Loyola Consumer Law Review

Volume 9 | Issue 2 Article 5

1997

Conspiracy Claim Based Upon Previous Decree and Parallel Business Behavior Not Sufficient to Establish Antitrust Violation

Jennifer A. Hovaniec

claims fell under the "disputes" meant to be arbitrated under the Agreement. Furthermore, Pilkington contended that a court resolving PPG's claims would, inescapably, have to examine the application, meaning, and interpretation of the Agreement which was designated exclusively for arbitration in Article XII. Moreover, Pilkington noted that the motion was brought under the auspices of the Federal Arbitration Act ("FAA"). 9 U.S.C. §§ 1-16, 201-08. Pilkington argued that the FAA represents a federal policy favoring arbitration and that this policy "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Pilkington proceeded to argue that the federal law superseded the court's discretion, limiting its role to determinations of arbitrability and the enforcement of subsequent arbitration decisions.

Finally, Pilkington stated that the Agreement did not preclude the application of United States antitrust law during the arbitration. According to Pilkington, Article XII's provision that the arbitration would be "in accordance with the laws of England" referred to a choice of procedural law for the arbitration process rather than a choice of substantive law. Pilkington supported its position by referring the court to the language of Article XIII, which mandated English law as the law governing the provisions of the Agreement. Pilkington asserted that if Article XII mandated English law as substantive law, Article XIII would be redundant.

The court, based on the broad language of the Licensing Agreement and the federal policy favoring arbitration embodied in the FAA, especially in international commerce circumstances, granted Pilkington's motion to stay proceedings and compel arbitration. In doing so, the court rejected PPG's argument that *Mitsubishi* was distinguishable due to a much narrower arbitration agreement in the instant case. Also, the court remained unpersuaded by PPG's position that the prevailing law at the time the parties formed the 1962 Agreement controls as the primary indicator of the parties' intentions.

United States antitrust law not waived by agreement.

The court concluded that the language of Article XII refers to procedural rather than substantive law, accepting Pilkington's contention that to hold otherwise would render Article XIII a redundancy. The court acknowledged PPG's concern that the application of English law, which does not recognize the Sherman Act, would serve as a complete bar to PPG's recovery. Therefore, the court held that the Agreement does not preclude the application of United States antitrust law. However, the court remedied the situation by obtaining a stipulation from Pilkington that all arbitrations would be conducted by applying United States antitrust law as the substantive law relevant to the dispute, regardless of the conflict with correlating English law. Moreover, the court retained jurisdiction over the matter to ensure accordance with the court's decision.

Conspiracy claim based upon previous decree and parallel business behavior not sufficient to establish antitrust violation

by Jennifer A. Hovaniec

In ***Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954)**, the United States Supreme Court held that mere proof of parallel business behavior by motion picture producers and distributors does not conclusively establish a conspiracy to restrict first-run movies in violation of the Sherman Act. Additionally, the Court held that prior decrees involving the respondent motion picture producers and distributors ("respondents") are only prima facie evidence of an alleged

conspiracy and, without additional evidence to support an illegal agreement, cannot constitute a violation of the Sherman Act.

The petitioner ("Theatre Enterprises") owns and operates Crest Theater, located six miles from a downtown shopping center in Baltimore, Maryland. Crest Theater opened on February 26, 1949. Before and after the opening, the theater's president continually attempted to acquire first-run features for the theater. A first-run feature is the first exhibition of a movie in a particular geographical area. Approaching each of the respondents individually, Theatre Enterprises requested either a first-run feature or an arrangement which would allow two theaters to show a first-run at the same time. Adhering to its policy of restricting first-run features to downtown Baltimore theaters, each of the respondents denied Theatre Enterprises' request. Crest Theater needed an exclusive license to procure first-run features. The respondents refused to give Theatre Enterprises an exclusive license because they owned three downtown theaters which received first-run features.

Petitioner's argument of conspiracy theory proves unavailing

Theatre Enterprises filed suit, alleging that the respondents conspired to restrict first-run features to downtown Baltimore theaters, thereby violating the antitrust law(s). As a direct result, Theatre Enterprises contended that the respondents restricted it to subsequent runs and unreasonable clearances. In response, the respondents claimed that day and date first-runs are usually granted to only non-competing theaters. Since Crest Theater would compete with the downtown theaters, the arrangement would be economically unfeasible. Furthermore, the respondents stressed the improbability of any downtown exhibitor waiving its clearance rights—the period of time that must lapse between runs of the same feature in a specified area—and additionally agreeing to simultaneous showings. The respondents denied the existence of any collaboration and attributed the uniformity of their refusals to deal with Theatre Enterprises to individual business judgment and the pure economics of generating revenue, but not at the expense of consumers. The respondents introduced evidence that Crest Theater draws less than one tenth of the patrons of a downtown theater due to its location.

