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Michael Eric Ross

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Antitrust

by Michael Eric Ross*
and
Jeffrey S. Cashdan**

The Eleventh Circuit's 1999 term was unremarkable for its antitrust jurisprudence. The court published only three antitrust decisions.¹

I. *MCA Television Ltd. v. Public Interest Corp.*²

MCA Television Ltd. ("MCA"), which licenses syndicated television shows, brought an action asserting breach of contract and copyright infringement claims against Public Interest Corp. ("PIC"), its licensee which owns a television station. PIC counterclaimed, alleging breach of contract and violation of Section 1 of the Sherman Act. PIC maintained that MCA unlawfully conditioned licensing of several of its television shows, in exchange for advertising time, on PIC's willingness to license episodes of another show (*Harry and the Hendersons*), for cash as well as advertising time. PIC reluctantly agreed to this arrangement, contending it would not have chosen to license *Harry and the Hendersons* if it had not been forced to do so as a condition of obtaining the

* Partner in the firm of King & Spalding, Atlanta, Georgia. University of Florida (A.B., 1971); Harvard University (J.D., 1974). Member, State Bar of Georgia.

** Partner in the firm of King & Spalding, Atlanta, Georgia. Claremont McKenna College (B.A., 1987); University of Chicago (J.D., 1990). Member, State Bars of Georgia and Illinois.

The views expressed in this Article are the personal opinions of the authors and do not necessarily represent the views of King & Spalding or any of its clients.

1. *Morton's Market, Inc. v. Gustafson's Dairy, Inc.* 198 F.3d 823 (11th Cir. 1999); *Lowell v. American Cyanamid Co.*, 177 F.3d 1228 (11th Cir. 1999); *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999). A fourth decision, *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843 (11th Cir. 1999), involved an antitrust action, but the opinion concerned application of FED. R. CIV. P. 19 and did not turn on application of substantive antitrust law. *Id.* at 847-50. Accordingly, this opinion is not discussed in this article.

2. 171 F.3d 1265 (11th Cir. 1999).

licenses for the other shows it desired. PIC alleged this arrangement constituted per se unlawful tying.³

After a bench trial, the district court held that PIC had breached its licensing contracts with MCA and had willfully infringed MCA's copyrights. As for PIC's antitrust counterclaim, the district court held that the licensing arrangement constituted unlawful tying, but that PIC had failed to prove it suffered any "antitrust injury" to support its claim for damages.⁴

PIC appealed the lower court's judgment on MCA's breach of contract and copyright infringement claims and on the issue of damages for the antitrust violation. MCA cross-appealed the antitrust liability judgment. As to the contract claims, the Eleventh Circuit affirmed the liability finding and remanded the case for reconsideration of damages.⁵ The appellate court followed the same course for the antitrust counterclaim, affirming the liability ruling and remanding for reconsideration of damages.⁶

As to the antitrust claims, the Eleventh Circuit held that MCA's arrangement constituted "block booking," which the Supreme Court long ago deemed per se unlawful under Section 1 of the Sherman Act.⁷ Block booking occurs when copyrighted material is sold only as a package and the licensee must accept an unwanted license in the package to obtain the license sought.⁸ The challenged arrangement here was a clear case of block booking. As such, the court properly held that it could not depart from established Supreme Court precedent despite increasing momentum in antitrust circles to re-evaluate certain per se unlawful practices under the rule of reason. Indeed, reasonable arguments can be made that the presumption of market power inherent in the view that all block booking arrangements are per se unlawful is flawed, and that case-by-case factual analysis is necessary to properly gauge the competitive effects of a particular arrangement. Until the Supreme Court accepts such arguments (or Congress steps into the fray), the Eleventh Circuit's hands are tied.⁹

3. *Id.* at 1267-69.

4. *Id.* at 1269.

5. *Id.* at 1276.

6. *Id.* at 1281.

7. *Id.* at 1276-79 (citing *United States v. Loew's Inc.*, 371 U.S. 38, 50 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-59 (1948)).

8. *See State Oil Co. v. Kahn*, 522 U.S. 3, 22 (1997) (holding that retail maximum price maintenance, formerly per se unlawful, should be analyzed under the rule of reason).

