2017 Corporate Counsel and Trade Regulation Seminar

New Developments in Antitrust

1:00 p.m. - 1:45 p.m.

Presented by
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Judicial Branch Building
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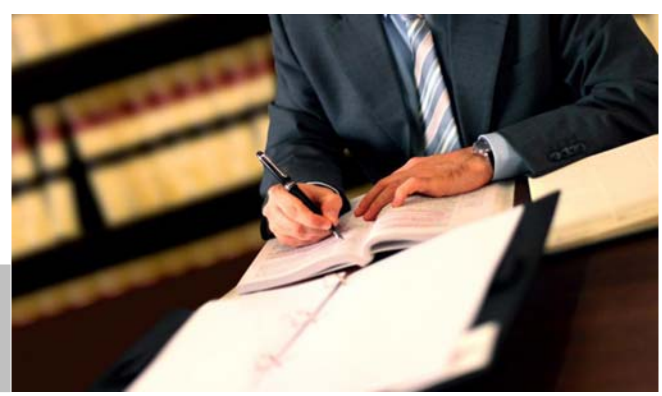
Des Moines, IA 50319



Friday, September 22, 2017

ANTITRUST IN 2016-17: ARE THE COURTS SEEING TOO FEW ANTITRUST CASES AND GETTING OUT OF PRACTICE?

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ANTITRUST IN 2016-17

- To do anything well you have to do it a lot.
- Today's question: Are courts seeing too few antitrust cases and, therefore, making mistakes when they *do* get an antitrust case?
- Other than the 2nd and 3rd Circuits, I'm concerned that courts just aren't getting enough antitrust experience.

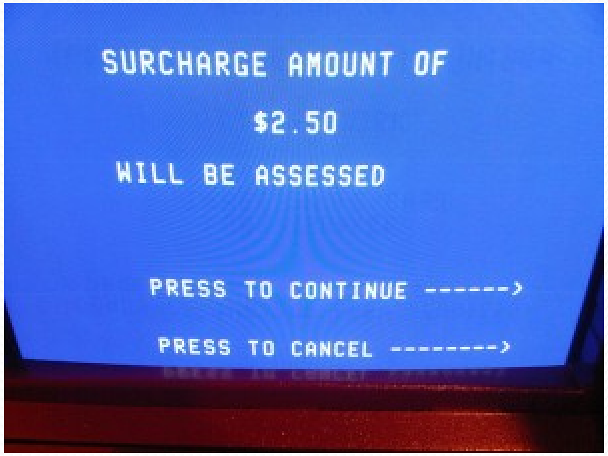
TODAY'S AGENDA

- We will cover:
  - (1) The US Supreme Court
  - (2) Some interesting federal appellate court decisions
  - (3) The Iowa Supreme Court
  - (4) Antitrust enforcement activities
  - We will give the NCAA a time-out for this year but will discuss one sports law case.
  - You can consider whether my theme for this year's presentation holds water or not.

THE SUPREME COURT IN 2016-17

- The Supreme Court did not decide any antitrust cases this past term even though it had one on the docket:
- *Osborn v. VISA, Inc.*, 797 F.3d 1057 (D.C. Cir. 2015), *cert. granted*, 136 S.Ct. 2543 (June 28, 2016).

VISA, INC. v. OSBORN



VISA, INC. v. OSBORN

- Say you are an independent ATM operator. As the operator you make money (1) by charging the card holder an access fee and (2) by receiving an interchange fee from the card holder's bank. From the interchange fee you have to pay a network services fee to a network – e.g., Visa, MasterCard, Star, etc.
- Both Visa and MasterCard have required ATM operators to give them MFN status. That is, if you the operator want to accept their cards, you can't charge a higher access fee to the Visa or MasterCard card holder than you do for other cards.
- However, Visa and MasterCard charge higher network service fees to the operators, so the operator receives a smaller amount net on a Visa or MasterCard transaction than on a transaction through another network.
- Because of the MFN provisions, independent operators can't say to cardholders, "We will charge you $2.00 for a Visa or MasterCard transaction, but if your card has a Star logo on it, we will charge you only $1.75."

VISA, INC. v. OSBORN

- There was no claim that Visa and MasterCard had conspired with each other. The claim was that the member banks in Visa and in MasterCard conspired among themselves. Visa and MasterCard are both publicly held companies today, but the rules in question were adopted when they were owned by the member banks.
- ATM operators and consumers sued, alleging violations of § 1 of the Sherman Act.

