By Cecily Anne Snyder and Patrick T. O Regan, Jr.*

AGREEMENT BETWEEN AMAZON.COM AND BORDERS DOES NOT CONSTITUTE PRICE FIXING

[Gary Gerlinger v. Amazon.com, et al., 2004 U.S.Dist. LEXIS 4604 (N.D. Cal. March 23, 2004)]

Gary Gerlinger filed a complaint challenging the agreement between Amazon.com and Borders Online claiming it was a violation of federal and state antitrust laws. At this point, the defendants have moved for summary judgment and plaintiff has moved for summary judgment on the pleadings.

Amazon.com was an early participant in the ecommerce arena and has expanded its original internet bookstore to online retailing generally. Borders, on the other hand, did not launch a website until 1998. ‘In April 2001, Amazon and Borders executed a ‘Syndicated Store’ agreement … under which they would jointly relaunch www.borders.com as a co-branded website.’[1] Under the agreement, ‘Borders paid Amazon.com a one-time fee for creating the website and Borders receives a commission on each sale.’[2] Plaintiff’s objection, as a consumer, is that the agreement ‘eliminates competition between two former rivals in the market for online sales of books.’[3] Thus, reducing competitive choice for the online consumer.

Per se Price Fixing

Gerlinger argues that the provisions in the agreement relating to price and limiting Borders from engaging in other online retailing during the term

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of the agreement constitute per se violations of the Sherman Act. The court disagrees and notes that "not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints."[4] The court concludes that "the Agreement does not set a minimum, maximum or range for the prices Amazon.com can charge for the books it sells on the websites… (and that) Amazon … has unfettered discretion to choose a price at which a book will be sold."[5] Further, the agreement "in no way affects the prices that Borders can sell books for at its brick-and-mortar stores or the price that Borders sets for books to be purchased on the Borders.com website for books which will be picked up at the store…."[6] Thus, the court concludes that § 4.3 of the agreement does not constitute per se price fixing.

Ancillary Restraint

If an arrangement that restrains trade is ancillary to the agreement, then it is subjected to the rule of reason. Defendants present the compelling argument that if Amazon.com were "able to offer lower prices for books on its own website than it did on Borders.com, then shoppers originally lured to the Borders.com site by the Border's name (its contribution to the Agreement) could be induced to purchase the book at a lower price from Amazon.com thus cheating Borders out of its commission."[7] The court concludes that the price arrangement was ancillary to the agreement but that there was insufficient evidence to make a determination of whether the agreement had an anti-competitive effect.

Impermissible Horizontal Market Allocation

Plaintiff also contends that the parties have allocated online bookselling to Amazon.com and left Borders to sell books only at its retail stores. This, claims the plaintiff, is an impermissible division of the market. Defendants asserts that the provision that prohibits selling online directly or by affiliating with another party is "at most an ancillary restraint which prevents 'free-riding' by Borders. Defendants also claim that the exclusivity provision is "narrowly limited to the specific area in which Amazon.com

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and Borders agreed to collaborate – online sale of books for direct home delivery.[8] Although ultimately the court concludes that it had insufficient evidence to make a determination, it did note that it found the defendants' contention troubling because "if the provision is in fact intended to prevent free-riding ….then the provision goes beyond the 'narrow tailoring' defendant asserts."[9]

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[1] 2004U.S. Dist. LEXIS 4604, 8
[2] Id.
[3] Id. At 9.
[4] Id. At 23 citing BMI v. Columbia Broadcasting, 441 U.S. 1, 23 (1979).
[5] Id. At 28.
[6] Id.
[7] Id. At 30.
[8] Id. At 36.
[9] Id. At 37.

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