9. Disagreeing with the lower court's determination that PIC did not show an "antitrust injury," the Eleventh Circuit reversed the district court's decision as it related to the cash portion of the *Harry and the Hendersons* contract and remanded the case for a determina-

II. *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*¹⁰

This case principally concerned application of the statute of limitations to a price-fixing action. A group of milk retailers brought suit against milk producers for price-fixing in Florida. Defendants contended that the private actions were time barred because most of the allegedly unlawful conduct had occurred more than four years prior to initiation of the private lawsuit. Plaintiffs contended that the statute of limitations had not expired because it did not start to run until four years prior to filing of the suit and because the statute of limitations had been tolled. The district court granted a motion for summary judgment, accepting all of defendants' arguments.¹¹

On appeal the Eleventh Circuit reversed.¹² First, the court held that evidence supported the view that the statute of limitations did not begin to run until less than four years before the filing of the action because of the continuing nature of the alleged antitrust conspiracy, thus bringing the case within the applicable statute of limitations.¹³ The court thus found that a jury issue existed as to whether the statute of limitations had expired.¹⁴

Second, the Eleventh Circuit held that even if the statute of limitations had run in whole or in part as to plaintiffs' claims, it may have been tolled for two reasons.¹⁵ Initially, the court considered statutory tolling. The court held that because plaintiffs' private action was brought within one year of a government investigation that bore a "real relationship" to the claims raised by plaintiffs' action, the statute of limitations had been tolled.¹⁶ The court explained that pursuant to Section 16(i) of the Clayton Act,¹⁷ private plaintiffs have one year from the expiration of a government action to bring a private action that bears a real relationship to the government's case.¹⁸ The court

tion on the question of whether PIC could successfully prove it had suffered tangible financial harm as a result of the agreement's anticompetitive effects. 171 F.3d at 1281. The court ruled that PIC may have suffered injury as a result of lost opportunities to fill the time slot allotted to *Harry and the Hendersons* with alternative programming. *Id.* at 1279-81.

10. 198 F.3d 823 (11th Cir. 1999).

11. *Id.* at 826-27.

12. *Id.* at 827.

13. *Id.* at 827-29 (citing 15 U.S.C. § 15b (1994)).

14. *Id.* at 829.

15. *Id.* at 829-37.

16. *Id.* at 831-32.

17. 15 U.S.C. § 16(i) (1994).

18. 198 F.3d 829-30.

concluded that the price-fixing claims of the private plaintiffs were sufficiently related to the bid-rigging claims of the government to satisfy the requirements of Section 16(i).¹⁹

This aspect of the Eleventh Circuit's decision appears correct in result. The government's bid-rigging claim and the private parties' price-fixing claims bear a substantial relationship to each other—same defendants, same product, same time period, and essentially the same conduct (fixing prices). Because "both suits set up substantially the same claims,"²⁰ the Eleventh Circuit's ruling appears correct. The language used by the Eleventh Circuit, however, is a bit too broad. The Eleventh Circuit stated that the government's bid-rigging claims and the private plaintiffs' price-fixing conspiracy claims bear a real relationship to each other, in part, because both alleged that the milk manufacturers "engaged in collusive behavior designed to eliminate competition."²¹ Of course, if this were the appropriate standard, then any antitrust lawsuits involving similar defendants and time periods would satisfy Section 16(i) because all antitrust lawsuits concern allegations of the elimination of competition.

The court next considered equitable tolling, particularly for stale damages claims. While the court determined that plaintiffs were entitled to bring the action, an issue remained as to whether they could pursue damages for allegedly unlawful transactions that occurred more than four years prior to initiation of their lawsuit.²² Plaintiffs contended that because defendants had fraudulently concealed their conspiracy, plaintiffs were entitled to pursue damages for sales that occurred more than four years prior to the initiation of their lawsuit. Defendants moved for summary judgment on the damages claims, and the district court granted the motion on the grounds that plaintiffs had notice of the price-fixing conspiracy and had failed to act with reasonable diligence to pursue their claims.²³

The Eleventh Circuit reversed on this issue as well.²⁴ The court held that information concerning the prior bid-rigging investigation by the government was insufficient to support a conclusion as a matter of law that plaintiffs previously were or should have been on notice of their

19. *Id.* at 831.

20. *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 323 (1965).

21. 198 F.3d at 830-31.

22. *Id.*

23. *Id.* at 827.

