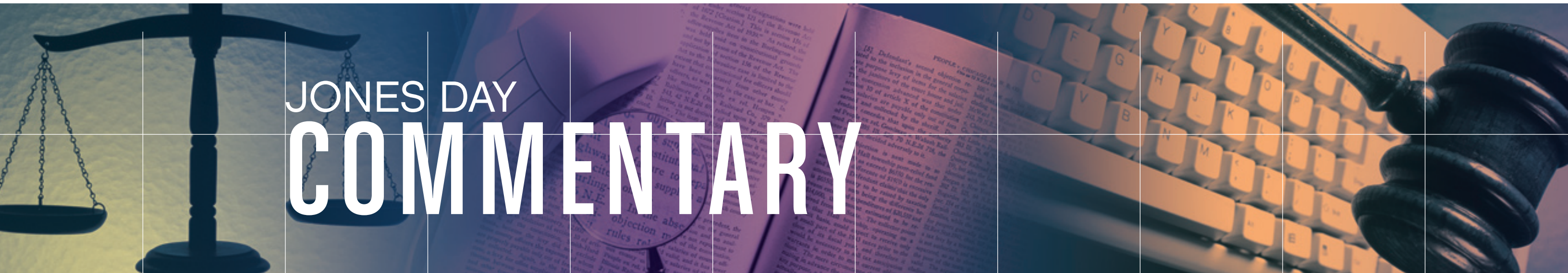
JONES DAY®

SEPTEMBER 2005



ANTITRUST AND THE 2005 SUPREME COURT TERM

As the first Monday in October approaches, the business community should be paying more attention than usual to the start of the 2005-2006 Supreme Court term. In addition to a new Chief Justice, the Court has a substantial antitrust docket for the first time in many years. Even more importantly, each of these cases offers the Court an opportunity to eliminate some of the lingering irrationalities of antitrust. If it fully seizes the opportunity, this Supreme Court term could be the most important for antitrust in the last 30 years.

Texaco Inc. v. Dagher; Illinois Tool Works Inc. v. Independent Ink Inc.; and *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.* raise very different substantive issues and were decided by three separate courts of appeals (the Eighth, the Ninth, and the Federal Circuits) but share a common message. They are a useful reminder of how antitrust litigation can go bad, even in this post-Chicago age. Borrowing from the well-known quote about unhappy families, each of the appellate panels got the key antitrust issue before it wrong "in its own way." The most obvious common thread is that, in each case, the appellate courts ruled against the defendants. More importantly, the appellate courts ruled against the defendants by ignoring the workings of the particular markets before them in favor of legal presumptions—precisely the opposite of the fact-based analyses that have become the norm in today's antitrust practice. And this fact probably explains the final common thread: In each case, the losing parties also found the federal antitrust enforcement agencies (as *amicus curiae*) on their side, urging rejection of antitrust liability and reversal of the decision below.

Conventional wisdom predicts that the Supreme Court will order the reversals advocated by the DOJ and FTC, with many commentators anticipating 9-0 or 8-1 majority opinions. (This is nothing new in the case of the Ninth Circuit, which has a well-established track record of reversals by the Supreme Court, but it is less true of the other two circuits.) While some might argue this takes all the suspense out of the coming term, experienced Court watchers have learned that the conventional wisdom can be wrong and that the unpredictability of Justices with lifetime tenure is ignored at one's peril.

© 2005 Jones Day. All rights reserved. Printed in the U.S.A.

This uncertainty is heightened by the potential for two new decision-makers on the Court. During his two-year tenure on the D.C. Circuit, new Chief Justice John Roberts did not issue or participate in any opinions dealing with substantive antitrust issues. Although he had been involved in a number of high-profile antitrust cases while in private practice and earlier in the Solicitor General's Office, including representation of states objecting to the DOJ/Microsoft settlement, it is hard to discern any consistent pattern from these representations. In his writings and speeches, Judge Roberts has offered little insight into his personal philosophy with respect to antitrust policy or enforcement.

The nominee to fill the seat of Justice Sandra Day O'Connor will step into the shoes of someone best remembered in the antitrust world for her concurring opinion in *Jefferson Parish v. Hyde*, which unsuccessfully sought to move the Court away from *per se* treatment of tying claims. Since Justice O'Connor has indicated her intent to remain on the Court until her successor is confirmed, it is not clear what role, if any, she or her successor will play in the cases under review this term.

