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Complex Litigation

N.J. Antitrust Act No Model of Liberality

It's a virtual mirror image of the Sherman Act, with a few variations

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Narrow judicial review and strict interpretation of the federal antitrust laws has led to a nationwide surge of antitrust litigation, brought under state antitrust statutes perceived as less stringent than their federal counterparts.

But don't count the New Jersey Antitrust Act among that company.

Not only does New Jersey's law essentially parallel the federal Sherman Act, but state courts are explicitly directed to construe the act "in harmony with ... judicial interpretations of comparable federal antitrust statutes." See N.J.S.A. 56:9-18; *Liggett Group, Inc. v. R.J. Reynolds Tobacco Co.*, 102 F.Supp.2d 518 (D.N.J. 2000); and "An Overview of Enforcement of State Antitrust Laws," www.gaminigip.com/Articles/OverSAL.html.

The Sherman Act, promulgated in 1890, was designed to prohibit trade-restraining practices that created monopolies or restricted competition. 54 Am. Jur. 2d, "Monopolies, Restraints of Trade, and Unfair Trade Practices," § 1 et seq. The Sherman Act strives to protect competition and thereby the competitive

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process that affords the public the benefits of lower prices, better products and more efficient production methods.

Section 1 of the act, the federal analog to N.J.S.A. 56:9-3, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *Id.* 15 U.S.C.A. 1. Hence, to sustain a claim under section 1, a plaintiff must prove the following: (1) the defendants contracted; (2) a combination or conspiracy among defendants; (3) the combination or conspiracy resulted in adverse anticompetitive effects within relevant product and geographic markets; (4) the objects of and conduct pursuant to the contract or conspiracy were illegal; and (5) the plaintiff was injured as a proximate result of the conspiracy. See *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72 (3d Cir. 1977).

Despite such pervasive language, the U.S. Supreme Court has held that only conduct that unreasonably restrains trade is illegal. *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 60-66 (1911).

Borrowing the basic substantive concepts of its federal counterpart, the New Jersey Antitrust Act — promulgated in 1970 and not pre-empted by any federal antitrust law — prohibits trade-restraining practices that are secured through monopolistic practices and that have the effect of depriving the public of

benefits traditionally derived from the competitive market.

In essence, the state antitrust act is designed to protect competition, not private litigants, by preserving free and unfettered trade. Indeed, the desire to protect competition is so great that illegal conduct by an antitrust plaintiff will not even necessarily bar pursuit of a claim. As stated in *Glasofer Motors v. Osterlund*, 180 N.J. Super. 6 (App. Div. 1981), the "plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition."

More specifically, the state antitrust act provides, in almost identical language to the Section 1 of Sherman Act, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, in this State, shall be unlawful." N.J.S.A. 56:9-3. The act goes further to state that it is "unlawful for any person to monopolize, or attempt to monopolize, or to combine or conspire with any person or persons, to monopolize trade or commerce in any relevant market within this State." N.J.S.A. 56:9-4(a).

Vertical Restraints of Trade

To determine whether conduct unreasonably restrains trade, the court has implored two distinct methods: (1) the per se rule and (2) the rule of reason. See *Ideal Dairy Farms, Inc., v. Farmland Dairy Farms, Inc.*, 282 N.J. Super. 140

(App. Div. 1995).

As noted in *E Z Sockets, Inc., v. Brighton-Best Socket Screw Mfg., Inc.*, 307 N.J. Super. 546 (Ch. Div. 1996), the per se rule — with its underlying policy of litigation efficiency and business certainty — is only appropriate when it relates to conduct that is manifestly anticompetitive. The per se rule, therefore, requires a plaintiff to prove the unreasonableness of the restraint on trade unless the act is per se violative of section 1.

An act is deemed per se violative of section 1 when such act results in a restraint that is always harmful to competition. Indeed, there are certain acts that must be deemed unreasonable and thereby illegal “because of their pernicious effect on competition and lack of any redeeming virtue.” *Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 5 (1958).

Accordingly, under the per se rule, neither federal court nor state court need examine the reasonableness of the restraint and the plaintiff need not prove anticompetitive effects as unreasonable, rather such anticompetitive effects are presumed.

As the *E Z Sockets* court noted, the rule of reason test, which is more frequently implored by both federal and state courts, focuses on whether the challenged conduct adversely affects competition. Under the rule of reason analysis, a plaintiff is required to prove that the restraint on trade adversely affects competition, thereby resulting in anticompetitive effects within the relevant product and geographic markets. *Cernuto, Inc., v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979).