24. *Id.*

price-fixing claims.²⁵ The court recognized that such information may have provided notice to plaintiffs, but concluded that a factual issue existed; thus, a jury trial was required.²⁶ The Eleventh Circuit further rejected the district court's conclusion that plaintiffs' failure to conduct any investigation during the period in question into whether they had price-fixing claims to raise against defendants required rejection of their fraudulent concealment argument.²⁷ The Eleventh Circuit again concluded that a factual issue remained as to whether there was sufficient evidence available to plaintiffs that would have led them to discover such claims.²⁸ Furthermore, the court held that the lack of any prior investigation was irrelevant to this central fact question.²⁹ In light of the procedural posture of the matter—on motion for summary judgment—the Eleventh Circuit resolved all doubt in favor of plaintiffs and concluded that sufficient factual issues remained to require a trial.³⁰

Finally, the Eleventh Circuit held that the district court properly concluded that one defendant withdrew from the conspiracy more than four years prior to plaintiffs' initiation of their lawsuit.³¹ The court ruled that this defendant's sale of its business effectively constituted withdrawal from the alleged conspiracy and, thus, insulated that defendant from any liability based on overt acts of the conspirators following its withdrawal.³² Accordingly, as to this defendant, the court held that plaintiffs' action was time barred.³³

III. *Lowell v. American Cyanamid Co.*³⁴

Lowell involved an alleged vertical resale price maintenance agreement. A group of farmers filed suit against American Cyanamid Company claiming that American Cyanamid and its dealers agreed to fix the retail price for certain crop-protection products.³⁵ American Cyanamid moved to dismiss the complaint, arguing that the farmers, who purchased the products at issue from the dealers, lacked standing

25. *Id.* at 833.

26. *Id.* at 832-37.

27. *Id.* at 836.

28. *Id.* at 837.

29. *Id.*

30. *Id.*

31. *Id.* at 839.

32. *Id.*

33. *Id.*

34. 177 F.3d 1228 (11th Cir. 1999).

35. *Id.* at 1228-29.

to bring a suit solely against American Cyanamid under the indirect-purchaser rule articulated in *Illinois Brick Co. v. Illinois*.³⁶ The district court granted the motion to dismiss.³⁷

The Eleventh Circuit reversed, explaining that *Illinois Brick* does not apply to vertical conspiracy claims when there is no "pass-on" of the alleged overcharge.³⁸ This conclusion is correct. *Illinois Brick* involved claims that concrete block manufacturers had fixed prices of blocks sold to masonry contractors, who in turn sold the blocks to general contractors, who then used them in buildings sold to plaintiffs.³⁹ Motivated by concerns of duplicate recoveries and overly complicated litigation about apportioning damages that might result if indirect purchasers were allowed to assert antitrust claims against horizontal conspirators, the Supreme Court in *Illinois Brick* concluded it would be unfair and inefficient to allow indirect purchasers to pursue horizontal conspiracy claims.⁴⁰ Instead, the Supreme Court held that only direct purchasers have standing to raise these claims.⁴¹ As the Eleventh Circuit noted, however, these concerns are not implicated in vertical resale price maintenance cases when the plaintiff purchases directly from an alleged conspirator.⁴² In such cases, there is no risk of duplicative recoveries or murky apportionment disputes because the consumer-plaintiff is the only party who has paid the overcharge. Although the manufacturer in *Lowell* did not sell directly to the consumer-plaintiff, plaintiff properly had standing to sue the manufacturer because the manufacturer allegedly conspired with the direct-selling dealer and was, therefore, jointly and severally liable with the dealer for the consumer's injury.⁴³ Thus, the Eleventh Circuit properly rejected defendants' contention and reinstated the claims.

IV. CONCLUSION

The Eleventh Circuit's antitrust docket for 1999 was extremely light, and the decisions issued were uneventful. This light antitrust docket is somewhat surprising given the general explosion in government and private antitrust enforcement in this circuit at the district court level.

36. 431 U.S. 720, 730-31 (1977).

37. 177 F.3d at 1228.

38. *Id.* at 1229, 1230.

39. 431 U.S. at 726-27.

40. *Id.* at 730-32.

41. *Id.*

42. 177 F.3d at 1230-31.

43. *Id.* at 1230 (citing PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 264 (revised ed. 1995)).

This light docket may be aberrational, or it may signal a trend towards resolution of complex antitrust cases at the lower court level, where the cost of litigation and risk of an adverse judgment motivates litigants to resolve cases relatively quickly, if possible.

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