SUMMARY OF ANTITRUST ISSUES RELATING TO E-COMMERCE

DISTRIBUTION OF GOODS AND SERVICES

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INTRODUCTION

Most antitrust issues relating to E-Commerce distribution of goods and services involve the application of settled legal principles to a new channel of distribution rather than the establishment of new legal principles. Because of the unique nature of the distribution channel involved, however, care is required to ensure that all antitrust issues are recognized.

I. Individual Refusals To Do Business With E-Commerce Dealers or Suppliers

- A private company acting unilaterally has the unfettered right to select the suppliers and customers with which it will do business, including those doing business from websites. An agreement cannot be inferred merely from a supplier's actions following receipt of a complaint from a dealer -- and vice versa. There must be evidence that tends to exclude the possibility that the defendant acted independently.

    - *United States v. Colgate & Co.*, 250 U.S. 300 (1919).
    - *Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752, 764 (1984)
    - *See FTC v. Raymond Bros.- Clark Co.*, 263 U.S. 565 (1924) (extending *Colgate* doctrine to circumstances under which a dealer will do business with a supplier).

- On the other hand, complaints do have some probative value, and additional evidence may support a finding that a complaining dealer entered into an agreement with the supplier -- and vice versa.

    - *Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. at 765-67.
    - *See Arnold Pontiac – GMC, Inc. v. Fisher Camuto Co.*, 769 F.2d 564 (3d Cir. 1986).

II. Agreements Not To Do Business With E-Commerce Dealers

- A supplier's agreement with individual dealers not to do business with E-Commerce dealers should generally be upheld so long as the individual dealer involved does not have market power.

    - Market power traditionally has been defined as the ability of a company to control prices or the output of products or services. Under that definition, dealers rarely are found to have market power.

        - *See, e.g., Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 464 (1992).
        - *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).
        - *Rebel Oil Co. v. Atlantic Richfield Co.,* 51 F.3d 1421, 1438, 1440-44 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995).
        - *Compare Toys "R" Us, Inc.,* 5 Trade Reg. Rep. (CCH) ¶ 24,516 (FTC 1998), *aff'd*, 221 F.3d 928, 936-37 (7th Cir. 2000).

- A supplier's agreement with a *group of dealers* not to do business with an E-Commerce dealer risks being characterized as a *per se* unlawful horizontal arrangement.

    - *See Fair Allocation System, Inc.,* Dkt. C-3832 (FTC 1998) (consent order) (boycott threatened by traditional dealers if supplier did business with E-Commerce dealer).
    - *See also United States v. General Motors Corp*., 384 U.S. 127 (1966).
    - *Big Apple BMW v. BMW of North America, Inc.*, 974 F.2d 1358 (3rd Cir. 1992).
    - *But cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296-97 (1985) (to establish a per se violation, antitrust plaintiff must make "threshold showing" that members of an alleged group boycott "possess market power or exclusive access to an element essential to effective competitive").

III. Agreements Not To Sell In E-Commerce

- An agreement between a supplier and dealer under which the *dealer* agrees not to operate an E-Commerce selling site should be considered a non-price vertical restraint subject to rule of reason antitrust evaluation.

    - *See, e.g., H.L. Hayden Co. v. Siemens Med. Sys.*, 879 F.2d 1005, 1014 (2nd Cir. 1989) (upholding supplier's contractual prohibition of mail order sales by dealers).
    - *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1469-70 (9th Cir. 1986) (same).

- An agreement between a supplier and dealer or group of dealers under which the *supplier* agrees not to operate an E-Commerce site that competes with the dealers raises more troublesome antitrust issues.

    - There is nothing inherently illegal about a dual distribution system under the antitrust laws.

        - *See REA v. Ford Motor Co.*, 355 F.2d 842, 865 (W.D. Pa. 1972), *rev'd on other grounds,* 497 F.2d 577 (3rd Cir. 1973)), *cert denied*, 419 U.S. 868 (1974).

    - However, because a dual distributing supplier functions at the same level as its dealers, and is their actual or potential competitor, antitrust issues arise as to whether restraints imposed by such a supplier should be considered vertical or horizontal. Horizontal agreements to fix prices, refuse to deal with a supplier or customer, allocate customers, or divide geographic markets generally are *per se* unlawful under the antitrust laws.

        - *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (horizontal price fixing).
        - *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (horizontal division of geographic markets).
        - *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (concerted refusal to deal).

    - On the other hand, while vertical price fixing (other than maximum price fixing) is a *per se* violation of the antitrust laws, vertical non-price restraints are subject to the rule of reason.

