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Strict Liability For Below-Cost Pricing In Calif.?

Law360, New York (August 20, 2010) -- The California Court of Appeal in San Francisco recently issued a decision that plaintiffs' lawyers are sure to argue establishes near-strict liability under California law for selling a product below cost. Bay Guardian Co. v. New Times Media LLC, No. A122488, 2010 WL 3156631 (Cal. App. 1st Dist. Aug. 11, 2010). The potential for treble damages should make all discounters of goods and services take note.

The court affirmed the San Francisco Bay Guardian newspaper's $15.9 million jury verdict against the owners of its competitor, the San Francisco Weekly. The decision punished the SF Weekly for luring away some of the Bay Guardian's display advertisers through below-cost discounts, even though there was no proof that the SF Weekly could recoup its losses later through higher monopoly pricing.

In the court's opinion, California law — unlike federal antitrust law and the law of many sister states — does not require such proof. In fact, harm to competition may not even be necessary. Instead, the court held that Business & Professions Code section 17043 requires only proof that the "purpose" of a below-cost sales scheme was to harm another competitor.

In California, according to the Court of Appeal for the First District, it doesn't matter that consumers benefit from lower prices, even in the long run: so long as one competitor sets out to harm another by below-cost prices, treble damages may be available.

Section 17043 is only one sentence long: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."

The Court of Appeal viewed this language as setting a standard for businesses competing in California that is at odds with the federal standard (and, by the way, inimical to the purpose of the antitrust laws). The court recognized that federal law looks to "the ultimate monopolistic impact and threatened harm produced by the pricing scheme — that is, the probability of recoupment through future supracompetitive pricing upon elimination of competitors."

Yet in the court's opinion, "the very gravamen of [a section 17043] offense is the purpose underlying the anticompetitive act, rather than the actual or threatened harm to competition." In the court's view, the fact that low prices without the probability of subsequent monopoly prices are an unmitigated boon to consumers is not part of the equation.

To make matters worse for discounters, the court also ruled that evidence of harm to a competitor triggers a presumption that a defendant's purpose was to injure competitors or destroy competition. The presumption affects the burden of proof, not the burden of persuasion. That means to escape liability, a defendant must affirmatively demonstrate that it had no such purpose. Given that one company's success generally comes at the expense of its competitors, such proof may be difficult to adduce.

The court's views are in tension with those of other California courts, and even its own prior decisions. The court's finding that "section 17043 does not require an anticompetitive impact" (meaning that a violation can be established not only without a showing of harm to competition, but possibly without even showing harm to any competitor) is at odds with the court's earlier decision holding that a plaintiff in a predatory pricing case is required to link "below-cost pricing to a competitive injury." See Fisherman's Wharf Bay Cruise Corp. v. Super. Ct., 114 Cal. App. 4th 309 (Cal Ct. App. 1st Dist. 2003).

The shift is justified, in the court's view, by a policy of protecting smaller businesses from their larger, more aggressive competitors, even though consumers would benefit from aggressive competition by paying lower prices.

If the opinion stands (that is, if the California Supreme Court does not grant review and reverse), it has the potential to chill aggressive price competition and promotion throughout California.

By so blatantly ignoring the guiding principle of the antitrust laws — that antitrust is intended to protect competition, not competitors — the opinion threatens to reduce consumer welfare and punish firms seeking to compete aggressively. That is an unfortunate and ironic result, given that cutting prices in order to increase business is conduct that the antitrust and consumer laws are supposed to promote and protect, rather than inhibit.

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