FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

RECENT U.S. DEVELOPMENTS: ILLINOIS BRICK AND STATE INDIRECT PURCHASER STATUTES

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In order for a plaintiff to bring an antitrust case, he must show he has suffered economic loss or damage. If, in the typical price-fixing case, the plaintiff who has been overcharged for merchandise merely adds this additional cost to the goods upon resale, there is an issue whether that party has truly suffered economic loss or damage. This aspect of the injury requirement in federal antitrust suits involves two related concepts: the "indirect purchaser doctrine" and its flip side– the "passing on" defense. "Indirect purchaser" cases typically involve a purchaser bringing an action against a defendant for price-fixing where the purchaser did not buy the product directly from the defendant. The "passing on" defense argues that the overcharged purchaser suffered no injury because it "passed on" the increase through higher prices to its customers.

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court limited the "passing on" defense to cases where the defendant could show that the plaintiff passed on the overcharge by raising its price, that its profit and sales were unaffected by the overcharge, and that it would not have raised its price but for the overcharge.

Nine years later, in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), the Supreme Court considered *Hanover Shoe* in deciding whether an indirect purchaser could claim antitrust injury because the intermediate seller had passed on the overcharge to it. In *Illinois Brick*, the State of Illinois and local governments were indirect purchasers of concrete block. They purchased products or contracted for construction into which the concrete block was incorporated by a prior purchaser; they did not purchase concrete block directly from the price-fixing defendants. In *Illinois Brick*, the Court applied *Hanover Shoe* and held that indirect purchasers were not entitled to recover under the antitrust laws because they did not suffer "injury" within the meaning of the *Clayton Act*, and that to hold otherwise would impose upon defendants the risk of multiple liability for the same overcharges. As in *Hanover Shoe*, the Court held an exception might exist when the indirect purchaser could establish that the direct purchaser passed on the overcharge to the indirect purchaser through a pre-existing cost-plus contract.

Illinois Brick also permitted two other exceptions:

(a) the "controlled entity" exception which allowed recovery by the indirect purchaser if it could prove that a member of the alleged conspiracy owned or controlled the direct purchaser; and
(b) the "co-conspirator" exception in which the indirect purchaser must show a conspiracy between the defendants and the direct purchasers.

The *Illinois Brick* decision brought about a swift and significant reaction with various legislative attempts in Congress to overturn the decision. Some states, such as Alabama, Arizona, California and Minnesota, authorized suits by indirect purchasers. Against this background, the U.S. Supreme Court decided *California* v. *Arc America Corp.*, 109 S.Ct. 1661 (1989).

In *Arc America* several states– the indirect purchasers– brought class actions against a number of cement manufacturers and their trade associations for a nationwide conspiracy to fix prices. They sought treble damages under the antitrust laws, and damages for violations of their

respective state antitrust laws. The Supreme Court reversed the Ninth Circuit and determined that the rule restricting federal antitrust recoveries to direct purchasers does not bar subsequent indirect purchasers from recovering damages for violations under state antitrust statutes.

In reaching this conclusion, the Supreme Court reasoned that the antitrust laws do not preempt state indirect purchaser statutes. No express preemption exists in this area of law. To assert that the state laws operate inconsistently with congressional objectives is a misreading of *Hanover Shoe* and *Illinois Brick*. Those cases merely construed the antitrust laws and never discussed state law or preemption standards or defined the relationship between federal and state law. Nothing in *Illinois Brick* suggests that permitting recoveries under state antitrust statutes would contravene congressional purposes.

The Supreme Court further reasoned that the state indirect purchaser statutes do not interfere with accomplishing the federal law purposes as identified in *Illinois Brick*. First, the state indirect purchaser statutes do not unnecessarily complicate antitrust litigation. The state statutes cannot and do not claim to affect available federal law remedies. The claims brought under state statutes can be brought in state courts, separately from federal actions. Moreover, federal courts have discretion in not extending pendent jurisdiction over state claims.