VISA, INC. v. OSBORN

- The district court dismissed the case on a 12(b)(6) motion, but the 2^{nd} Circuit reversed.
- "The Plaintiffs have adequately alleged an agreement that originated when the member banks owned and operated Visa and MasterCard and which continued even after the public offerings of these associations."
- The Supreme Court granted cert.

VISA, INC. v. OSBORN

- The defendants argued mere membership in an association can't be enough to make you a conspirator even if the association has an anticompetitive rule.
- The argument seemed to have several different strands:
  - (1) Under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), you need to allege enough detail to demonstrate that an antitrust conspiracy is plausible. Here there is no allegation that any bank communicated with any other bank.
  - (2) When a joint venture acts as a joint venture and pursues the interest of that venture as a whole, that cannot be the basis for a § 1 claim.
  - (3) A § 1 complaint challenging a joint venture must plausibly suggest that the venture's members were pursuing separate economic interests.

VISA, INC. v. OSBORN

- In October 2016, the United States filed a merits brief in support of the judgment below. (Note that Supreme Court failed to ask for the views of the government *before* granting cert.)
- The government essentially made the point that the petitioners were confusing (1) whether there is concerted conduct for purposes of Sherman 1 (the threshold issue presented by the 12(b)(6) motion) with (2) when does a joint venture violate the antitrust laws (the ultimate merits of the case).
- The government pointed out that this case is governed by…

AMERICAN NEEDLE v. NFL

AMERICAN NEEDLE v. NFL

- A unanimous Court, per Justice Stevens, held that to decide whether there is concerted action to trigger section 1 coverage, you do not look at whether a single legal entity is technically involved, or whether the parties involved "seem like one firm or multiple firms in any metaphysical sense."
- Instead, you perform a "functional analysis."
- You look at whether there are "independent centers of decisionmaking."
- Here, each NFL team was an independent center of decisionmaking, so an agreement among them was subject to § 1.
- The fact that a single entity, NFL Properties, was formed, does not shield the arrangement from § 1 if there are independent centers of decisionmaking.
- By analogy, in *Visa, Inc. v. Osborn* the member banks are "independent centers of decisionmaking."

VISA, INC. v. OSBORN

- On November 17, 2016, less than 3 weeks before scheduled O/A, the Supreme Court dismissed the writ as improvidently granted.
- "Writ of certiorari DISMISSED as improvidently granted. These cases were granted to resolve "[w]hether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act." After having persuaded us to grant certiorari on this issue, however, petitioners chose to rely on a different argument in their merits briefing. The Court, therefore, orders that the writs in these cases be dismissed as improvidently granted."
- Not sure I agree. Maybe just the SC giving cover to the law clerk who wrote the cert pool memo.
- Regardless, I tend to concur the case didn't warrant the Court's attention. The 2nd Circuit was right on the only issue before it – namely, whether the plaintiffs had adequately pled concerted activity.
- Note the date when the SC granted cert – June 28, 2016.

JUSTICE GORSUCH'S ANTITRUST CASES

- How will Justice Gorsuch approach antitrust cases?
- I could find only one majority opinion he wrote on the 10th Circuit.
- *Novell, Inc. v. Microsoft Corp*., 731 F.3d 1064 (10th Cir. 2013).
- The opinion employs a very concentrated Chicago School approach – maybe too concentrated for my taste.
- When rolling out a new version of the Windows in the mid-1990's, Microsoft originally gave access to its application programming interfaces (API's) to competing software developers like Novell (WordPerfect).
- Then after giving access during the Beta version, Microsoft pulled access before the final version in order to provide "a real advantage" to its own software (as Bill Gates put it).
- Novell sued under Sherman § 2. The district court granted JML to Microsoft. Novell appealed.

NOVELL v. MICROSOFT

- The 10th Circuit per Judge Gorsuch affirmed on the basis of insufficient evidence of exclusionary conduct. Relying on the US Supreme Court's decision in *Law Offices of Curtis V. Trinko*, the 10th Circuit basically said this is a refusal to deal and refusals to deal generally don't constitute exclusionary conduct.
- Remember, though, that in *Aspen Skiing* the Supreme Court upheld a § 2 plaintiff's verdict based on a refusal to deal – i.e., where the dominant ski operator in Aspen refused to continue selling a combined lift ticket with the smaller ski operator. *Trinko* distinguished *Aspen Skiing* largely on the ground that the monopolist in *Aspen Skiing* had discontinued a prior cooperative arrangement.
- Why isn't *Novell* an *Aspen Skiing*-type case?

