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Case Study: Kentucky Speedway V. NASCAR

Law360, New York (January 25, 2010) -- The recent decision in Kentucky Speedway LLC v. National Association of Stock Car Auto Racing Inc., (Slip. Op. No. 08-5041, Dec. 11, 2009), sets a stringent standard for proof of the relevant market in antitrust cases.

Of most significance is that the court ruled that parties must provide expert testimony for proof of the relevant market.

The opinion also affirmed the requirement that expert testimony used to prove the relevant market must satisfy the admissibility standards of both Rule 702 of the Federal Rules of Evidence and the judicial precedent of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

This article will provide an overview of the facts and the court's holdings, and then address what this case means for parties and lawyers.

Factual and Procedural Background

The three parties in this case were plaintiff, Kentucky Speedway (KYS), and defendants, the National Association of Stock Car Auto Racing (NASCAR), and International Speedway Corporation (ISC).

Defendant NASCAR sanctions stock car auto races. This means it is responsible for organizing and staging the races, selecting venues, picking drivers that are allowed to compete, and setting the rules for the races.

Defendant ISC owns racetracks. At the time of this case, ISC owned 12 tracks that hosted Sprint Cup races. Sprint Cup races are recognized as a premier NASCAR event. ISC is an affiliate of NASCAR. NASCAR's owners, the France family, also have an ownership stake in ISC.

KYS planned and built a racetrack in northern Kentucky. Since its opening, the KYS racetrack had hosted a number of professional auto races, but had not been able to attract what it called the “major league” of professional auto races, a NASCAR-sanctioned Sprint Cup race. KYS blamed its failure to attract a Sprint Cup race on allegedly anti-competitive conduct by NASCAR and ISC.

KYS sued NASCAR and ISC for antitrust violations, alleging that they violated the antitrust laws by not sanctioning a Sprint Cup race at KYS’s racetrack and by preventing KYS from purchasing other tracks that already hosted a Sprint Cup race.

The district court granted summary judgment for NASCAR and ISC, holding that there was insufficient evidence supporting KYS’s definitions of the relevant market because the expert testimony could not withstand Daubert standards for admissibility.

KYS’s expert defined two relevant product markets, the “Sanctioning Market” and the “Hosting Market.”

The Sanctioning Market is the product or service market for sanctioning premium stock car races. KYS alleged that NASCAR had a 100 percent market share in the Sanctioning Market.

The Hosting Market is the market for hosting Sprint Cup stock car races — owning and operating the racetracks at which stock car races are run. KYS alleged that ISC had substantial market share in that Hosting Market. It alleged that 55 percent of Sprint Cup races were held at ISC owned racetracks.

Despite the allegation of those high market shares, the Court of Appeals rejected the expert’s testimony.

The court held that the expert had not properly defined those relevant markets by correctly using the “reasonable interchangeability” test to determine what products properly are in the relevant product market by determining the products that consumers believe are reasonable substitutes for one another in the event of a price increase (the cross-elasticity of demand).

The court also rejected the expert’s application of the “small but significant and nontransitory increase in price” (SSNIP) test for assessing the effect or amount of a price increase to evaluate the cross-elasticity of demand.

The court noted that KYS’s expert did not use the standard SSNIP test that had been subjected

to peer review, but used what it termed his “own version” of the SSNIP test.

The court then rejected KYS’s argument that expert testimony was not required to avoid summary judgment where the relevant product market was definable by reference to the high alleged market shares and reliance on lay testimony and internal NASCAR documents.

The Sixth Circuit noted that there was a circuit split on whether expert testimony was necessary to establish the relevant market. See slip op. at 15; compare *Lantec v. Novell*, 146 F. Supp. 2d 1140 (D. Utah 2001), *aff’d*, 306 F.3d 1003 (10th Cir. 2002) (rejecting 11th Circuit rule requiring expert testimony to define relevant market) with *Colsa Corp. v. Martin Marietta Servs. Inc.*, 133 F.3d 853 (11th Cir. 1998) (market definition “cannot be based upon lay opinion testimony”).

But the court held that lay testimony and internal marketing documents did not provide a sound economic basis for assessing the market.

The Sixth Circuit held that the product market must be defined with a sound economic basis supported by expert economic testimony. Where KYS could not define the relevant market in which the alleged antitrust injury had occurred, the court granted summary judgment for defendants.

Impact of Kentucky Speedway

This case underscores that market definition is the first step in pleading and proving a Sherman Act claim. The Sixth Circuit has established a stringent standard of proof for market definition in antitrust cases, both for the type of proof and the method of proof.

For the type of proof, the Sixth Circuit has clearly said that it expects a reasonable interchangeability analysis that accounts for all reasonable substitutes for the product at issue and it requires use of the SSNIP test to evaluate that reasonable interchangeability and the steps a hypothetical monopolist could take. Market definition requires a sound economic basis supported by expert testimony.

For antitrust plaintiffs, even where the relevant market appears obvious because there appear to be clear anti-competitive effects on customers and markets, that does not end the inquiry.

The Sixth Circuit and other courts will require a market definition supported by economic analysis provided by expert testimony. The defendant client can push hard on the market

definition issue, and hold the plaintiff to a rigorous, expert driven market definition.

A potential problem that this case raises for parties is that performing a formal cross-elasticity analysis can be very difficult. The plaintiff can be caught on the horns of a dilemma.

On the one hand, it ought to be hesitant not to use an expert and to rely on lay testimony and marketing documents. But, on the other hand, the plaintiff faces the prospect of undertaking a cross-elasticity analysis at great expense, and then having the court find that it was not accurate enough to be reliable and to have it excluded on that basis.

This case highlights the importance of expert testimony satisfying Daubert standards. Here, the court rejected the expert's use of the expert's own formulation of the SSNIP test.

The court recited the Daubert litany that the expert's methodology was unacceptable because it was not peer reviewed, with a known error rate — accepted by the relevant community, and capable of being tested.

So, the proactive client must give substantial thought not only to the appropriate relevant market definition, but also to the expert testimony that will support it. The relevant market may not be limited to the product directly at issue, even it seems clear to the parties. Parties, counsel, and experts have to consider what other products reasonably could be included in the relevant market.

Another potential future impact for this case relates to the proof required of the relevant product market for per se offenses.

The opinion has broad language that could be read to say that pleading and proof of a relevant product market is required not only in Section 2 monopolization and attempted monopolization cases, but also in all Section 1 cases, including horizontal conspiracy claims that would be subject to the per se rule of illegality.

This case leaves an avenue open for defendants to argue that even in a per se horizontal price fixing case, the plaintiff or government has to plead and prove the relevant market with a reasonable interchangeability analysis and expert testimony.

In conclusion, the overriding impact of this case is that parties should be wary of proceeding without expert testimony on the market definition issue.

That impact affects both plaintiffs and defendants, because if the plaintiff has proved a reasonable relevant market with expert testimony, then the defendant likely will be required to respond with a challenge to that definition with expert testimony.

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