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## *No antitrust violation absent a showing of harm from an "economically rational" predatory pricing conspiracy*

by Mary Grossman

To recover under the antitrust laws for harm caused by a predatory pricing conspiracy, a plaintiff must be able to demonstrate that the alleged conspiracy was economically rational. In *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), two American television manufacturers proved unable to convince the United States Supreme Court that twenty-one Japanese manufacturers who sold televisions for lower prices in the United States than in Japan had engaged in a predatory pricing conspiracy in violation of the antitrust laws because the alleged conspiracy was economically irrational.

In the five to four decision, the Supreme Court reversed the Third Circuit Court of Appeals and upheld the district court's grant of summary judgment in favor of the Japanese television manufacturers. The American manufacturers, Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE"), charged the Japanese manufacturers with conspiring to fix television prices at artificially low levels in the United States and artificially high levels in Japan in an attempt to drive American manufacturers from the market. The American manufacturers claimed that the Japanese manufacturers' pricing

policies violated the Sherman Act, the Robinson-Patman Act, the Wilson Tariff Act and the Antidumping Act of 1916. However, Zenith and NUE were unable to convince the Supreme Court that a genuine issue of material fact existed regarding the nature of the Japanese manufacturers' pricing policies.

The Japanese manufacturers moved for summary judgment after lengthy discovery. In considering the motion, the district court reviewed lists of evidence that both sides intended to produce at trial. The district court determined that most of the American manufacturers' evidence was inadmissible. In addition, the district court held that the remaining admissible evidence did not raise a genuine issue of material fact regarding the conspiracy allegations and granted the Japanese manufacturers' motion for summary judgment. The American manufacturers appealed to the Third Circuit Court of Appeals.

### **Possibility of conspiracy based on evidence noted by court of appeals**

The Third Circuit Court of Appeals reversed the district court. In reaching its decision, the court of appeals held that much of the excluded evidence was admissible

and should have been considered with regard to the motion for summary judgment. The court of appeals delineated six possible conclusions a reasonable fact finder could reach based upon the excluded evidence. All six conclusions supported the American manufacturers' conspiracy theory. First, the Japanese manufacturers could create both high prices and high profits in Japan which the American manufacturers could not undercut because of significant trade barriers erected by the Japanese government. Second, the Japanese manufacturers had higher fixed costs than Zenith and NUE, thereby requiring the Japanese manufacturers to operate at nearly full capacity to make a profit. Third, the Japanese manufacturers' plant capacity exceeded the demands of the Japanese market which, together with the second factor, gave the Japanese manufacturers a strong incentive to increase their sales in the United States. Fourth, the Japanese manufacturers had entered into agreements fixing the minimum prices for the sale of televisions in the United States. Fifth, each Japanese manufacturer agreed to sell through only five American distributors. Finally, the Japanese manufacturers undercut their own prices through a variety of rebate schemes, driving the prices charged in the

United States even lower.

The court of appeals decided that a reasonable fact finder could infer from these conclusions that the Japanese manufacturers conspired to depress prices and drive the American manufacturers out of the market. Since a reasonable fact finder could infer such a conspiracy, the court of appeals held that a genuine issue of material fact existed as to whether the Japanese manufacturers had violated the antitrust laws. Thus, the Third Circuit Court of Appeals reversed the district court's grant of the Japanese manufacturers' motion for summary judgment.

### **Supreme Court determines conspiracy theory economically irrational**

The Japanese manufacturers appealed the decision, and the Supreme Court granted certiorari to decide two issues. The Court's principal task was to determine whether the court of appeals properly evaluated the district court's decision to grant the Japanese manufacturers' motion for summary judgment. In addition, the Court granted certiorari to determine whether the Japanese manufacturers could be liable under the antitrust laws for a conspiracy compelled, at least in part, by a foreign government. The Supreme Court quickly disposed of the latter issue, ruling that insufficient evidence existed to establish a conspiracy which injured the American manufacturers and that even if a conspiracy existed, "American antitrust laws do not regulate the competitive price conditions of other nations' economies." The Supreme Court then

turned its attention to the summary judgment issue.

The Court held that in order to survive the motion for summary judgment, the American manufacturers should have demonstrated the existence of genuine issues of material fact as to whether the Japanese manufacturers illegally conspired against the American manufacturers and whether the alleged conspiracy injured the American manufacturers. The American manufacturers also should have demonstrated that the various alleged pricing conspiracies were actually predatory pricing conspiracies which harmed the American manufacturers. The Court expressed its skepticism that the American manufacturers suffered an "antitrust injury" at the hands of a predatory pricing conspiracy. The Court doubted the existence of such a conspiracy because the alleged conspiratorial activity would tend to benefit the American manufacturers. To overcome the motion for summary judgment, the Court indicated that the appellate court should have required more persuasive evidence from the American manufacturers supporting their claim because their "claim is one that simply makes no economic sense." The Court also noted that the court of appeals should have required evidence which would exclude the possibility of independent rather than conspiratorial action by the Japanese manufacturers.