NOVELL v. MICROSOFT

- The *Trinko* Court said, "The unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end."
- Judge Gorsuch juiced up this holding: "[A]s in *Aspen,* the monopolist's discontinuation of the preexisting course of dealing must 'suggest[ ] a willingness to forsake short-term profits to achieve an anti-competitive end.'" This rearranges the logic of *Trinko* a bit.
- Judge Gorsuch then analogized refusal to deal cases to predatory pricing cases and said that Novell had to present independent evidence from which "a reasonable jury could infer that Microsoft's discontinuation of this arrangement suggested a willingness to sacrifice short-term profits." Since no such evidence was presented, Novell's claim failed as a matter of law.

NOVELL v. MICROSOFT

- Maybe a little strong. As in *Aspen Skiing*, doesn't the fact that Microsoft used to share its API's suggest that the sharing was profitable? That is what *Trinko* said. In short, the 10th Circuit required *additional proof* that the monopolist was sacrificing profits, instead of allowing an inference from the fact that the monopolist discontinued a cooperative arrangement that had previously been in place and seemed satisfactory to everyone.
- So far, the US Supreme Court has not equated refusal to deal cases with predatory pricing cases. Predatory pricing cases are a special animal because low prices are clearly a good thing for consumers.

IN RE PRE-FILLED PROPANE TANK ANTITRUST LITIGATION

IN RE PRE-FILLED PROPANE TANK ANTITRUST LITIGATION

- 860 F.3d 1059 (8th Cir. 2017).
- A proposed class action brought against distributors of pre-filled propane exchange tanks.
- The allegation was that when the price of propane rose in 2008, the defendants acted in concert to reduce the fill level of the tanks from 17 to 15 pounds of propane.
- There was a settlement in 2010. But the plaintiffs allege the conspiracy continued. In fact, the FTC issued a complaint in 2014, which prompted this new lawsuit.
- The defendants moved to dismiss this new lawsuit based on the 4-year statute of limitations in the Clayton Act, i.e., 2008 was more than 4 years ago. The district court agreed with the defendants and dismissed.
- Plaintiffs appealed, arguing a continuing violation.

IN RE PRE-FILLED PROPANE TANK ANTITRUST LITIGATION

- The 8th Circuit panel affirmed the district court. Judge Benton dissented.
- Last year, I discussed the panel decision and said, "I think the decision is maybe a bit questionable."
- This year the court reversed en banc.
- The issue is: When you have an agreement to inflate prices *outside* the limitations period, and the same prices continue to be charged *inside* the limitations period, can suit be filed? Is there a continuing violation?
- New majority (written by Judge Benton): "[S]ales at artificially inflated prices are overt acts that restart the statute of limitations." (However, you can only sue over sales within the limitations period.)
- The new dissent (written by the judge who wrote the panel majority) offers a different standard: "[T]he plaintiffs must sufficiently allege that the defendants engaged in a live ongoing conspiracy sometime in the limitations period to survive a motion to dismiss."
- Remember, the 2010 settlement and the 2014 FTC complaint kind of complicate things.

IN RE PRE-FILLED PROPANE TANK ANTITRUST LITIGATION

- In a sense, the issue is kind of the same as in *Visa v. Osborn*: You start out with a conspiracy or agreement. The conduct enabled by the conspiracy continues, but the defendants say it is no longer being undertaken pursuant to the conspiracy. Are the defendants home free?
- I agree with the en banc majority in *Propane*. If you have a conspiracy and the conduct enabled by the conspiracy continues, then the defendants have to show some kind of break in the action – i.e., affirmative proof of a time period when there was independent conduct - to avoid the continuing violation rule.

UNITED STATES v. AMERICAN EXPRESS

UNITED STATES v. AMERICAN EXPRESS

- 838 F.3d 179 (2nd Cir. 2017).
- AmEx typically reimburses merchants less than Visa or MasterCard.
- At the same time, AmEx requires merchants to enter into nondiscrimination provisions (NDP's). These forbid the merchant from trying to discourage customers from using AmEx or charging differently for use of AmEx as opposed to other credit cards.
- This case arose when the DOJ and a number of states (including Iowa) sued AmEx.
- The allegation was that these vertical arrangements (the NDP's) unreasonably restrained competition in violation of Sherman § 1. A rule of reason case.
- After a trial, the district court found for the government and permanently enjoined AmEx from enforcing the NDP's.