Second, the Court found that claims under the state statutes do not reduce the incentive of direct purchasers to bring private antitrust actions by reducing potential recoveries. *Illinois Brick* was not concerned with the risk that a federal plaintiff would recover only a partial damage award or receive a lower offer of settlement. That case focused on the concern that by dividing the recovery between indirect and direct purchasers under a single statute– Section 4 of the *Clayton Act*– insufficient incentive would exist for plaintiffs to sue under that statute. The state laws do not pose such a risk. Settlements which are intended to dispose of all claimants, whether claiming under federal or state law and whether direct or indirect purchasers, may reduce direct purchasers' recoveries because they will have to share the settlement fund. This is a practical result and is not due to the operation of state laws.

Third, the Court determined that claims under state laws will not contravene any express federal policy condemning multiple liability for antitrust defendants. *Illinois Brick* and similar cases simply construed Section 4 of the *Clayton Act*, and did not identify a federal policy against imposing state liability in addition to those imposed by federal law.

Conclusion

The *Arc America* decision does not change the landscape of antitrust litigation as radically as one would initially expect. *Arc America* allows the state indirect purchaser statutes to exist in tandem with federal antitrust laws. However, indirect purchasers may not recover under federal antitrust laws. Only under the laws of certain states, such as Alabama, California and Minnesota, may plaintiffs recover as indirect purchasers. In other states, such plaintiffs will continue to resort to various circuitous approaches, such as allegations of conspiracy between the defendants and unnamed direct purchasers from whom the plaintiffs bought the goods. Whether such approaches will yield recoveries to indirect purchasers remains to be seen.

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WRESTLING AND ANTITRUST IN THE U.S.

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Applying the antitrust law to professional sports, like any other attempt to push a square peg through a round hole, is bound to be troublesome.[1]

The popularity of professional wrestling in North America has followed a cyclical pattern for the past four decades with upswings beginning three decades apart. The penultimate boom

started in the late 1940s and was spawned by the concomitant boom in the sale of affordable TV sets for the home. In 1946, both the NBC and Dumont networks began featuring professional wrestling as part of their prime time fare. Like boxing, it was ideal for TV since it was confined to a small space. One of the first TV stars was Gorgeous George and, at its peak in this early cycle, wrestling was on prime time for eight hours a week.

Coincident with this TV boom was the formation of a federation of wrestling promoters operating throughout North America who first met informally in 1948 and then incorporated themselves as the National Wrestling Alliance (NWA) in 1951. The Alliance was, in fact, an international cartel in which the promoters agreed:

(a) not to enter into their colleagues' territories; and

(b) to assist each other with the loan of "talent" if a non-NWA interloper tried to set up shop in any NWA territory. (The promoters also met annually to decide who was to be that year's World Champion and how he would divide his time among territories.)

Despite the complaints of many (non-NWA) outsiders, this arrangement continued until October 15, 1956, when, after a Department of Justice investigation, the NWA signed a consent decree acknowledging the fact that members of the Alliance had violated the *Sherman Act* by operating a combination in restraint of trade. This voluntary agreement contrasts sharply with the conviction of the International Boxing Club of New York, Inc., one year earlier on the same charges.[2] Also of interest is the fact that in late 1955 Dumont carried its last wrestling show.

The Consent Decree enjoined all members of the NWA from (amongst other things):

- assigning to any promoter the exclusive rights to operate in a designated area;
- requiring, requesting or urging any promoter to promote wrestling exhibitions only through the services of members; and
- requiring, requesting or inducing any person to refuse to promote or book any wrestler.

For 30 years, the Department of Justice kept a watching brief on the activities of the NWA but did not bring any charges despite receiving many complaints from non-member promoters that they had been prevented from booking arenas because of exclusivity contracts and from certain wrestlers that they had been black-listed. Notwithstanding the complaints, an informal regional distribution of markets continued until the early 1980s.

Why was the Justice Department not active in this sport?

First, there was no public outrage at the claims of economic disadvantagement by some promoters and wrestlers. In fact, this situation might be a microcosm of the failed *Curt Flood* case against the baseball antitrust exemption.