The Supreme Court decided that the allegations of a predatory pricing conspiracy were most likely unfounded because they made no economic sense. The Court indicated that profits from a predatory pricing

conspiracy are speculative in nature. Since the Japanese manufacturers had been undercutting the Americans' prices for twenty years, it would have been irrational for the Japanese manufacturers to incur losses for twenty years because recovering from such large losses through later monopolistic profits would have been unlikely. The Court concluded that the Japanese manufacturers had no motive to incur losses without a reasonable expectation of recovering those losses. It was more likely that the Japanese manufacturers were able to sell at lower prices, not because they were selling at a loss under a predatory pricing agreement, but because their costs were lower than American manufacturing costs. Thus, the Court did not agree that the low prices charged by the Japanese manufacturers indicated the existence of a predatory pricing conspiracy designed to drive the American manufacturers out of the market.

When the Supreme Court described the alleged predatory pricing conspiracy to drive the American manufacturers out of the market as economically irrational, the Americans' challenge to the Japanese manufacturers' motion for summary judgment was doomed. The Court held that the American manufacturers had been unable to demonstrate any other plausible motives for the alleged predatory pricing conspiracy. Since the American manufacturers proved unable to demonstrate a rational motive for the alleged conspiracy, no "genuine issue for trial" existed. Where a "genuine issue for trial" is not present, a grant of summary

judgment is appropriate. The Supreme Court, therefore, reversed the court of appeals and concurred with the district court's grant of summary judgment in favor of the Japanese manufacturers. Nonetheless, the Supreme Court remanded to the circuit court of appeals for consideration of other plausible motives for the alleged predatory pricing conspiracy. On remand, in *In re Japanese Products Antitrust Litigation*, 807 F.2d 44 (3d Cir. 1986), the court of appeals found no

other rational motives for the alleged conspiracy and, thus, no genuine issue for trial.

### Dissenting opinion

In their dissent, Justices White, Brennan, Blackmun, and Stevens faulted the majority's invasion of the fact finder's province. The American manufacturers presented evidence of the existence of the conspiracy and harm caused by the conspiracy. The dissenters contended that the Court

acted as the fact finder when it relied on its own "economic theorizing" over that of the American manufacturers' expert. The dissenters agreed with the court of appeals that the American manufacturers should have had the opportunity to present their evidence to a fact finder to decide whether the Japanese manufacturers used a predatory pricing conspiracy to violate the antitrust laws.

## *Sufficiently stated antitrust claims held arbitrable under licensing agreement*

by Alex Goldman

In *PPG Industries, Inc. v. Pilkington plc*, 825 F. Supp. 1465 (D. Ariz. 1993), the United States District Court for the District of Arizona faced two motions by the defendant ("Pilkington"): (1) a motion to dismiss the monopolization and attempted monopolization counts in the plaintiff's ("PPG") complaint; and (2) a motion to stay proceedings and compel arbitration or dismissal of the claims filed. Relying on the standards for dismissal and PPG's allegation that Pilkington possessed monopoly power in specific markets, the court denied the motion to dismiss the monopolization and attempted monopolization claims. However, persuaded by the language of the 1962 Licensing Agreement ("Agreement") between PPG and Pilkington and the Federal Arbitration Act, the court granted the motion to stay the proceedings and compel arbitration of PPG's claims in England. The court retained jurisdiction over the matter to make sure the arbitration would be carried out in accordance with United States antitrust law.

### PPG files antitrust action

In the late 1950s, Pilkington successfully developed and patented a float process for the manufacture of flat

glass. Pilkington licensed this technology to PPG under the 1962 Agreement. Pilkington also entered into over 50 licensing agreements involving the operation of 150 float glass manufacturing plants around the world.

In the mid-1970s, PPG patented its own float process, called the "LB process," and made efforts to license, build, develop, and operate plants using the LB technology. These efforts led to a series of disputes between PPG and Pilkington in which Pilkington claimed the LB process was a derivative of its own technology and, therefore, fell under the 1962 Agreement. Pursuant to the Agreement's provisions, Pilkington initiated arbitration proceedings in London for the resolution of these disputes.

The latest dispute arose in 1985. This dispute stemmed from PPG's efforts to involve itself in the construction and operation of an LB process-based flat glass plant in China. Pilkington again submitted the issue to arbitration, and a resolution was reached in 1992. The arbitrators decided that PPG would have independently developed the LB process in due time because of its efforts in China. Nevertheless, the arbitrators awarded Pilkington a "national" royalty. Later in 1992, PPG filed a complaint against Pilkington,