Antitrust Law Section Profile

By William H. Rooney

Attorneys can reap exceptional career benefits by joining this section


Rooney

The Antitrust Law Section addresses issues of interest to lawyers, economists, teachers and students who are interested in antitrust matters. Our many programs and co-sponsored events help us foster an active dialogue on the latest developments in the antitrust arena and address cutting-edge issues with top-level speakers.

Some of our upcoming and recent events include:

- The 2012 Annual Antitrust Forum will be held on December 7 and will feature a discussion on the economic durability of market power in high-tech markets.
- The section's program and dinner at Annual Meeting will be held on Jan. 24, 2013. Prominent antitrust practitioners, regulators, scholars and economists will comment on developments in antitrust law and economics. The dinner speaker will be Commissioner Edith Ramirez, Federal Trade Commission.
- "The Institutional Dimensions of Antitrust Adjudication," a program held on September 19, featured Professor Daniel A. Crane of the University of Michigan Law School and Jean-François Bellis, partner at Van Bael & Bellis, Brussels, Belgium.
- A panel discussion entitled, "Merger Enforcement in the Americas," was presented on July 17, as part of the section's summer merger program. The panel featured antitrust regulators from the United States, Canada, Mexico and Brazil.

The section's program and dinner at Annual Meeting will be held on Jan. 24, 2013.

The Antitrust Law Section hosts monthly programs with speakers who address topical issues. All section members are invited to attend the speaker presentations. Speakers this year have included Jon Leibowitz, chairman of the Federal Trade Commission, and Joseph Wayland, acting assistant attorney general for the Antitrust Division.

The Antitrust Law Section also has three subcommittees that are well-designed for participation by young attorneys and law students. The subcommittees address horizontal restraints, vertical restraints and class actions. ◆

For more information or to become a member of the Antitrust Law Section, please contact me at wrooney@willkie.com, Jodi Lucena-Pichardo at jlucenapichardo@willkie.com, or Tiffany Bardwell at tbardwell@nysba.org.

Antitrust Law Section Profile

By Gregory Asciolla

Two new court rulings say no exception in *per se* rule on international price-fixing

Naked price-fixing agreements among competitors traditionally have been subject to the *per se* rule, which declares such conduct to be illegal without analysis of its effect on competition.

The rule is rooted in the Judiciary's long-standing experience in analyzing such agreements, and courts have remained steadfast in its application. Recently, there were two challenges to the applicability of the *per se* rule in the context of foreign price-fixing, both arising in district courts in the Ninth Circuit.

In each case, criminal antitrust defendants relied on language in *Metro Industries, Inc. v. Sammi Corp.* to support their argument that because the alleged price-fixing conduct occurred abroad, it should be governed by the less stringent rule of reason, which requires proof of anticompetitive effects in order to prove liability.

This argument was rejected in both cases, which distinguished *Metro Industries* and held that naked price-fixing agreements are *per se* illegal under the Sherman Act regardless of whether the price-fixing conduct occurs domestically or abroad.

In *Metro Industries*, the Ninth Circuit held that *per se* treatment was inappropriate in an alleged horizontal market division agreement involving a Korean registration system that gave Korean producers of stainless steel steamers an exclusive right to export a registered product design into the U.S. for three years.

The Ninth Circuit found the rule of reason applicable due to the novelty of the business practice, and that it had never previously undergone judicial scrutiny in the antitrust context.

However, the court further stated that even if the registration system would constitute a *per se* market division agreement in the domestic context, "application of the *per se* rule is not appropriate where the conduct in question occurred in another country." It is on this statement that the defendants in two recent cases based their motions.

A different circumstance

In *U.S. v. Hsuan Bin Chen*, defendants moved to dismiss their indictments which charged them with fixing the prices of thin-film transistor liquid crystal display panels (TFT-LCDs) in Taiwan. The indictments alleged that the co-conspirators held secret meetings and discussions in Taiwan, where they reached an agreement to fix prices of TFT-LCDs that were sold in the U.S.

Defendants contended that *Metro Industries* held that Sherman Act violations based entirely on foreign conduct are subject to a rule of reason analysis, and as such the indictment failed because it did not allege anticompetitive effects.

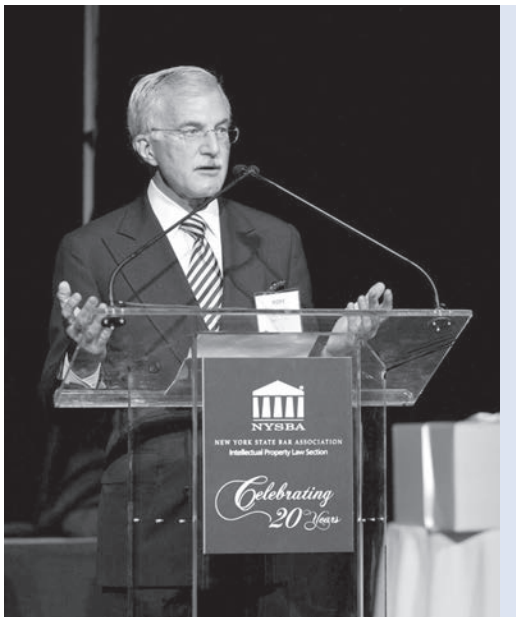
The court rejected this argument and found defendants' reliance on *Metro Industries* misplaced. The court distinguished *Metro Industries* on the ground that the conduct there was novel and there was no precedent as to whether the conduct was inherently anticompetitive, whereas in *Bin Chen* the conduct constituted a naked price-fixing agreement that has long been subject to the *per se* rule.

Similarly, in *U.S. v. Eagle Eyes Traffic Industrial Co., Ltd.*, defendants moved to dismiss their indictments or, in the alternative, requested a ruling that as a matter of law the rule of reason, rather than the *per se* rule, applied to their case because, based on *Metro Industries*, some of the challenged conduct occurred overseas.

Citing *Bin Chen*, the *Eagle Eyes* court rejected this argument on the same ground that *Metro Industries* was distinguishable because it involved a novel business arrangement, whereas the conduct in *Eagle Eyes* involved naked price-fixing (albeit overseas) of aftermarket auto lights sold in the U.S. The court, citing the holding in *eMag Solutions LLC v. Toda Kogyo Corp.*, affirmed that *Metro Industries* did not hold that a case alleging a *per se* violation of the Sherman Act requires a rule of reason analysis because it involves foreign conduct.

Both *Bin Chen* and *Eagle Eyes* have read the Ninth Circuit's decision in *Metro Industries* to have left intact the traditional *per se* rule of illegality to naked price-fixing conduct that occurs overseas and causes injury to U.S. consumers. ◆

Asciolla is of counsel to Labaton Sucharow LLP and focuses his practice on representing businesses in complex antitrust and commodities class actions.



IP turns 20—The Intellectual Property Section celebrated its 20th anniversary with a gala on September 14 at Gotham Hall in New York City. The section's founding chair, Rory J. Radding, left, current chair Kelly M. Slavitt and President Seymour W. James, Jr. gave special remarks. James applauded the section's efforts in the President's Section Diversity Challenge and the Women in Intellectual Property Law initiatives. Attendees were treated to a continuous slideshow of the section's members and memorable events throughout the evening.
[Photo by Happening Photos, Inc.]