Litigation Update

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COURT DENIES REVIEW OF ANTITRUST CASE IMPOSING LIABILITY FOR PRICE CUTS

***(3M Company v. LePage's Inc.*, No. 02-1865)**

The U.S. Supreme Court this week declined to review a lower-court decision that imposed substantial antitrust liability on a large company for engaging in "predatory pricing" (*i.e.,* for selling its products at too *low* a price), even though the uncontested evidence demonstrated that the company at all times sold its products at prices that exceeded its costs.

The decision was a setback for the Washington Legal Foundation (WLF), which filed a brief in the case, *3M Company v. LePage's, Inc.*, urging that review be granted. WLF argued that consumers benefit when companies lower their prices and that companies should not be punished for engaging in price competition that is good for consumers. WLF argued that the lower-court decision, unless reversed on appeal, would chill pro-consumer price cuts by companies that seek to avoid potential antitrust liability. WLF filed its brief on behalf of itself and the National Association of Manufacturers.

"The point of the antitrust laws is to protect competition, not competitors," said WLF Chief Counsel Richard A. Samp after reviewing the Supreme Court's order denying review. "Some companies may suffer severe losses when a rival competes by slashing its prices, but antitrust law is not intended to stop such competition, which benefits the economy as a whole," Samp said. WLF has pledged to continue its efforts to ensure that antitrust law is not used as a weapon to stifle competition.

The case involved an antitrust suit filed against 3M Company, the dominant firm in the market for transparent tape. One of its competitors, LePage's, Inc. (which has held between 9% and 14% of the market), filed suit against 3M, claiming that 3M sought unfairly to maintain its monopoly position by engaging in exclusionary pricing practices. LePage's argued that 3M effectively lowered its tape prices to levels that LePage's could not match by bundling rebates offered to retailers on tape sales with rebates offered on sales of other 3M products in markets in which LePage's does not compete. It was nonetheless uncontested at trial that, regardless how one allocates the prices 3M charged for its various products, at all time it sold its tape (including discount tape, the market segment in which LePage's competed) at above-cost prices.

The U.S. Court of Appeals for the Third Circuit in Philadelphia voted 7-3 to uphold a nearly $69 million judgment imposed on 3M for monopolization in violation of § 2 of the Sherman Act. The appeals court held that even when a dominant firm sells its products at or above cost, it can be found to have violated the antitrust laws when it engages in other exclusionary marketing practices designed to take business away from competitors. The court faulted 3M not only for its practice of bundling rebates (paid to retailers who handled multiple 3M products) but also for engaging in "*de facto* exclusive dealing" -- by which the court meant that 3M offered prices that encouraged retailers to obtain all of their tape needs from 3M.

In its brief urging the Supreme Court to grant review, WLF argued that the Court should reaffirm its bright-line rule that even dominant firms may not be found liable for "predatory pricing" so long as they sell their products above cost. The Supreme Court established that rule in its 1993 *Brooke Group* decision; WLF argued that the Third Circuit's efforts to distinguish *Brooke Group* were unpersuasive. WLF argued that while courts have rightly condemned "exclusive dealing" contracts that close off a company's ability to even attempt to compete in a market, the law does not recognize the Third Circuit's "*de facto* exclusive dealing" doctrine. WLF argued that a company cannot be held to have engaged in "exclusive dealing" simply because it offers prices so attractive that customers are persuaded to make all their purchases from that company.

WLF also argued that the Third Circuit's decision, by condemning some above-cost price cutting, will discourage price cuts by firms that fear incurring antitrust liability. WLF argued that bright-line rules are particularly important in this area, because leaving open the possibility that companies engaged in pro-competitive price cutting will be found liable for "predatory pricing" will chill the very conduct that the antitrust laws are designed to protect.

3M's efforts to obtain Supreme Court review may have suffered a fatal blow when in May the United States filed a brief recommending that the Court not grant review. While apparently agreeing with WLF that the Third Circuit decided the case wrongly, the United States said that this case was not an appropriate vehicle for the Supreme Court to consider all the complexities of bundled rebate programs. The United States recommended that the Court permit the issue to continue to percolate in the lower courts, to allow those courts to more fully consider the issue before taking up the issue itself.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.