NOBOA PAGÁN ABOGADOS
REGULATORY BRIEFING NEWSLETTER

May 30, 2006 • Sto. Dgo., D. R. • Year II, Volume XXII

Editor's Note. US Antitrust Modernization Commission. By A. Noboa-Pagán.

Since 2002, the United States Congress designated an Antitrust Modernization Commission with the task of examining whether or not to modernize all American Antitrust legislation. The Commission is in an actual study process, and has solicited opinions to all parties concerned with the operation of antitrust laws, so as to evaluate proposals and submit them to Congress and Presidential approval; and prepare a report containing a detailed declaration of findings and conclusions, together with recommendations for legislative or administrative action the Commission considers to be appropriate.

The discussed topics include antitrust civil remedies, whether or not to repeal the 1914 Robinson-Patman Act that prohibits certain types of discriminatory prices; enforcement role of the states on the application of merger control acts; exclusionary conducts, to decide if Section 2 of the Sherman act should be revisited, concerning refusal to deal issues, bundling prices, denial of an essential facility; and determining if exemption and immunity cases should be eliminated if not justified its benefits or time-limit them. Participating in this discussion are practice lawyers, academics, members of the judicial power, and consulting firms.

Meanwhile, the United States Judicial system has various cases that might modify some antitrust law interpretation rules, with respect to patent licences, refusals to deal, among others. In this edition of RB, we briefly discuss some of them, together with a Dominican Supreme Court Sentencing, the LEIDSA case, in which our High Court exhibits a magnificent work of interpretation of the fundamental right to free enterprise and monopoly prohibition and the integration of competition law implicit in the constitutional prerogative.

Executive Summary. Petition of unconstitutionality of articles 1 and 7 of the concession contract held by LEIDSA and the Dominican State. By. Y. Martínez Oller

On May 30th, 1996, the Dominican Government, via the National Lottery's General Administrator, consented a contract with Lotería Electrónica Internacional Dominicana, S. A. (LEIDSA), in which it granted *exclusive rights* to design, install, operate, administer and market an electronic lottery system on a National level.

On March 20th, 2001, the Executive Power's Legal Consultant denied MEEJ Electronic (MEEJ) the possibility to contract with the Dominican Government a new franchise to incur in the lottery business, because of the exclusive commitment granted to LEIDSA to manage that business.

As a result, MEEJ petitioned the Dominican Supreme Court of Justice (SCJ) to declare the contract held between LEIDSA and the State null and void, alleging that articles 8.12[1], 55.10[2] and 110[3] of the Dominican Constitution were being violated.

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[1] *"[…] monopolies are specifically forbidden unless they are of state or state related institutions"*

[2] About President faculties *"[…] Celebrate contracts, submitting them to the National Congress for approval, when they contain dispositions that affect public rents […]"*

[3] *"No exemption will be recognized, nor exoneration granted, reduction or limitation of taxes, contributions, or fiscal or municipal rights, in benefit of particulars, if not done by law […]"*

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MEEJ's core allegation was that the establishment of an unconstitutional monopoly, as well as the preferential tax rights granted in favour of the alluded company, was lessening its constitutional right to *free enterprise*.

Last April 26, 2006, the SCJ, at the request of MEEJ Electronic, dictated a sentence in unconstitutionality against some articles of the contract celebrated between the Dominican State, represented by the National Lottery, and LEIDSA.

Relevant aspects addressed by the decision:

1. The SCJ confirms the *lato sensu* interpretation of *law*, so as to determine the constitutionality of all acts that emanate from a constitutionally recognized organ of power.
2. The SCJ firmly sustains that establishing **monopolies** that are not in favour of the State (even though they authorized by the State itself) are **illegal** and **unconstitutional.**
3. Grants *private right of action*, in the scope of article 67 of the Constitution, to anyone whose legal and constitutional rights have been lessened and suffers any damage on account of an unconstitutional law.
4. Dictates a simple and partial unconstitutionality sentence, according to which it declares "articles 1 and 7 of the agreed contract between LEIDSA and the Dominican State, unconstitutional" and maintains the other dispositions of the referred contract.