Thus, the plaintiff bears the burden of not only proving anticompetitive effects, but also of defining the relevant product and the geographic market. Accordingly, in this instance, a court must conduct a thorough examination of the relevant product and the geographic markets to effectively survey the effect of the challenged conduct on the market. Hence, as the court noted in *Belmar v. Cipolla, et al.*, 96 N.J. 199 (1984), an analysis of the economics of the industry in question is necessary to determine whether the given restraint is unreasonable.

In sum, the rule of reason test is a balancing process that examines the

competitive significance of a given practice. The balancing process entails a two-step analysis: (1) defining the relevant market in which the alleged restraint operates; and (2) evaluating the “evils” inherent in the questioned practice and weighing the anticompetitive influences against the pro-competitive benefits. *Pomanowski v. Monmouth County Bd. of Realtors*, 89 N.J. 306 (1982).

If the pro-competitive benefits of such practice outweigh the anticompetitive effects, the restraint on trade will not be deemed unreasonable by either the Sherman Act or the state antitrust act.

Vertical agreements to maintain prices and stifle competition are invalid. However, the *E Z Sockets* court also noted that “vertical restraints” themselves are not per se illegal because they have the potential to stimulate inter-brand competition. In fact, encouraging inter-brand competition is a major concern of the antitrust laws because competition protects consumers, the Supreme Court said in *Continental T.V., Inc. v. G.T.E. Sylvania Inc.*, 433 U.S. 36 (1977).

Forum Shopping

Although the state antitrust act mirrors the federal antitrust laws, the rights conferred upon parties by the New Jersey act are not identical to those conferred by its federal counterpart. Indeed, one significant procedural difference is the right to a jury trial.

Unlike the federal antitrust laws, the state antitrust act does not provide a right to a trial by jury. Indeed, the state antitrust act omits any references to a jury trial. Such an omission displays a deliberate intent not to grant such a right. See *Boardwalk Properties, Inc. v. BPHC Acquisition, Inc.*, 253 N.J. Super. 515 (App. Div. 1991).

The reason the New Jersey act does not grant a right to a jury trial appears to lie in the fact that the purposes and remedies made available through the act are predominantly equitable in nature. After all, as noted in *Boardwalk Properties*, the overriding purpose of the act is to advance public policy in favor of competition. The court further notes that while a private litigant may financially benefit from filing an antitrust claim, the prima-

ry remedies available are equitable.

A plaintiff should thus be aware that in filing an antitrust claim under the state antitrust act, a court is likely to determine that such plaintiff primarily seeks to obtain relief that is equitable in nature. Both New Jersey and federal law hold that no jury trial is available where only equitable relief is sought. Thus, antitrust plaintiffs who seek a trial by jury should file their claim in federal court or risk the inability to obtain a jury as finder of fact.

As a result of the differences in rights afforded to antitrust plaintiffs under the state antitrust act and the federal antitrust laws, antitrust plaintiffs who do not file their claims in the desired court, may not obtain their preferred mode of trial. See “The Right To A Civil Jury Trial,” 26 *Seton Hall Law Rev.* 1461 (1995). Thus, antitrust plaintiffs should consider forum shopping between federal and state court, and file their claims in federal court if they seek a jury trial or state court if they seek a nonjury trial.

Additionally, a significant substantive difference between the two can be found in the New Jersey act’s refusal to incorporate an interstate commerce requirement, thereby — as stated in *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 111 (3d Cir. 1988) — resulting in the appearance of being less stringent in its requirements than its federal counterpart. Thus, in contrast to federal antitrust law, which requires plaintiffs’ claims to contain a substantial connection to interstate commerce, the New Jersey act does not require plaintiffs to establish such a connection and, therefore, they may more readily satisfy the requirements necessary to sustain a claim under the state antitrust act.

Moreover, unlike the federal antitrust laws, the New Jersey act does not regulate price discrimination claims and fails to incorporate an adaptation of the Robinson-Patman Act. As such, any claims for price discrimination must be filed in federal court. See *Gregory Marketing Corp. v. Wakefern Food Corp.*, 207 N.J. Super. 607 (Law Div. 1985).

Still, the state antitrust act shares a number of features of the federal antitrust laws. For instance, so long as plaintiffs are able to prove actual business was conducted and the alleged injury to their

business resulting from an unreasonable restraint of trade is more than de minimis, violations of either the state antitrust act or the federal antitrust laws will be punished both civilly and criminally. N.J.S.A. 56:9-12. Assuming success, a private plaintiff may obtain both injunctive relief and money damages,

treble damages and attorneys' fees, whether the antitrust claims were filed in state court or federal court.

In addition, similar to the federal antitrust laws, the state antitrust act provides for a four-year statute of limitations.

The procedural and substantive dis-

tinctions between New Jersey and federal antitrust law can have a great affect upon the outcome of a case and thus, warrant a state versus federal juxtaposition. As such, careful consideration should be paid to these distinctions so plaintiffs may file their claims in the court of their choice. ■