UNITED STATES v. AMERICAN EXPRESS

- The oversimplified facts are as follows: The credit card market has four firms (Visa, MasterCard, AmEx, and Discover) with high barriers to entry.
- AmEx accounts for about 26% of credit card purchase volume. Ordinarily this would not seem like market power. However, the district court emphasized that "cardholder insistence" (certain customers' preference for AmEx cards) gave AmEx market power.
- The 2nd Circuit reversed.
- The appellate opinion is fairly complicated, but I think the gist is this…

UNITED STATES v. AMERICAN EXPRESS

- AmEx doesn't have market power. 26% is not market power. The credit cards all compete in one market. "It was error for the District Court to have relied on cardholder insistence as support for its finding of market power. Cardholder insistence results not from market power, but instead from competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards."
- In other words, Visa and MasterCard compete by offering merchants more and cardholders less. AmEx competes by offering merchants less and cardholders more. But they still compete.
- The court notes that lots of merchants refuse to accept AmEx.
- My take: Maybe (?) an unfair trade practice but not an antitrust violation.
- Note how inconsistent we all are on when you should and shouldn't unbundle. Think about airline fees. Cable TV.

UNITED STATES v. AMERICAN EXPRESS

- One more twist: The United States (Trump Administration) decided not to ask for cert and is opposing efforts by the participating states (including Iowa) to obtain review of the 2^{nd} Circuit decision.

MIRANDA v. SELIG

MIRANDA v. SELIG

- 860 F.3d 1237 (9th Cir. 2017).
- All minor league ballplayers are employed by a major league team.
- Allegedly, MLB requires that all first-year minor leaguers earn $1,100 per month, Class-A $1,250, Class-AA $1,500, Class-AAA $2,150.
- Minor league players do not belong to a union. So probably no labor exemption.
- Miranda, et al. brought a class action alleging conspiracy by the major league teams in violation of Sherman § 1.
- Case was dismissed by the trial court based on the baseball exemption.
- Here, the dismissal is affirmed by the 9th Circuit.

MIRANDA v. SELIG

- The 9th Circuit refers to the baseball exemption as the "business of baseball" exemption.
- What is ironic about that?
- In 1998, after Curt Flood died, Congress passed the Curt Flood Act named in his honor.
- The Act partially repeals the baseball exemption but only subjects "the conduct, acts, practices or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of *major league baseball players*" to the antitrust laws.
- What is ironic about that?

CHICOINE v. WELLMARK, INC.

- 894 N.W.2d 454 (Iowa 2017).
- The Iowa Supreme Court's only antitrust case this past year. The court didn't get to the merits but it illustrated an important point about antitrust law.
- And maybe illustrated the theme of today's presentation.

CHICOINE v. WELLMARK, INC.

- As you know, most states have a single BC/BS health insurer. In Iowa and South Dakota, it is Wellmark.
- An MDL is pending in the Northern District of Alabama involving suits brought by various health care providers alleging that the various BC/BS entities have conspired to keep out of each other's markets (e.g., other BC/BS entities don't enter Iowa or South Dakota). Allegedly, this market division has monopsony effects: It allows Wellmark and the other BC/BS entities to drive down reimbursement rates for health care providers.
- One of the MDL plaintiffs is an Iowa chiropractor.

CHICOINE v. WELLMARK, INC.

- Meanwhile, in Polk County District Court there is putative class litigation brought by Iowa chiropractors including Chicoine against Wellmark under the Iowa Competition Act.
- Wellmark persuaded the district court here to stay the Chicoine litigation "in favor of further proceedings in [the MDL], until further order of this court."
- Chicoine, et al. appealed.

CHICOINE v. WELLMARK, INC.

- The Iowa Supreme Court reversed.
- Both the Alabama MDL and the Iowa state court litigation were antitrust cases involving the BC/BS network, but…
- "[A]s the district court found, the plaintiffs raised approximately 'ten detailed specifications of wrongdoing' concerning Wellmark's treatment of *Iowa chiropractors* while MDL No. 2406 focused on two allegations concerning the BCBSA's treatment of *all healthcare providers*. Although there appears to be an allegation common to both cases that the BCBSA entities have generally conspired to stay out of each other's territories (i.e., Iowa and South Dakota in the case of Wellmark), the present case alleges discriminatory treatment of chiropractors instead of artificially low reimbursements for all healthcare providers. In addition, the present case alleges other anticompetitive agreements, including between Wellmark and self-insurers. It is unclear in our view whether any resolution of claims in MDL No. 2406 would result in the resolution of claims in this action."