Telecommunications/Antitrust. Albert O. Stein v. Pacific Bell's DSL services. By Y. Martínez Oller.

Stein, on behalf of himself and all California subscribers to Pacific Bell's Digital Subscriber Line ("DSL") services, alleged that the defendant Pacific Bell, an incumbent local exchange carrier (ILEC), withheld technical information from its competitive local exchange carriers (CLECs). Stein claimed that this constituted a *refusal to deal*, in violation of Section 2 of the Sherman Act, and the 1996 Telecommunications Act (TCA) which states that all ILECs, in addition to the general obligations of telecommunications carriers, have the duty to negotiate in good faith with any requesting carrier. Plaintiff also filed a claim under the essential facilities and monopoly leveraging claim, for the same conduct.

On the Sherman Act claim, following *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 124, S. Ct. 872 (2004),* the District court granted summary judgment in favor of the defendant, stating that a refusal to deal in violation of the 1996 Telecommunications Act, could not give rise to a separate claim on Section 2 of the Sherman Act. Since the Telecommunication Industry has a regulatory regime that specifically attends to anticompetitive conduct, there isn't any substantial contribution that the Sherman Act could advance, in terms of antitrust regulation, therefore making a claim on such grounds inadmissible.

With regards to the essential facilities allegations, the doctrine states that an *essential facility* is one which is not merely helpful but vital to the claimant's competitive viability *(Cyber Promotions, Inc. v. America Online, Inc.,* 948 F. Supp. 456,

463 (E.D. Pa. 1996)). However, in *Trinko* it was held that where a government agency has powers to enforce access to a facility, the essential facilities doctrine will not apply; concluding that where access exists, the doctrine serves no purpose, *Trinko, 124 S. Ct. at 881*. Since there is no basis on which to found this claim, the Ninth Circuit confirmed that summary judgment was properly granted.

However, the district court dismissed the TCA claims on the ground that Stein lacked a *private right of action*. The Supreme Court remanded the case to the District Court to consider whether there was a proper Telecommunications Act claim stated by Stein.

To conclude, the Supreme Court reinstated District court's decision to grant summary judgment, both on Stein's Sherman Act claim and monopoly leveraging claim; vacated the District Court's decision on the TCA claim and remands it so as to determine whether Stein properly alleged such a violation.

Intellectual Property / Anticompetitive Agreements. Federal Trade Commission v. Schering-Plough Corporation (petition for a writ of certiorari). By Y. Martínez Oller.

The Federal Trade Commission (FTC or Comission) submitted a petition for a *writ of certiorari* to the United States Court of Appeals for the Eleventh Circuit; before considering the petition, the Court requested the Solicitor General's views on the case, to comment on whether or not the FTC´s case was worth hearing.

The FTC challenged the settlement agreements held by Schering-Plough (Schering), a pharmaceutical company that produces and markets the patented drug K-Dur 60, and two of its prospective generic competitors, on account that those agreements violated *Section 5 of the FTC Act, 15 U.S.C. 45.*

Schering held these agreements as a part of an infringement suit settlement. In said agreements the prospective competitors would be free to market the generic version of Schering's high blood pressure and congestive heart disease drug, on a specified future date and Schering would make a substantial *reverse payment* to Upsher-Smith Laboratories (Upsher) and ESI Lederle, Inc. (ESI).

Ultimately, in Schering v. Upsher, the parties negotiated and granted Upsher permission to produce its generic on September 1, 2001 (five years before the patent's expiration date); and Schering would receive an exclusive license to market various Upsher products, outside North America, for $60 million dollars.

In Schering v. ESI, a magistrate judge was appointed to mediate the settlement litigation. ESI was granted permission to market its generic version on January 1, 2004 (more than two years before the patent's expiration date), and a conditioned payment of $10 million, pending FDA approval for its generic by a specified date.

