U.S. SUPREME COURT ISSUES THREE NOTABLE ANTITRUST DECISIONS

In three recent decisions, the Supreme Court has provided businesses with greater competitive freedom regarding joint venture operations, the sale of patented products in conjunction with other products, and the pricing of products to dealers.

1. Joint Ventures—*Texaco v. Dagher*

Holding. When an economically integrated joint venture sets the price of its own products, the joint venture does not engage in a *per se* violation of Section 1 of the Sherman Act.

Background. Texaco Inc. ("Texaco") and Shell Oil Co. ("Shell") collaborated in a joint venture, Equilon Enterprises, to refine and sell gasoline in the western United States under the Texaco and Shell brand names. *Texaco Inc. v. Dagher*, Slip Op. (Feb. 28, 2006). When Texaco and Shell created Equilon, they ended competition between them in the domestic refining and marketing of gasoline. Under the joint venture agreement, Texaco and Shell agreed to pool their resources and share the risks of and profits from Equilon's activities. The formation of Equilon was approved by consent decree by the Federal Trade Commission.

Plaintiffs, a class of Texaco and Shell service station owners, brought suit in district court, alleging that Texaco's and Shell's use of the joint venture to fix the price of gasoline sold under the Texaco and Shell brands was *per se* illegal. The plaintiffs did not challenge the joint pricing of the two brands under the rule of reason. The district court awarded summary judgment to defendants. The Ninth Circuit reversed.

The Supreme Court granted *certiorari* to decide the question of "whether it is *per se* illegal under Section 1 of the Sherman Act . . . for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products."

The Court's Opinion. The Court found that "[t]hese cases do not present [a *per-se* illegal price-fixing] agreement . . . because Texaco and [Shell] did not compete with one another in the relevant market—namely, the sale of gasoline to service stations in the western United States—but instead participated in that market jointly through their investments in Equilon." *Texaco,* Slip Op. at 4. The Court characterized the price setting by the joint venture as "little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products." *Id.* at 4.

The Court stated that, "[w]hen persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market." *Id.* Thus, the Court ruled that, while the joint venture's price setting "may be price fixing in a literal sense, it is not price fixing *in the antitrust sense*." *Id.* at 4-5 (emphasis added).

The Court expressly rejected the Ninth Circuit's use of the ancillary restraints doctrine. Under the ancillary restraints doctrine, courts must determine whether a restriction "is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid." *Id.* at 6. The Court characterized that doctrine as governing "the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on *nonventure activities*." *Id.* at 5-6 (emphasis added). The Court stated that "[w]e agree with petitioners that the ancillary restraints doctrine has no application here, where the business practice being challenged involves the *core activity of the joint venture itself*—namely, the pricing of the very goods produced and sold by Equilon." *Id.* at 6 (emphasis added).

Comment. Although the outcome in *Dagher* was not unexpected, *Dagher*'s reasoning may portend a reduced scope of application of Section 1 to certain joint venture conduct. Under *Dagher*, when a lawful, economically integrated joint venture sets the prices of its products, and engages in other "core" venture activities, such conduct is not "price-fixing" in the antitrust sense and is not subject to scrutiny under the ancillary restraints doctrine. When activities are thus at the "core" of the joint venture, or perhaps are within the scope of the venture's defined business purpose (*i.e.*, are "venture conduct"), the activities will be analyzed under the same rules that apply to single-firm conduct. *Dagher* should be of considerable significance to joint ventures that represent an economic integration of resources and a sharing of risk.

2. Sale of Patented Products—*Illinois Tool Works Inc. v. Independent Ink*

Holding. A patent does not confer a presumption of market power. In all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.

Background. Petitioners, Trident, Inc. and its parent, Illinois Tool Works, Inc., (collectively "ITW") manufacture and market printing systems that include patented printheads and ink containers as well as unpatented ink. *Illinois Tool Works Inc. v. Independent Ink, Inc*, Slip Op. at 2 (Mar. 1, 2006). ITW licenses original equipment manufacturers ("OEMs") to incorporate the patented components into printers that the OEMs sell to their customers. *Id.* The OEMs agree that they will purchase their nonpatented ink exclusively from ITW and that neither they nor their customers will refill the patented containers with ink of any other kind.