        - *See Continental TV, Inc. v. GTE Sylvania, Inc.,* 433 U.S. 367 (1977) (vertical territorial restraint).
        - *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960) (resale price maintenance).
        - *Compare State Oil Co. v. Khan,* 522 U.S. 3 (1997) (vertical maximum resale price agreements evaluated under rule of reason).

    - While dual distribution issues were not presented in the leading non-price vertical restraint case, *Continental TV, Inc. v. GTE Sylvania, Inc*., 433 U.S. 36 (1977), the Supreme Court's approach suggested that vertically imposed restraints by a supplier engaged in dual distribution should not be considered *per se* unlawful horizontal restraints, particularly without a showing that the restraints invariably produce a demonstrable anticompetitive effect that differs from potentially pro-competitive effects.

- *See also Illinois Corporate Travel v. American Airlines*, 889 F.2d 751, 753 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990).
- *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 711 (11th Cir. 1984).

IV. E-Commerce Price Fixing Issues

- Suppliers should avoid developing programs pursuant to which the prices at which dealers resell products are controlled by the supplier. Minimum resale price maintenance remains *per se* unlawful.

  - *See Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. at 761.
  - *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980).

- Horizontal price fixing also is *per se* unlawful. An early E-Commerce antitrust case involved electronic reporting of current prices that was disseminated publicly, but in a manner that the government contended was only of interest to competitors. Therefore, when the competitors adopted parallel pricing, the government argued that the electronic reporting arrangement constituted price fixing.

  - *United States v. Airline Tariff Pub Co.,* 1994-2 Trade Cas. (CCH) ¶ 70,687 (D.D.C. 1994) (consent decree).

V. Robinson-Patman Act Issues Involving Sales to E-Commerce Dealers

A. Competition Among E-Commerce and Traditional Dealers.

- E-Commerce dealers may be competitors to "bricks and mortar" ("traditional") dealers offering the same products to the same consumers. Accordingly, offering more favorable prices to E-Commerce dealers than those contemporaneously offered to traditional dealers competing for the same consumer business raises issues under Section 2(a) of the Robinson Patman Act.

  - *See National Ass'n of College Bookstores, Inc. v. Cambridge Univ. Press,* 990 F.Supp. 245 (S.D.N.Y. 1997) (Amazon.com may compete with every book retailer in the U.S.).
  - *See, e.g., FTC v. Simplicity Pattern Co.* 360 U.S. 55, 62-63 (1959).
  - *Liggett & Myers Tobacco Corp.,* 56 F.T.C. 221, 247-48 (1959).

B. Promotional Offers to E-Commerce Dealers.

- Offering particular promotional opportunities only to E-Commerce dealers or only to traditional retailers could be challenged by the disfavored dealers as a

discriminatory allowance or service or facility under Section 2(d) or 2(e) of the Robinson-Patman Act.

- *See, e.g., General Foods Corp.*, 52 F.T.C. 798, 826-27 (1956).
- *Luxor, Ltd.*, 31 F.T.C. 663-64 (1940).

VI. Exclusive Dealing Issues

- Legal problems under Section 2(e) of the Robinson-Patman Act, as well as exclusive dealing issues under the Sherman and Clayton Acts, could arise if a supplier directed inquiring consumers visiting its website only to particular E-Commerce dealers. Legal claims could be raised under such circumstances, both by other traditional or E-Commerce dealers purchasing the same products from the supplier but not being offered such a benefit.

  - *See Zwicker v. J.I. Case Co.,* 596 F.2d 305, 309-310 (8th Cir. 1979)(mailings to potential customers of dealers covered by § 2(e) of Robinson-Patman Act).

VII. Dealer Laws

- State laws protecting exclusive dealerships may be affected by E-Commerce sales by other dealers.
  - *Cf. Irvine v. Murad Skin Research Labs,* 194 F.3d 313 (1st Cir. 1999) (dealer's infomercial broadcasting into Puerto Rico impaired Puerto Rican dealers' exclusive rights under deal statute).

Questions

1. Can a supplier require that its dealers link their websites to the supplier's site?

2. (a) Can a supplier with a 40% market share prohibit or otherwise control the use of links from its dealers' websites to those of the supplier's competitors?

   (b) What if the supplier's market share is 10%?

3. Can a supplier limit the geographic scope where, or products that, its linked dealers may offer over their websites (*e.g.*, due to export controls or labeling regulations, safety considerations, etc.)?

4. Can a supplier impose standards for websites created by its dealers (e.g., requiring data to be encrypted, that privacy policies or warranty limitations be posted, or prescribing layout and compatibility requirements)?

5. Can a supplier allow only some of its dealers to link to its website?