a tying "sale" by a defendant. The Judge found the Second Circuit's reasoning persuassive. That led him to conclude that the Standard Operating Agreement by which independent contractors sold their services to FedEx was not a tying product.

But even if this was true, Chief Judge Castillo concluded that the plaintiff's complaint failed. One of the critical elements of tying is forcing a purchaser to buy an unwanted product. This forcing must come from economic power derived from the market, not a contractual relationship that the plaintiff entered into voluntarily. Chief Judge Castillo found Rocha had voluntarily elected to participate in the Business Support Package. He purchased his vehicle and other services because of his contractual obligations, not because of any market power. Chief Judge Castillo concluded that Rocha's allegations might have stated a claim for breach of contract. However, Rocha did not establish that FedEx used its market power to force him to pay for unwanted products and services—a necessary element of a tying claim.

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Weber-Stephen Products LLC v. Sears Holding Corporation, slip op. No. 1:13-cv-1686, 2014 WL 656753 (N.D. Ill. February 20, 2014)

by Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

This case involved antitrust claims of monopolization and an attempt to monopolize. The case was brought by Sears as a counterclaim to Weber's charges of patent infringement. Judge Edmond Chang of the Northern District of Illinois denied Weber's motion to dismiss because Sears had not sufficiently pled monopoly power over the relevant market, or a dangerous probability of obtaining it. However, Judge Chang did grant Weber's motion to dismiss on the grounds that Sears had not provided enough facts to establish anticompetitive behavior or abuse of market power.

In 1998, Weber agreed to supply grills to Sears' retail stores. In 2012, Weber notified Sears that it intended to stop doing business with the company. Weber said it was ending the relationship because Sears was not devoting enough resources to its brand. Weber also claimed that Sears was luring customers into its stores by advertising Weber's products and then selling them Sears' own branded products. Sears, on the other hand, claimed that Weber's termination came on the heels of Sears' initial efforts to develop a competing grill.

Sears' competing grill gave rise to Weber's suit for patent infringement and Sears' counterclaim.

Sears alleged that outdoor gas grills could be divided in three segments. It characterized Weber's Genesis-brand grills as falling into the premium segment. Sears estimated that Weber's U.S. market share in that segment exceeded 70 percent. Weber contended these classifications were arbitrary and gerrymandered to give Weber this high a share. So Weber argued that Sears had not sufficiently pled that it held a monopoly over the relevant market—or the dangerous probability of obtaining it—which is necessary for an antitrust counterclaim.

Here is what Judge Chang concluded. Market definition is a deeply fact-intensive inquiry. On a motion to dismiss, Sears' allegations on market share must be accepted as true. He found that Sears had adequately pled the relevant market. The judge was less persuaded by Sears' allegations of monopoly power, but he concluded that these were adequate to meet the pleading standard.

Judge Chang noted that one of the accepted ways of proving market or monopoly power is to define a relevant market and then show the defendant's share "exceeds whatever threshold is important for the practice." Sears had offered only one factual assertion in support of Weber's monopoly power: that it had a more than 70 percent market share. He noted this single assertion was close to falling short of pleading sufficient facts. That's because it was well settled that if barriers to entry are low, a high market share does not necessarily signify market power.
He said, however, Weber's assertion that there were no barriers to entry was Weber's entire challenge to a finding of monopoly power. The judge concluded that—in light of Weber's cursory treatment of barriers to entry, and the general principle that monopoly power ordinarily could be inferred from a predominant share—Sears had adequately pled monopoly power.

Nevertheless, Judge Chang concluded that Sears had not adequately established sufficient facts on anticompetitive behavior or abuse of market power. He noted the crux of Sears' allegations was Weber's withdrawal of its products from Sears' stores and website. This claim falls within the principles of a refusal to deal, which--as a general rule--are lawful.

In exceptions to this general rule, Judge Chang focused on the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985). He described this as the leading case for Section 2 liability based on a refusal to deal. Judge Chang stated the monopolist ski-facility owner refused to deal with the other facility for the very purpose of maintaining its monopoly—even refusing to sell retail-priced tickets to its competitor.