Respondent, Independent Ink, Inc., which has developed an ink with the same chemical composition as the ink sold by petitioners, filed suit against ITW seeking a judgment of noninfringement and invalidity of ITW's patents. *Id.* at 2. Independent Ink further alleged that ITW engaged in illegal tying and monopolization in violation of Sections 1 and 2 of the Sherman Act. *Id.*

The district court granted ITW's motion for summary judgment on the Sherman Act claims because Independent Ink failed to submit evidence that could support a finding of market power in the tying product. *Id.* at 2-3. The Court of Appeals for the Federal Circuit reversed the district court's decision as to respondent's Section 1 claim based on its view that Supreme Court precedent held that patents presumptively confer market power. *Id.* at 3.

The Court's Opinion. The Court acknowledged that, "[o]ver the years . . . this Court's strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the Court has required a showing of market power in the tying product." *Indep. Ink*, Slip Op. at 5. In addition, the Court noted that in 1988 "Congress amended the Patent Code to eliminate that presumption in the patent misuse context" and that the Justice Department and the FTC, in their 1995 IP licensing guidelines, had announced that they would not presume that a patent confers market power. *Id.* at 12 and 16. After considering those developments, the Court concluded that tying arrangements involving patented products should be evaluated like nonpatent tying cases. *Id.* at 13. "*[In] all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product*." *Id.* at 16 (emphasis added).

Comment. The Court's holding provides businesses that market patented products greater freedom to sell the patented product in conjunction with other products and services—provided that the business does not have market power in the tying product.

3. Distribution—*Volvo Trucks v. Reeder-Simco*

Holding. The Robinson-Patman Act does not apply to secondary-line price discrimination absent a showing that the manufacturer discriminated between dealers contemporaneously engaged in actual competition to resell the manufacturer's product to the same customer (or customers in the same relevant market).

Background. In *Volvo Trucks* Reeder-Simco GMC, Inc. ("Reeder"), a Volvo dealer that sold custom-order trucks, brought suit against Volvo Trucks North America, Inc. ("Volvo") for price discrimination under the Robinson-Patman Price Discrimination Act ("Robinson-Patman Act" or the "Act"). *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S.Ct. 860 (Jan. 10, 2006). Reeder argued that Volvo had discriminated against Reeder in the discounts that Volvo offered to Reeder as compared to the discounts offered to other Volvo dealers. *Id*. at 867. Reeder thus asserted that, through persistent secondary-line price discrimination, Volvo injured both Reeder and competition in the sale of Volvo trucks. *See id.* at 867-70; *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 707 (8th Cir. 2004).

The Court's Opinion. The Court stated that the Robinson-Patman Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. *Volvo Trucks*, 126 S.Ct. at 866. The Court found that each bidding transaction by which the Volvo trucks were sold constituted *its own relevant market*. *Id.* at 871-72 (emphasis added). Because Reeder had not competed with a favored purchaser in the same (single-transaction) relevant market, the Court found Reeder could not establish the competitive injury required under the Act. *Id.* at 870.

Comment. Through provocative commentary in the secondary-line price discrimination context on the importance of interbrand competition, the Supreme Court in *Volvo Trucks* has invited lower courts to consider whether a secondary-line competitive injury must have an "interbrand" dimension. Lower courts will now likely assess whether the competitive injury from secondary-line price discrimination must affect competition in the relevant market as a whole or just the party against which the price discrimination was exercised. Also notable is the Court's ruling that each bidding transaction constituted its own relevant market.

* * * * * * * * * * * * * * *

If you have questions regarding any of these cases, please contact Bill Rooney (212-728-8259, wrooney@willkie.com) or David Park (212-728-8760, dpark@willkie.com) in our New York office, Barry Nigro (202-303-1125, bnigro@willkie.com) or Ted Whitehouse (202-303-1118, twhitehouse@willkie.com) in our Washington, DC office, or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

March 9, 2006

Copyright © 2006 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information.