# Antitrust Law Daily Wrap Up, TOP STORY: High Court turns away four antitrust cases, (Oct. 2, 2017)

Antitrust Law Daily Wrap Up

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By Jody Coultas, J.D.

On the first day of the October 2017 term, the U.S. Supreme Court declined to add any antitrust or trade regulation cases to its calendar. The Court denied four petitions for review in antitrust cases, as well as two RICO petitions and one petition concerning the Telephone Consumer Protection Act. No word yet on whether the Court will take up a request from a number of states to review a Second Circuit ruling that the Department of Justice failed to prove that "anti-steering" rules that prohibited merchants who accepted American Express cards from directing customers to alternative credit card brands violated Section 1 of the Sherman Act (*State of Ohio v. American Express Company*, Dkt. 16-1454).

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**Summary judgment standard.** The Court avoided wading into a split among the circuits regarding the proper interpretation and application of Federal Rule of Civil Procedure Rule 56 on summary judgment in antitrust cases. It denied a petition for *certiorari* filed by a polystyrene products recycler contending that the decision of the First Circuit that a conspiracy involving the five largest converters of polystyrene products and their trade association to boycott a recycling business model could not be reasonably inferred from the evidence presented conflicted with several other circuit courts of appeal. Although the First Circuit had revived the antitrust claims of Evergreen Partnering Group, Inc., when it first addressed the case in 2013, the court later affirmed summary judgment in favor of the defendants. In its petition for *certiorari*, the recycler contended that the decision of the First Circuit conflicted with several other circuit courts of appeal (*Evergreen Partnering Group, Inc. v. Pactiv Corp.*, Dkt. 16-1148).

"The Court lost an important and timely opportunity to clarify an issue that has created tremendous confusion and inconsistency among the circuits—the proper tools for applying the summary judgment standard in antitrust," said Richard Wolfram, attorney for petitioner Evergreen Partnering, in response to the Court's denial of *certiorari*. "Although the Court understandably focuses on issues of law and not fact for petitions that it accepts, one has to wonder what set of facts—with the lower court here improperly weighing evidence and making credibility determinations and applying the much-criticized equal inferences rule—would serve as a better vehicle for resolving this question. This issue is not going away, and anyone who practices antitrust knows that."

**Intersection between intellectual property and antitrust.** Also, the Court declined to review whether actions taken by a monopolist that might otherwise violate the antitrust laws should be *per se* immune from antitrust liability simply because the monopolist claims to be protecting its intellectual property. At issue was a decision of the U.S. Court of Appeals in Denver that Jeppesen Sanderson, Inc., a subsidiary of the Boeing Company that creates and sells terminal charts used by pilots for navigation, had a legitimate business justification for its refusal to license copyrighted work to SolidFX, LLC, as it was developing software to display Jeppesen's charts on mobile devices (*SolidFX, LLC, v. Jeppesen Sanderson, Inc.*, Dkt. 16-1303).

**Tying, exclusive dealing.** A decision of the U.S. Court of Appeals in Denver affirming a Kansas federal district court's holding that a distributor of sutures and endomechanical products failed to demonstrate that two medical and surgical products distributors engaged in illegal tying and exclusive dealing was not disturbed by the Supreme Court. In its petition for *certiorari*, the distributor contended that, in a rule-of-reason tying claim, tying market power could be sufficiently shown based on the anticompetitive effects in the tied market. Thus, the petition argued, the Tenth Circuit erred in affirming the grant of summary judgment, holding that no reasonable

juror could find that the two competing distributors had tying market power (*Suture Express, Inc. v. Owens & Minor Distribution, Inc.*, Dkt. 16-1487).

**Conflict preemption.** The Court let stand a decision of the U.S. Court of Appeals in Philadelphia, dismissing federal and state price fixing claims raised by consumers and auto dealers. The appellate court affirmed dismissal because the carriers were alleged to have engaged in acts that were prohibited by the Shipping Act of 1984, a statute that precluded private plaintiffs from seeking relief under the federal antitrust laws and preempted state law claims under the circumstances. The petitioner asked whether price fixing claims brought under state laws against foreign vehicle carrier service companies were properly dismissed on "conflict preemption" grounds (*Alban v. Nippon Yusen Kabushiki Kaisha*, Dkt. 16-1415).

**RICO**

**Class actions.** The Court declined to review a decision of the U.S. Court of Appeals in New Orleans that the predominance requirement for class actions lawsuits was satisfied in a RICO action against a multi-level marketing business that allegedly operated an illegal pyramid scheme. The marketing business argued in its petition that the Fifth Circuit did not require the plaintiffs to demonstrate reliance in affirming the district court's certification of the plaintiffs' class (*S.G.E. Management, L.L.C. v. Torres*, Dkt. 16-1309).

**Proximate cause.** The Supreme Court will not hear a petition arguing that the "directness" test for RICO proximate cause is draconian and decimating RICO's evolution and asking whether the rationale of determining extraterritoriality by measuring from inside the enterprise, out outlined in *RJR Reynolds, Inc. v. E.U.*, which held a predicate act's foreign reach defines RICO's extraterritoriality, also control proximate cause analysis (*Ogden v. Wells Fargo Bank, N.A.*, Dkt. 17-137).

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Finally, the Court declined to consider a decision of the U.S. Court of Appeals in Cincinnati holding that class certification was improperly denied on predominance grounds where the issue of the absence of consent was amenable to generalized proof that consent was not sought for any recipient. In its petition, Top Flite Financial Inc. contended that the Sixth Circuit erred in reversing the district court's denial of class certification because the fax recipients offered no evidence showing that the issue of whether the company that complied the fax number list had obtained consent to send the faxes would be answered on a common or individualized basis (*Top Flite Financial Inc. v. Bridging Communities, Inc.*, Dkt. 16-1336).

The decisions, arguments, briefs, and petitions concerning antitrust and trade regulation issues before the 2017 Term of the U.S. Supreme Court are presented in this Antitrust Law Daily feature. A chart lists issued opinions, granted petitions, pending petitions, and denied petitions, along with a summary of the questions presented and the current status of each case.

Attorneys: Richard Wolfram (Richard Wolfram, Attorney at Law) for Evergreen Partnering Group, Inc. William E. Lawler (Vinson & Elkins, LLP) for Pactiv Corp. Shannon Wells Stevenson (Davis Graham & Stubbs LLP) for SolidFX, LLC. Sanford I. Weisburst (Quinn Emanuel Urquhart & Sullivan, LLP) and Daniel M. Abuhoff (Debevoise & Plimpton LLP) for Suture Express, Inc. E. Lawrence Vincent (Burns Charest LLP) for Jill M. Alban. C. Thomas Ludden (Lipson Neilson Cole Seltzer & Garin, PC) for Top Flite Financial Inc.

Companies: Evergreen Partnering Group, Inc.; Pactiv Corporation; SolidFX, LLC; Jeppesen Sanderson, Inc.; Suture Express, Inc.; Owens & Minor Distribution, Inc.; Nippon Yusen Kabushiki Kaisha; American Express; S.G.E. Management, L.L.C.; Wells Fargo Bank, N.A.; Top Flite Financial Inc.; Bridging Communities, Inc.

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