CHICOINE v. WELLMARK, INC.

- Two takeaways…
- Not all antitrust cases which overlap as to parties and time period are identical. The specific antitrust claims matter.
- Antitrust doesn't necessarily = too burdensome to litigate.
- Maybe a third takeaway…
- It's ok for Iowa courts to get more practice handling antitrust cases.

ANTITRUST ENFORCEMENT ACTIVITIES

- *US v. Anthem*
- *US v. Aetna*
- *EU v. Google*

US v. ANTHEM/CIGNA

- 855 F.3d 345 (DC Cir. 2017).
- Anthem is the BC/BS entity in 14 states (not Iowa/South Dakota – Wellmark).
- DOJ sued to block the proposed Anthem/Cigna merger under Clayton § 7.
- Not entirely clear to me why State of Iowa joined the case. Anthem and Cigna are pretty invisible in Iowa. I didn't see any Iowa market pled in the complaint.
- The key claim was that there would be a substantial reduction in competition in the "national accounts" market – employers purchasing health insurance for more than 5K employees across more than one state. Basically it's a market for self-insurance. The insurer provides claims administration and access to a network. Anthem is #2 with 41% and Cigna #4 with 6%.

US v. ANTHEM/CIGNA

- Anthem responded that any anticompetitive effects would be outweighed by two procompetitive benefits: (1) the merged company could negotiate lower rates, and (2) the merged company could offer Cigna innovative programs to more customers.
- The government's complaint had featured the innovative competitor theory: "Cigna has been particularly effective in using its innovative wellness programs to compete with Anthem." "Cigna has been particularly focused on investing time and resources in value-based arrangements…"
- The government's theory: Cigna is the little engine that could and post-merger the innovative Cigna programs would go away.
- I'm skeptical of the innovative competitor theory. If the programs are good, the new company will use them. If they're bad, it won't. This kind of thing shouldn't be a significant antitrust consideration.
- Anyhow, Anthem tried to turn the innovative competitor theory around against the government.

US v. ANTHEM/CIGNA

- The district court enjoined the proposed merger under Clayton § 7.
- The DC Circuit majority affirmed, upholding the district court's conclusion that the anticompetitive effects of the merger were not outweighed by procompetitive effects.
- In assessing anticompetitive effects the court used a *structural* approach focusing on HHI's. In assessing procompetitive effects the court used more of an *anecdotal* approach. It questioned the ability of a merged entity to renegotiate provider contracts and simultaneously maintain the innovative Cigna programs. "It was perfectly reasonable for the district court to find that some providers, even if they are unwilling to accept less money, will simply respond by offering customers less in the way of Cigna high-touch service."
- Additionally, the DC Circuit majority questioned in dicta whether efficiencies can be a defense to a merger, citing some old 1960's US Supreme Court precedent.

US v. ANTHEM/CIGNA

- The dissent (Judge Kavanaugh) quantifies both anticompetitive and procompetitive effects. He concludes the merger would enable the merged company to raise fees somewhat, but this would be easily outweighed by the lower provider rates that would be obtained. Therefore, on a net basis these large employers would receive substantial savings.
- "For large employers, therefore, the savings from the merger would far exceed the increased fees they would pay to Anthem-Cigna as a result of the merger."
- "[T]he Government's expert… never did a merger simulation that calculated the amount of the savings that would result from the lower provider rates and be passed through to employers… So we are left with Anthem-Cigna's evidence showing $1.7 to $3.3 billion annually in passed-through savings for employers."

US v. ANTHEM/CIGNA

- Also the dissent criticizes the majority's invocation of merger cases from the 1960's: "In landmark decisions of the 1970's… the Supreme Court indicated that modern antitrust analysis focuses on the effects on the consumers of the product or service, not the effects on competitors. In the horizontal merger context, the Supreme Court in the 1970s therefore shifted away from the strict anti-merger approach that the Court had employed in the 1960s…"
- Is the DC Circuit out of practice?