DAGHER

Dagher may be one of the worst antitrust decisions ever—and we say that knowing there are a lot of contenders for this title. Jones Day is now representing the petitioner Texaco Inc. (now Chevron) before the Supreme Court, but even correcting for lawyer bias, this was still a remarkably bad decision. Texaco and Shell effectively merged their U.S. gasoline refining and marketing operations by creating two joint ventures, one covering the eastern United States and the other the western United States. At some point after their formation, the ventures started charging the same price in a particular region for both Shell and Texaco branded gasoline. A class of gas station owners sued each joint venture, alleging that the decision to charge uniform prices for the Shell and Texaco brands of gasoline was a *per se* violation of Section 1. After the district court granted summary judgment to the defendants, a divided panel of the Ninth Circuit reversed. Judge Reinhardt, writing for the majority, concluded that "unifying" the price for the Shell and Texaco brands was *per se* illegal, unless "setting one unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors… is reasonably necessary to further the aims of the joint venture."

As the *amicus* brief filed in support of the petition by the Solicitor General on behalf of the DOJ and FTC pointed out, the Ninth Circuit decision seemed to ignore a series of joint venture decisions by the Supreme Court that made clear that the *per se* rule had no application to the activities of a legitimate joint venture, and that application of the *per se* rule to such apparently innocent activities as the setting of prices by such a venture would undermine the utility of the *per se* rule where it really mattered—in hard-core, potentially criminal behavior such as naked price fixing, bid rigging, and market/customer allocation. It urged the Court to accept the petition, unless it decided that summary reversal was appropriate. In addition, it pointed out that the ancillary restraints doctrine had no application when the challenged restraint affected only a joint venture's own conduct as a competitor in the marketplace. According to the Solicitor General, "[t]he court of appeals' improper expansion of *per se* liability to encompass agreements that are not 'manifestly anticompetitive' threatens to deter legitimate and beneficial economic activities by raising the specter of *per se* liability for efficiency-enhancing joint ventures that unite formerly competing products under common ownership and pricing control."

This case has attracted a raft of *amicus* filings supporting reversal, and thus, ironically, this truly awful decision now has the potential to generate useful guidance from the Supreme Court on the application of antitrust law to joint ventures—an increasingly important form of business organization. A key issue that may be addressed is whether Section 1 applies at all to an integrated joint venture's operation of its own business. Of course, the Supreme Court's opinion could easily reverse on a very narrow ground, but the more useful approach would be to set forth some clear principles on this subject and reduce the amount of confusion that somehow permitted the Ninth Circuit to get so confused.

INDEPENDENT INK

In 1912, the Supreme Court considered a case in which the owner of a patented mimeograph machine licensed its use on the condition that the licensee also buy its ink for the

machine from the patent holder. In his opinion for the Court in *Henry v. A.B. Dick Co.*, Justice Lurton rejected the claim that this "tying" arrangement was anticompetitive. Only five years later, however, the Supreme Court reversed itself, holding that such a tie allowed a patent holder to use its patent on the "tying" product (the mimeograph) to stifle competition in the market for the "tied" product (the ink). When the Supreme Court hands down its decision this term in *Illinois Tool*, Justice Lurton may—after nearly a century—have his revenge.

Illinois Tool sells a patented printhead for the application of barcodes to packages as they move on an assembly line, and it conditions its printhead license on the purchase of ink from Illinois Tool. A rival supplier of ink sued under Sections 1 and 2 of the Sherman Act, but the district court dismissed, finding that Illinois Tool had no market power in the sale of its patented "tying" product.

The Federal Circuit reversed, holding that, in a tying claim under Section 1, "where the tying product is patented or copyrighted, market power may be presumed rather than proven." Without attempting to argue that the presumption was defensible as a matter of fact or legal policy, the Federal Circuit held that it was dictated by Supreme Court precedent that it was bound to follow.

Since the Supreme Court made it clear in the late '70s and early '80s that tying arrangements would no longer be condemned absent a showing of genuine market power in the tying product, there has been an overwhelming consensus that a presumption of market power in intellectual property cases is both factually groundless and legally unwise.

The Federal Circuit's decision was particularly troubling because many, if not most, "patent tying" claims arise in patent cases over which the Federal Circuit has exclusive appellate jurisdiction. Thus, the Federal Circuit's ruling in *Illinois Tool* has the potential to do disproportionate harm to antitrust policy and incentives to innovate. In response to these concerns, a variety of *amici*—including, in a rare appearance, the American Bar Association, in briefs drafted by Jones Day—urged the Supreme Court to grant *certiorari* and reject the presumption, even if it required the Court to overrule its early tying precedent.

Few believe that the presumption of market power will survive when the Court decides *Illinois Tool*. No evidence exists to support it factually, either in this case or broadly enough to justify a legal presumption, and no court has offered an excuse for preserving it beyond *stare decisis*. The *stare decisis* argument, however, is weak. There is a good chance that a majority will adopt the conclusion of Justice O'Connor in her *Hyde* concurrence: "Nor does any presumption of market power find support in our prior cases."