At trial, the jury found for the respondents. The Court of Appeals for the Fourth Circuit affirmed. The United States Supreme Court granted Theatre Enterprises' request for certiorari. Theatre Enterprises claimed that the trial judge erred in refusing to direct a verdict in its favor and in instructing the jury about the scope and effect of a previous decree against the respondents in *United States v. Paramount Pictures*, 334 U.S. 131 (1948). In *Paramount*, the respondents violated antitrust laws by conspiring to restrict first-run features and favorable clearances for themselves. Theatre Enterprises alleged that since the same respondents were found to have previously conspired to establish a uniform system of first-runs and clearances, use of the same means justified a finding of conspiracy in this case.

Mere uniformity of refusals does not constitute antitrust violation

The Court considered the critical issue to be whether the respondents' uniform refusal to give first-run features stemmed from independent business decisions or an illegal agreement. Business behavior is admissible evidence, and an agreement may be inferred from such evidence. However, proof of parallel business behavior does not conclusively establish an offense under the Sherman Act. Furthermore, the respondents introduced evidence establishing the reasonableness of their actions. Thus, the Court concluded that Theatre Enterprises could not exclusively rely upon the uniformity of the respondents' refusal to grant it a first-run feature to establish an antitrust violation.

Paramount decrees not sufficient to establish conspiracy

The Court held that no error existed in the jury instructions concerning the proper weight of the *Paramount* decrees. Section 5 of the Clayton Act provides that:

> [A] final judgment or decree rendered against a defendant in an equity suit brought by the United States under the antitrust laws 'shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such

defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.'

The trial court judge had admitted the decrees into evidence. However, he explained to the jury that the respondents had previously conspired to restrict first-runs and clearances in violation of the antitrust laws and that this violation could be used as prima facie evidence to support Theatre Enterprises' claim. The trial court judge, nonetheless, instructed the jury that Theatre Enterprises could not rely exclusively upon that evidence; it needed to affirmatively show that the respondents conspired to restrict Theatre Enterprises to unreasonable clearances or second-run features. The Court concluded the instructions did not deprive Theatre Enterprises of any of the benefits conferred by Section 5 of the Clayton Act.

Further, the Court noted that the *Paramount* decrees were not based upon any findings regarding first-run features or clearances in Baltimore theaters. Moreover, the conspiracy in the *Paramount* case existed as of 1945 and was enjoined by June 1948; the conspiracy alleged in the instant case began in February 1949. In order to prevail on a conspiracy charge, Theatre Enterprises needed to show additional evidence connecting the *Paramount* decrees to Theatre Enterprises. The Court explained that Theatre Enterprises could not rely entirely on its allegations of antitrust violations based solely upon a *previous* decree entered against the respondents.

In conclusion, a conspiracy under these circumstances, according to the Court, does not result from the mere uniformity of business behavior; a previous finding of a conspiracy does not conclusively establish a conspiracy. Accordingly, the Supreme Court affirmed the decision of the trial court and the Court of Appeals for the Fourth Circuit in favor of respondents.

District Court held Sherman Act will not reach conspiratorial conduct occurring solely in foreign jurisdictions

by Jennifer Bonjean

Editor's note:

The United States Court of Appeals for the First Circuit reversed and remanded the following decision on March 17, 1997. The court noted that whether the Government may seek criminal prosecution under Section 1 of the Sherman Act based solely on foreign activity is one of first impression. The court held that international conduct having "substantial and intended effect" within the United States borders may consitiute a criminal violation under Section 1. For further information, see ***United States v. Nippon Paper Industry Co., Ltd.*****, No. 96-2001, 1997 WL 109100 (1st Cir. (Mass.)).**

The United States Government brought a criminal indictment against Nippon Paper Industries Co., Ltd. ("Nippon"), a Japanese corporation, for violating Section 1 of the Sherman Act, 15 U.S.C. § 1 (1996). The Government alleged that in 1990, Nippon's predecessor, Jujo Paper Co., Inc. ("Jujo"), conspired to fix prices of fax paper sold in the United States. In ***United States v. Nippon Paper Industry Co., Ltd.*****, 944 F. Supp. 55 (D. Mass. 1996)**, the United States District Court for the District of Massachusetts granted Nippon's motion to dismiss. The court held that the Government failed to adequately plead its claim that Nippon established a vertical price fixing agreement with Japanese trading companies which ultimately sold Nippon's fax paper to American consumers. Furthermore, the court held that