Sears had described *Aspen* in its briefs as a case where the defendant's actions were followed by evidence of market contraction, which had an adverse impact on consumers. Judge Chang found that this anticompetitive effect was precisely what was missing from Sears' allegations. Unlike *Aspen*, where the only competitor was eliminated by the monopolist's acts, consumers had ample access to Weber's products: via non-Sears outlets, as well as Sears' own branded premium grills. He concluded that Sears' allegations that Weber's conduct had caused harm to consumers were conclusory, so they were not enough to adequately plead anticompetitive conduct.

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American Needle, Inc. v. New Orleans Louisiana Saints, slip op. No. 1:04-cv-7806, 2014 WL 1364022 (N.D. Ill. April 7, 2014)

by Jeffery M. Cross and Tina Wills

ABOUT THIS CASE STUDY:

Judge Sharon Johnson Coleman of the Northern District of Illinois denied cross-motions for summary judgment based on claims for antitrust violations brought under the Sherman Act. The motions were brought by the plaintiff, American Needle, Inc., and several defendants, including the National Football League, 30 of the league's 32 teams, NFL Properties and Reebok.

The NFL licenses its intellectual property through a separate entity: NFL Properties. Before this litigation, American Needle held licenses through a contract with NFL Properties to make and sell hats with NFL team logos. In 2000, the NFL sought bids for an exclusive licensing agreement. It eventually signed a contract with Reebok to exclusively make and sell NFL hats. As a result, NFL Properties did not renew American Needle's contract. American Needle brought the instant action. It claimed the new exclusive arrangement violated the Sherman Antitrust Act. After a series of appellate reviews, the only claim remaining was to determine if the exclusive arrangement unreasonably restrained trade.

American Needle moved for summary judgment. It argued that a violation of the Sherman Act based on an abbreviated review—versus a full Rule of Reason analysis—could be found. (An abbreviated review is appropriate if the anticompetitive effects of the restraint are obvious.)

The defendants responded, stating that many procompetitive effects resulted from the exclusive license arrangement. These included encouraging additional licensee commitments and improvements in product design, quality, distribution and style coordination. The court rejected American Needle's request for an abbreviated review, finding that the plausibility of procompetitive effects precluded this.

The defendants cross-moved for summary judgment. They argued that American Needle's claims should be dismissed because it failed to prove proper market definition and causation. The court rejected both arguments. Regarding market definition, the defendants stated that American Needle didn't demonstrate a proper product market, which was fatal to its claims under the Sherman Act. Judge Coleman noted that the purpose of inquiries into market definition and market power are to determine whether an arrangement has the potential for anticompetitive effects.

The judge concluded that direct evidence of anticompetitive effects obviated the need to inquire into market power. She stated the plaintiff had presented evidence of direct anticompetitive effects. This was based on information that showed, shortly after executing the exclusive arrangement, wholesale prices of hats rose by a significant degree and output dropped. Judge Coleman noted that the higher prices and lower output continued for years, never returning to pre-exclusivity levels.

The defendants responded that direct evidence of anticompetitive effects only eliminated the need for market definition in *horizontal restraint* cases. They argued that the case involved a *vertical restraint*, so market definition was necessary. The court disagreed. It said the Supreme Court had previously recognized horizontal elements in the case, and that those findings rendered American Needle's direct evidence sufficient to eliminate a need for market definition.

Judge Coleman added the Supreme Court had ruled that—despite using NFL Properties as a single agent to enter into the agreement with Reebok—the decision of each team to grant Reebok an exclusive license was a horizontal agreement among competing logo owners. She concluded that the presence of a vertical restraint (the agreement between NFL Properties and Reebok) did not change this horizontal element recognized by the Supreme Court.

The defendants also argued that the "direct evidence" of anticompetitive effect was subject to challenge. They indicated that American Needle had failed to address factors such as quality mix of the products sold. The court again disagreed. It found that any question about the quality of American Needle's direct evidence must be determined by a trier of fact, and not by the court at summary judgment.

