January 23, 2015

Fifth Circuit Reverses Jury Verdict for Antitrust Plaintiffs, Finding Lack of Sufficient Evidence to Establish a Conspiracy

The United States Court of Appeals for the Fifth Circuit recently reversed a jury verdict of liability under Sections 1 and 2 of the Sherman Act, holding, among other things, that the plaintiffs had failed to offer sufficient evidence to support an inference of antitrust conspiracy. *Abraham & Veneklasen Joint Venture, et al.* v. *Am. Quarter Horse Ass'n,* No. 13-11043 (5th Cir. Jan. 14, 2015). The Court's opinion reflects an unusually close review of the factual record by the Court of Appeals, resulting in a rare appellate reversal on the grounds that the evidence could not sustain a verdict. But the decision also demonstrates continued adherence to the standard for proving the existence of an antitrust conspiracy established by the United States Supreme Court in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.,* 475 U.S. 574 (1986), nearly 30 years ago.

The defendant in the case was the American Quarter Horse Association (AQHA), a non-profit group with more than 280,000 members worldwide. AQHA maintains a breed registry for American quarter horses and sponsors horse shows and races in which only AQHA-registered horses may participate. Changes to AQHA's rules governing registration of horses are proposed by its Stud Book and Registration Committee (SBRC), a small standing committee whose membership changed annually, and may be adopted by AQHA's board of directors, whose membership also varied annually.

In April 2012, AQHA was sued in connection with its decision not to amend its rule prohibiting registration of cloned quarter horses. Plaintiffs included a company involved in equine reproduction and a related joint venture that invests in cloned quarter horses.

Plaintiffs alleged that the SBRC and its members conspired with AQHA to block the registration of cloned horses in violation of Section 1 of the Sherman Act, and that AQHA had monopolized the market for elite quarter horses in violation of Section 2 of the Act. As the Fifth Circuit observed as early as 1977, "[m]eaningful participation in this multimillion dollar industry is dependent upon AQHA membership and AQHA registration." (Op. at 2 (quoting *Hatley* v. *Am. Quarter Horse Ass'n,* 552 F.2d 642, 654 (5th Cir. 1977)). Thus, plaintiffs alleged that without a place on AQHA's breed registry, their horses were effectively excluded from the market.

The case was tried before a jury in July 2013 in the Northern District of Texas. AQHA moved for a judgment as a matter of law. The District Court denied the motion, and the jury returned a verdict for the plaintiffs. The jury declined to award damages, but the District Court entered an injunction directing AQHA to adopt specific rule changes to permit cloned horses to be registered.

AQHA appealed, arguing that the plaintiffs had failed to present evidence sufficient to establish each element of their Sherman Act claims, and also challenged the scope of the District Court's injunction (a challenge the Fifth Circuit did not reach given its liability determination).

The Court of Appeals first considered whether AQHA, the SBRC and the SRBC members should be deemed a "single entity" for purposes of the Court's Section 1 analysis. Although the Court did not ultimately decide the issue, it did consider the applicability of the United States Supreme Court's ruling in *American Needle, Inc.* v. *National Football League*, 560 U.S. 183 (2010), which held that although NFL teams were all part of the same league, they were not a "single entity" that is immune from antitrust liability. In *AQHA*, the Court of Appeals noted that "*American Needle*'s rejection of 'single entity' status for organizations with 'separate economic actors' does not fit comfortably with the facts before us." (Op. at 7.) For example, the Court found that AQHA's membership lacked the "unity of purpose and decisionmaking by the interested economic actors" that was found to be present in *American Needle*. (*Id.* at 10.)

Assuming *arguendo* that AQHA, the SBRC and its members were separate entities capable of conspiring, the Court of Appeals turned to the sufficiency of the evidence to prove a conspiracy. Relying on *Matsushita* and its progeny, the Court made clear that "[a]ny conduct that is 'as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.'" (*Id.* at 13 (quoting *Matsushita*, 475 U.S. at 588).)

Against that background, the Court noted that plaintiffs' appellate brief contained only one page addressing evidence of an agreement between AQHA and the SBRC—with only a single string cite to the record—and found that each category of evidence put forward by plaintiffs was lacking.

First, although plaintiffs had argued that some SBRC members had a financial interest in banning cloned quarter horses, they had failed to show that those members represented anything more than a "vocal minority." (*Id.* at 14.) Second, plaintiffs had not offered evidence that the committee operated as a "boys club" with "disproportionate influence to affect vote outcomes within the SBRC or the Board." (*Id.*) Third, the Court observed that an AQHA Executive Committee member's vocal opposition to cloned horses at an AQHA convention amounted only to a "typical one-sided complaint" from which no inference of conspiracy could be drawn. (*Id.* at 16.) Because the plaintiffs had failed to show "any hint of a favorable response from the alleged co-conspirator," the Court of Appeals concluded that there could be no inference of concerted action. (*Id.*)

The Court was also unpersuaded by plaintiffs' argument that AQHA had cherry-picked industry leaders opposed to cloning for membership in the SBRC, finding the evidence insufficient to support an inference of conspiracy. Further, the Court rejected plaintiffs' argument that AQHA's executive director's handwritten notes revealed a "plan" to delay and derail the registration of cloned horses, explaining that the notes revealed only "thinking and concerns others expressed about cloning and AQHA's possible

reaction to it, . . . [but] contain[ed] no 'smoking gun' referencing any agreement within AQHA or its membership to restrain the market for elite Quarter Horses." (*Id.* at 18.)

The Court concluded that "[r]easonable jurors, in sum, could not draw any inference of conspiracy from the evidence presented, because it neither tends to exclude the possibility of independent action nor does it suggest the existence of any conspiracy at all." (*Id.*) [1]

The Court of Appeals' decision in *AQHA* shows that, despite the evolution in various areas of antitrust law over the past three decades, the Supreme Court's standard for proving the existence of a conspiracy established in *Matsushita* is still alive and well. Antitrust plaintiffs must prove conduct that tends to exclude the possibility of independent action, and, at least in the Fifth Circuit, will face close scrutiny of their evidence on appeal.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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[1] The Court summarily rejected plaintiffs' Section 2 claim. The Court held that AQHA could not have unlawfully monopolized the market for elite quarter horses because it did not compete in that market; as a member organization, AQHA "is not engaged in breeding, racing, selling or showing elite Quarter Horses." (Op. at 19.) The Court rejected plaintiffs' argument that competition in the monopolized relevant market is not a requirement of Section 2.