REEDER-SIMCO

The facts in *Volvo v. Reeder-Simco* involve a claim under the Robinson-Patman Act, which prohibits price discrimination. Reeder, a heavy-duty truck dealer, sued its truck supplier, Volvo, complaining that Volvo gave other dealers more favorable discounts.

No dealer purchases trucks for inventory; they only buy when they are the successful bidder on a project. Reeder focused on three fact patterns to prove its price-discrimination claim. First, Reeder compared the discounts Volvo gave to Reeder when it was the successful bidder to discounts Volvo gave to the successful bidders in completely separate transactions in which Reeder did not compete. Second, Reeder compared the discounts that Volvo *offered* to Reeder when Reeder was not the successful bidder to discounts Volvo actually gave to other successful bidders in separate transactions. (Reeder did not lose the business to another Volvo dealer on those occasions, but to a dealer quoting a competing truck brand.) Third, Reeder pointed to two instances where Reeder and another Volvo dealer competed for the same job. In one of them, Volvo gave the same discount to both dealers, but Volvo later increased the discount to the other dealer *after* the customer made its decision to buy from the other dealer. In the second head-to-head transaction, Volvo offered the same discount to Reeder and another dealer (although Reeder claimed it received the discount too late), but the customer purchased a competitive brand from a third dealer.

The Supreme Court granted *certiorari* on two issues: "Whether an unaccepted offer that does not lead to a purchase… may be the basis for liability" and "whether the [Robinson-Patman

Act] permits the recovery of damages by a disfavored purchaser that does lose sales or profits to a competitor that does not purchase from the defendant, but does not lose sales or profits to a purchaser that receive[d] the benefit of the defendant's price discrimination." These issues have significant practical implications for the application of the Robinson-Patman Act in bid situations and, more broadly, to the generally held conclusion among practitioners that the Act has no application to either refusals to sell or offers that do not lead to sales.

Reeder's case (and the Eighth Circuit decision) rested to a large extent on differences between discounts in different transactions, a result one ordinarily would have expected in a competitive marketplace. After all, how likely is it that Volvo would have faced the same competitive conditions in two entirely different bids, having nothing to do with each other? Moreover, how likely is it that Volvo would have had any reason to disadvantage Reeder when Reeder was competing only against non-Volvo dealers—since any such illogical decision simply would have shifted business from Volvo to its competitors? The Eighth Circuit nonetheless accepted the plaintiff's argument, adopting a view of the Robinson-Patman Act's scope that is likely to inhibit price discounting that (1) occurs as the result of competition in the marketplace, and (2) presents no threat of discrimination between buyers competing against each other. In particular, the appellate court found liability even though Reeder presented *no* transaction where it competed against another Volvo dealer and where Volvo sold to the two dealers at different prices—ordinarily a prerequisite to a Robinson-Patman violation.

Given the many errors of the decision below, the Court may not need to consider the scope and vitality of the old *Morton Salt* inference, which permits a jury to infer competitive injury from a sustained price increase in a highly competitive industry. In an antitrust era in which courts increasingly insist on proof of competitive effects, and in which even the enforcement agencies have largely abandoned the "incipiency" merger standard, the *Morton Salt* inference stands as a throwback to an earlier era of presumptions and inferences in lieu of proof of likely competitive effects. Even if one concludes—and, unfortunately, the statutory language makes it easy to do—that the Robinson-Patman Act's populist heritage makes irrelevant a Sherman Act-type inquiry, the fact remains that allowing a plaintiff to prove competitive injury in the absence of any proof that the challenged price discrimination led to any meaningful diversion of sales or any significant profit loss threatens to turn virtually any claim of price discrimination into a *per se* violation—or, at least, into a jury trial.

* * * * *

Joint ventures, the significance of patents in antitrust analysis, and Robinson-Patman—these are three of the areas in antitrust most ripe for Supreme Court guidance. And they are all before the Court in a single term. We will have to wait and see how much help the Court chooses to give in each of these areas, but at least the opportunity exists for a truly historic period of Supreme Court antitrust jurisprudence. Stay tuned!

LAWYER CONTACTS

For further information, please contact your principal Firm representative or the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Kathryn M. Fenton
1.202.879.3746
kmfenton@jonesday.com

Kevin D. McDonald
1.202.879.3743
kdmcdonald@jonesday.com

Thomas Demitrack
1.216.586.7141
tdemitrack@jonesday.com

Jones Day Commentaries are a publication of Jones Day and should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at its discretion. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.