The court also indicated that, to the extent a relevant product market definition might be a necessary element, American Needle had satisfied its burden. The company had pointed to the wholesale market for NFL trademarked hats as the relevant market. Although a subset of the NFL apparel market, the court considered the factors supplied by the Supreme Court in *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962) to determine the submarket's boundaries. The judge found that the NFL hat market was licensed separately from other apparel and often sold in retail outlets primarily focused on headwear sales. As such, the court concluded that hats are a submarket distinct from other apparel or non-apparel items.

In addition, Judge Coleman noted that the Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) had found that the willingness of merchants to pay a premium for advertising was evidence of the unique attractiveness of a sports league, suggesting a submarket. Judge Coleman stated that multiple manufacturers were in fact willing to pay substantial premiums to place NFL logos on their hats. As such, she concluded that NFL hats were distinct enough from unadorned hats or hats bearing other types of logos. Based on this, the court found that American Needle's market definition—if a market was necessary—was sufficient.

The defendants next argued that American Needle had failed to prove causation. They maintained that the licensing contract with American Needle would not have continued, even without the exclusive deal with Reebok. The court disagreed, finding a question of fact that the status quo—including American Needles' license agreement—would have remained absent the exclusive contract.

The defendants then argued that American Needle waived its claims by signing a document that permitted it to bid—alongside Reebok and others—to win the exclusive contract. The court found that the language in the bid document was not enough to show waiver of a Sherman Act claim.

For all of these reasons, the court denied both parties' motions for summary judgment.

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In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation, slip op. No. 1:13-cv-9116, MDL No. 2492, 2014 WL 7237208 (N.D. Ill. December 17, 2014)

by Jeffery M. Cross

ABOUT THIS CASE STUDY:

This opinion, by Judge John Z. Lee of the Northern District of Illinois, raises interesting questions confronting a court asked to preliminarily approve the settlement of a class action. The issues included the fairness and adequacy of conduct remedies to be implemented over a 50-year period by institutions that were non-parties. The case also involved the appropriateness of direct notice, when the identities of the members of the settlement class could be hard to find. Finally, the decision addressed the appropriateness of a defendant retaining unused funds when the settlement period ends. Ultimately, Judge Lee denied the motion for preliminary approval of the settlement, pending the parties' ability to address the court's concerns.

The plaintiffs were current and former collegiate athletes. They sued the NCAA on a class-wide basis, alleging breach of contractual obligations and common law duties. This was based on the way the NCAA's member institutions handled concussions while the plaintiffs were engaged in its sanctioned sporting events.

There was extensive discovery and mediation facilitated by two retired federal judges. This allowed the plaintiff class representatives and the NCAA to reach a settlement that involved declaratory relief in the form of future conduct. Consequently, the plaintiff sought preliminary approval of the settlement and certification of a so-called "hybrid" settlement class, under Rules 23(b)(2) and 23(d)(1). The first rule permits the court to order injunctive or declaratory relief. The second provides for the court to tailor notice provisions to the class, including direct notice and an opportunity to opt out.

The settlement included establishing a $70 million dollar fund for medical monitoring of student athletes who suffered concussions or were exposed to sub-concussive hits. The medical monitoring program was to last for 50 years. As the court noted, the research on brain damage from concussions demonstrates that individuals may be asymptomatic for many years. The settlement also provided that NCAA-member institutions would institute new return-to-play policies. These included pre-season baseline testing,

and the presence of medical personnel trained in the diagnosis, treatment, and management of concussions at all games of contact sports—as well as practices.

In return for setting up the medical evaluation fund and the change in return-to-play policies, the putative class members would release the NCAA and its members from any claims: 1) of damages or equitable relief for medical monitoring related to concussions or sub-concussive hits; and 2) seeking relief for personal injury on a class-wide basis.

One of the issues raised by Judge Lee was whether the NCAA had the authority to mandate that its members implement the return-to-play policies. He concluded that—to the extent a member school failed to comply with the provisions—it was unfair to provide the school with the *benefits* of the settlement without any of the *costs*. In that regard, he noted that a student-athlete should not be precluded from suing the school if the school refused to comply. The NCAA argued that such a scenario was unlikely. However, Judge Lee stated there was nothing in the record to enable him to make that determination.