> Flood's chances for success rested on the hope that a demonstration of changing attitude toward the sport– pitting the vulnerability of individual players against the deepening commercialism of their profession– might sway the Supreme Court to undertake a thorough-going reexamination of the grounds for its judicial restraint.[3]

Second, the case might not have been pursued because of the difficulty of obtaining evidence. Most wrestlers are in a precarious position. Very few have long-term contracts with promoters. Very few have developed such strong personae that they can go where they want and still be booked even if the promoter does not like them. (Profit is still the dominant motive of all promoters.) Thus, in Sam Rayburn's words, "those who want to get along have to go along."

Third, there might be a perception that State Athletic Commissions effectively control the sport (or "exhibition" as it is denominated in most states). This, however, would be a false perception. Approximately half of the states do not have Commissions and, in the states where they exist, the Commissions are mainly interested in collecting a percentage of the gross receipts. In fact, one regulated state, New Jersey, is about to deregulate wrestling.

Finally, and perhaps most logically, the explanation may be that economists in the Justice Department might have convinced the powers-that-be that there is only one thing sure about cartels– they will ultimately break down. It always pays a participant or an interloper to cheat and break the cartel's rules, be they formal or informal. In this case, the cheater appeared in 1984 in the form of Vince McMahon Jr. (whose father was one of the early members of the NWA and who started the Word Wrestling Federation [WWF]) when he

started promoting bouts and stealing talent in NWA areas outside of his, implicitly sanctioned, WWF territory of the Eastern seaboard. The first area he successfully entered was St. Louis and his first stolen talent was none other than Hulk Hogan, lured away from Verne Gagne in Minneapolis. Through the clever use of television and aggressive merchandising the WWF operated in 48 states, Canada and Europe. McMahon's activities have led to the bankruptcy of many regional promotors and he appeared to be heading to a monopoly position until December, 1988, when television czar Ted Turner entered the fray with the purchase of a major, but near-bankrupt, NWA promotion based in the Carolinas. Turner has already started hiring away talent from McMahon and he also has a major promotional weapon in the form of his Superstation in Atlanta (WTBS).

Does the preceding mean that the Department of Justice can cease their watching brief of the sport? Surely a non-cooperative duopoly is in the best interest of the consumer— better promotions and better value. The operative word is not-cooperative. Recent reports allege that McMahon and Turner have already had one telephone conversation about a truce. If such a rapprochement should come about, one hopes that the Justice Department will be quick to reopen its books.

Notes

1. Rivkin, Steven R., "Sports Leagues and Antitrust Laws", in Roger G. Noll ed. *Government and the Sports Business*, Washington, The Brookings Institution, 1974, p. 387.
2. *United States* v. *International Boxing Club of New York*, 348 U.S. 236 1955.
3. Rivkin, *op cit* p.408.

National Conference on The Centenary of Competition Law in Canada

October 24-25, 1989
Toronto, Ontario

This year marks the centenary of the first competition law enacted in Canada in May 1889. In recognition of this milestone, a National Conference on the Centenary of Competition Law in Canada will be held on October 24 and 24 in Toronto, Ontario. Conference sponsors include the Bureau of Competition Policy, the Institute for Research on Public Policy, the University of British Columbia, Blake, Cassels & Graydon, and Fraser & Beatty Legal Publications *(Canadian Competition Policy Record).*

The Conference will trace the evolution of the substantive provisions of the *Competition Act* (1986), evaluate the economic and legal interpretation of these provisions and explore directions for change in light of past experience and recent developments in the field. Plenary sessions and workshops will bring together leading practitioners, academics and government officials from Canada, the United States and other Western industrialized countries.

Topics to be covered include:

- Competition Policy as a Framework Policy
- Administrative and Enforcement Issues
- Competition Policy and International Markets
- Horizontal Restraints
- Vertical Restraints
- Regulation and Competition Policy
- Public vs. Private Enforcement of Competition Law
- Monopoly, Monopolization and Abuse of Dominant Position
- Deceptive Marketing Practices
- Mergers, Structural Change and Economic Efficiency
- Lessons from the Past and Current Experience of Other Countries

Conference Coordinators:

W.T. Stanbury (University of British Columbia), R.S. Khemani (Bureau of Competition Policy,) and D. Conklin (Institute for Research on Public Policy)

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