FTC's core allegation was that Schering's reverse payments persuaded both companies to delay the launching of their generic drugs, constituting an

unreasonable restraint on competition, **in detriment of consumers and trade overall.**

The FTC reasoned: ***If there has been a payment from the patent holder to the generic challenger, there must have been some offsetting consideration. Absent proof of other offsetting consideration, it is logical to conclude that the quid pro quo for the payment was an agreement by the generic to defer entry beyond the date that represents an otherwise reasonable litigation compromise. Id. at 76a-77a (footnote omitted).*** **Finding no proof of other offsetting consideration for the payments to Upsher or ESI, the Commission found the agreements illegal.** ***Id. At 87a-93a, 141a-145a.***

Based on the examination of "a. the scope of the exclusionary potential of the patent; b. the extent to which the agreements exceeded that scope; and c. the resulting anticompetitive effects" (*Id at 17a citing Valley Drug, 334 F.3d at 1312*), the administrative law judge (ALJ) that processed FTC's complaint, concluded that the Complaint Counsel (the FTC) failed to meet his burden of proof, since they didn't successfully connect beyond any doubt, that either payment was made directly in exchange of delayed entry. The ALJ also reasoned that in order to establish that the settlements had the alleged anticompetitive effect, Complaint Counsel needed to "prove that better settlement agreements or litigation results would have resulted in Upsher[] and ESI selling their generic equivalents prior to […]" the entry dates agreed upon in the two settlements. ***Pet. App. 310a.***

The court of appeals decided in accordance to the ALJ decision, and the question presented to the Eleventh Circuit was whether the court of appeals erred in establishing that there was not enough substantial evidence to support FTC allegations. The court agreed that the evidence greatly supported ALJ conclusions and stated that the terms of the settlements where within the patents exclusionary power, and as a result ***the mere presence of a reverse payment could not provide the sole basis for a violation of antitrust law. Id. At 34a, 35a.***

And even though such an agreement, were it not within a patent litigation, would most likely be considered as an unreasonable restraint on commerce, since the Patent Act grants the right to exclude others from making, using, offering for sale, or selling the invention ***35 U. S. C. 154(a)(1),*** **it is not necessarily impermissible in this context.**

The Solicitor General agreed with the opinion of the Court that while the issues here presented verify the need to determine the proper standards by which to conduct legitimate patent settlements, this case does not preset an appropriate opportunity to determine said standards.

As for the FTC allegations suggesting that the Eleventh Circuit's decision "sharpens the tensions" between the Eleventh and Sixth Circuit (which held that reverse payments constituted a per se violation of antitrust laws in *Cardizen CD Antitrust Litigation, 332 F.3d 896, 2003*), affirms that the questions implicated in this case and the decision emitted by the court do not enter in conflict with those of the Sixth Circuit, since the issues in *Cardizen* involved drugs that did not fall in the scope of the allegedly infringed patent, thus there is no circuit split. Moreover the Second Circuit in

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Tamoxifen, 429 F .3d at 389, **did not constitute reverse payments a per se violation of antitrust laws, furthermore its case did not involve drugs outside of the patent's scope, and thus it creates no circuit split with the Sixth Circuit *Cardizen* verdict.**

Finally, the Eleventh Circuit's decision does not foreclose any future antitrust liability claims by other courts of appeals, as surmised by the FTC; there is no basis to assume so as illustrated by the above cases. The Solicitor General recommended that the petition for a *writ of certiorari* be denied.

Activities

INVITATION to RV&HB's LEGAL COLLOQUY:

"INTERNATIONAL COMMERCIAL ARBITRATION AND ANTITRUST LAW IN THE DR-CAFTA"

Speaker: Dra. Angélica Noboa Pagán

Thursday June 22th 2006
Time: 6:00 p.m.
"Salón Canciller"
Hotel "El Embajador", on Sarasota Av.,
Santo Domingo, Dom. Rep.

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