Another issue raised by Judge Lee was whether direct notice to the putative class members was feasible. He noted the sheer breadth of the class definition made it hard to identify the individual class members. The class was estimated to be 4.2 million student-athletes who played NCAA-sanctioned sports. As part of the notice plan, the parties were to send a written request to all NCAA member schools, asking for the name and address of all current and former participants.

The parties acknowledged that they did not know whether and in what manner individual schools maintained this data. The further back in time that a student-athlete attended a school, the less likely it would be that schools would have up-to-date contact information. This was due in part to some class members moving or changing their names. Judge Lee noted that two-thirds of the proposed settlement class graduated from school more than 10 years ago. He also stated it was unclear if the NCAA had the authority to mandate schools to comply with the information request in a timely manner.

Given such a lack of information, the Judge could not determine the plausibility and appropriateness of direct notice. He ordered the parties to conduct a test by selecting nine schools—three from each college athletic division—and request this information. Judge Lee said such a sampling should provide additional information on whether a direct notice program would work.

Finally, he noted the settlement provided that if any of the $70 million dollars remained after 50 years, it would be returned to the NCAA. The Judge recognized that retention provisions created incentives to artificially curtail the number of medical evaluations, so there would be a balance at the end of the term. Consequently, he rejected this part of the settlement. He suggested the parties might agree to use any balance to extend the program, or donate the unused funds to concussion research.

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Your Future Is Our Purpose

Slep-Tone Entertainment Corp. v. Teddy O'Brian's Inc., slip op., No. 14 C 3570, 2015 WL 249368 (N.D. Ill. January 20, 2015)

by Jill C. Anderson and Jeffery M. Cross

ABOUT THIS CASE STUDY:

In this case, the district court dismissed antitrust counterclaims for lack of antitrust standing and antitrust injury.

Slep-Tone is a manufacturer of karaoke accompaniment music and related products. It sued Teddy O'Brian's, a bar, for trademark infringement and unfair competition. According to Slep-Tone, "karaoke jockeys" (KJs) that put on shows at Teddy O'Brian's used tracks that copied those manufactured by Slep-Tone. This profited Teddy O'Brian's and deprived Slep-Tone of royalties.

Teddy O'Brian's filed a counterclaim. It alleged that Slep-Tone and another manufacturer agreed to sue KJs who refused to work with them, and to sue venues that hire KJs affiliated with other manufacturers. The goal was to drive others out of the market and create barriers to entry.

Slep-Tone moved to dismiss on the grounds that Teddy O'Brian's had failed to allege either antitrust injury or antitrust standing. The district court agreed. With respect to injury, the court noted that the consumers of Slep-Tone's products were the KJs, not the defendant. Although the court acknowledged it was possible that the alleged conduct increased the price for KJ's services, Teddy O'Brian's had not specifically alleged as much.

Regardless, the court found that Teddy O'Brian's also lacked standing. This was because the KJs—not the venues—were "absorb[ing] most of [the] impact" of the alleged scheme to corner the karaoke track

manufacturing market. Any injury to Teddy O'Brian's, the court reasoned, is "too speculative and remote from the anticompetitive conduct to confer standing on defendant." *Id.* at *2.

The court distinguished this situation from *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). In that case, the Supreme Court held a plaintiff enrolled in a health plan that covered services by psychiatrists but not psychologists had standing to sue the insurer. This was based on the theory that the insurer was colluding with psychiatrists to keep psychologists out of the market. The district court reasoned that the plaintiff in *McCready* was much more analogous to the KJs (who were not parties here) than to Teddy O'Brian's.

As in *McCready*, the harm to the KJs was not only foreseeable but an integral step in achieving the allegedly purposeful goal of driving other karaoke track manufacturers out of the market. But the KJs were not pursuing the claim here. Rather, it was being pursued by their customer, whose injury was too far removed from the unlawful conduct to have standing to sue for it.