US v. ANTHEM/CIGNA

- Two qualifiers in the dissent:
- 1. The dissent would remand for consideration of anticompetitive monopsony effects (*see Chicoine supra*):
- "That said, on my view of the case, the Government could still ultimately block this merger based on the merger's effects on hospitals and doctors in the *upstream* provider market. At trial, the Government asserted an alternative ground for blocking the merger: The Government claimed that the merger between Anthem and Cigna would give Anthem-Cigna monopsony power in the upstream market where Anthem-Cigna negotiates provider rates with hospitals and doctors. The District Court did not decide that separate claim. I would remand for the District Court to decide it in the first instance."
- "Monopsony power describes a scenario in which Anthem-Cigna would be able to wield its enhanced negotiating power to unlawfully push healthcare providers to accept rates that are below competitive levels. That may be an antitrust problem in and of itself."

US v. ANTHEM/CIGNA

- "As a result, the legality of the merger should turn on the answer to the following fact-intensive question: Would Anthem-Cigna obtain lower provider rates from hospitals and doctors because of its exercise of unlawful monopsony power in the upstream market where it negotiates rates with healthcare providers? Given the way it resolved the case, the District Court never reached that critical question. Therefore, I would remand for the District Court to expeditiously decide that question in the first instance."
- 2. The dissent doesn't buy "innovative provider" as an argument for or against the merger. In fact, it doesn't think Cigna is all that innovative:
- "The majority opinion also says that Cigna provides programs that help reduce utilization and that those could be jettisoned after the merger. But there is no good reason to think that those programs would be jettisoned rather than adopted by the merged company. Moreover, this speculation does not account for the fact that Anthem already has lower utilization rates than Cigna. So is it not likely that Cigna customers would utilize health care *more* after the merger than they do now."

U.S. v. AETNA/HUMANA

- 2017 WL 3251892017 (D.D.C. 2017).
- Will just talk briefly about this one.
- There were two problems in this merger: (1) Medicare Advantage plans, (2) the Obamacare exchanges.
- Regarding #1, the court unsurprisingly found anticompetitive effects if Aetna and Humana merged their Medicare Advantage plans. The real issue was whether these proposed divestiture of approximately 290,000 plans to Molina, a third party, would resolve their effects. The court said no, because Molina was primarily a Medicaid company and wouldn't be successful with running the Medicare Advantage business.
- Regarding #2, Aetna had already pulled out of the exchanges in the counties in Fla, Ga, and Mo where it was competing with Humana. The court did not find an adverse effect on competition in Ga or Mo, because Aetna was losing money there and you can't expect a company to keep losing money. In Fl, however, the court said this was a litigation strategy, because Aetna had been making money there. So the court found anticompetitive effects of the merger on the exchanges in Fl.

US v. AETNA/HUMANA

- On a quick read this seemed like a sound decision to me, recognizing that one must give weight to the facts found by the district court.
- Aetna did not appeal and abandoned the merger.

EU v. GOOGLE


Concurrence:
Google
Shopping
Antitrust:
Google
Shopping
Commission européenne
European Commission

EU v. GOOGLE

- I really didn't understand the motivation behind Brexit until I read this case.
- \$2.9 billion fine. Actually 2,424,495,000 euros.
- Explanation for the fine is four pages long. \$725,000,000 per page.
- "Google has abused its market dominance in general internet search by giving a separate Google product (… "Google shopping"…) an **illegal advantage** in the separate comparison shopping market."
- "Google has systematically given **prominent placement** to its own comparison shopping service…"
- "On the other hand, rival comparison shopping services are subject to Google's generic search algorithms, including **demotions**…"
- "Google has to respect the simple **principle of equal treatment** in its search results for its own comparison product…"
- All boldface is in the original.

EU v. GOOGLE

- What's wrong here? Let me count the ways.
- 1. Google favors the Google product in its search results. So what? The Google product has the Google name. Who is misled by that? It's transparent.
- 2. Google searches are a valuable service that's free. So Google has to monetize the service. This is just one way of monetizing. Ads are another. Ads in a sense "bias" the search results as well. If the end result is not misleading, who cares?
- 3. Google isn't tying sales of two products (like Microsoft in *U.S. v. Microsoft* years ago). Google is offering a product – searches. Why can't it tailor that product however it wishes as long as it isn't misleading? What if Google's results showed *only* its own shopping service?
- 4. In comparison shopping, Google isn't the dominant player. Amazon is. A way of trying to break down Amazon's advantage.
- However…
- 5. Note the hypocrisy of Google campaigning for "net neutrality" but not practicing "search neutrality." Neutrality should be a requirement for other businesses, not Google.

CONCLUSION

- Thank you for your attention.
- Questions?