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Your Future Is Our Purpose

Avnet, Inc. v. Motio, Inc., slip op. No. 12 C 2100, 2015 WL 425442 (N.D. Ill. January 30, 2015)

by Jill C. Anderson and Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

In this patent infringement action, the defendant (Motio) moved to amend its pleading to add antitrust counterclaims for attempted monopolization and conspiracy in restraint of trade based on *Walker Process* fraud and sham litigation. To address the plaintiffs' argument that the amendment would be futile because the claims would not survive a motion to dismiss, the court made a detailed analysis of the new allegations.

With respect to the *Walker Process* claim under Section 2 of the Sherman Act[1], Motio alleged that Avnet obtained its patent by knowingly and willfully misrepresenting facts to the Patent Office. This included: 1) deliberately selecting search terms to exclude prior art; 2) making false and misleading statements about Motio's product; and 3) manufacturing a chat log to make it appear that Avnet had conceived of the invention before the prior art.

The court rejected Avnet's argument that, because the Patent Office did not actually rely on the chat log in issuing the patent, Motio could not establish materiality. Accepting Motio's allegations of fraud as true, the court noted "an exception to the 'but-for materiality' requirement of a fraud claim" for "affirmative egregious misconduct." *Id.* at *5. Motio alleged injury in the form of lost sales, costs in defending a bad-faith patent-infringement claim, increased cost of entry in the market, restricted output, and lessened competition.

1 A Walker Process claim arises from the filing of a lawsuit based upon a fraudulently acquired patent. See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

The second claim invoked the "sham litigation" exception to the Noerr-Pennington doctrine. This doctrine immunizes parties that petition the government for redress from antitrust liability. The court noted that a suit is a "sham" when it is both objectively baseless and subjectively motivated by a desire to cause anticompetitive injury. Here, Motio argued that the patent was procured by fraud, so the lawsuit was objectively baseless and motivated by a desire to push Motio out of the market. Based on the same claim of antitrust injury, the court found that Motio sufficiently stated a claim for attempted monopolization using "sham litigation".

Finally, Motio alleged an antitrust conspiracy in violation of Section 1 of the Sherman Act by the two plaintiffs: BSP and Avnet. BSP procured the patent and was the original plaintiff. When Avnet acquired BSP, it joined the lawsuit. Motio alleged that BSP represented to Avnet before the acquisition that, if this suit were successful, Avnet would have a monopoly in the market for certain products. As such, Motio alleged that the acquisition itself was a combination in restraint of trade. The court found these allegations—along with Motio's claim of resulting output restrictions and increased cost of entry—sufficient to withstand a motion to dismiss.

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Your Future Is Our Purpose

Woodman's Food Market, Inc. v. Clorox Co., slip op. No. 14-CV-734, 2015 WL 420296 (W.D. Wis. February 2, 2015)

by Jill C. Anderson and Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

The district court denied a motion to dismiss the complaint of a regional grocery chain. The plaintiff, Woodman's Food Market, alleged Clorox violated the Robinson-Patman Act, 15 U.S.C. § 13(d) and (e), by offering to sell "large pack" products only to club retailers—such as Costco and Sam's Club—but not to general market stores.

Large pack products are typically offered to customers at a lower cost per unit than those in smaller containers. Woodman's had previously bought large pack products from Clorox for resale. The plaintiff alleged Clorox announced a new policy preventing "general market retailers" such as Woodman's from buying large packs of most of its products at the large-pack unit price. This price was reserved for large-scale retailers like Costco and Sam's Club. Woodman's sued, alleging price discrimination under the Robinson-Patman Act. This Act generally prohibits sellers from paying allowances or furnishing services to promote the resale of its products—unless these allowances or services are made available to all competing customers on proportionately equal terms.

Clorox moved to dismiss the Robinson-Patman claims. It stated that large packs were not considered a promotional service under the Act. Woodman's countered that the large packs constituted special packaging that aids resale, which would be covered under the Act. Although no federal court had yet addressed the issue, Woodman's found support for its position in two old FTC administrative decisions involving cosmetics and coffee.

Finding the two FTC decisions directly on point, the court denied the motion to dismiss. Based on Woodman's allegations, the court found it "reasonable to conclude that the special size of Clorox's large packs is connected to the resale of those products." *Id.* at *5.

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