Focus

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Preliminary Relief Is Difficult, But Not Impossible, to Obtain

By Matthew L. Cantor

Consider the following hypothetical: A small business has developed an innovative product. However, the exclusionary acts of a competitor monopoly or a multicompetitor conspiratorial agreement essentially have foreclosed the small business from competing.

The small business, which has little capital left because of the anti-competitive activity, has enough funds to initiate antitrust litigation but cannot afford to pursue a costly lawsuit through trial unless the trial court grants preliminary relief — ordering the competitors to cease their anti-competitive conduct. Without such relief, consumers will fail to receive the benefit of the company's innovative product.

Because businesses generally view antitrust litigation as a last resort, this scenario repeatedly presents itself. Cash-strapped entities that have been driven out of the market by monopolists or group boycotts need relief quickly in order to receive justice.

However, because preliminary injunctions are "extraordinary remedies," courts generally do not grant such relief. In suits brought against conspiracies to restrain trade or the illegal exercise of monopoly power, the plaintiff must meet the heavy burden of proving that it is likely that the defendant's acts have caused consumer harm in order to be granted preliminary relief. See ABA Section of Antitrust Law, "Antitrust Law Developments" 885 (5th ed. 2002).

(In contrast, courts routinely grant preliminary injunctions in anti-merger antitrust suits brought by federal or state agencies under Clayton Act Section 7. In such cases, the agency need prove only that it is substantially likely that the merger will cause anti-competitive effects to be granted a preliminary injunction.)

The recent case of *Sun Microsystems Inc. v. Microsoft Corp.*, 2003 U.S.App.LEXIS 12937 (4th Cir. June 26 2003), demonstrates that, while it may be difficult to obtain a preliminary injunction in an antitrust lawsuit, it is not impossible. *Sun* sets forth the prerequisites for preliminary relief.

Sun Microsystems alleged that Microsoft Corp. — an entity already adjudged to have engaged in exclusionary conduct in protecting its monopoly in the market for Intel-compatible PC operating systems (see *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)) — had used its monopoly in this market to distort competition in a related, but distinct, market for emerging "middleware."

Getting a preliminary injunction is crucial for cash-strapped businesses that have been destroyed through anti-competitive means.

Sun explained the differing functions of operating systems and middleware: "Operating systems ... function to implement instructions from applications software and enable computer hardware to operate. ... Because operating systems vary, such that application-software developers have to tailor their software to each separate operating system, middleware has been conceived for placement between applications software and the various operating systems with the ultimate idea, in part, of creating cross-compatibility in applications software for the various operating systems."

Sun, the creator of a software language called Java that offers applications the ability to work on a number of operating-system platforms (as opposed to one), allegedly was having its Java program undermined by Microsoft in various ways.

Sun's specific allegations follow: "First, Microsoft 'embraced' the Java technology by licensing from Sun the right to use its Java Technology to develop and distribute compatible [p]roducts. Second, Microsoft 'extended' the Java platform by developing strategic incompatibilities into [Microsoft Java products]. According to Sun, these incompatibilities tied applications using Microsoft's Java development tools to [the Microsoft operating system]. Third, Microsoft used its distribution channels to flood the market with its version of the Java Technology in ... an attempt to 'hijack the Java Technology and transform it into a Microsoft proprietary programming ... environment." *Sun* (quoting *Sun Microsystems Inc. v. Microsoft Corp.*, 87 F.Supp.2d 992 (N.D. Cal. 1995) (concerning Lanham Act allegations brought by Sun against Microsoft)).

Sun also alleged that Microsoft engaged in acts to destroy Sun's principal source of distribution — the Netscape Web browser. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (holding, for example, that Microsoft's co-mingling of Internet-browser code with operating-system code was anti-competitive and harmed Netscape).

After noting that the D.C. Circuit Court of Appeals previously had held that various actions taken by Microsoft, which were the subject of Sun's lawsuit, were illegal, the District Court granted Sun a "must carry" preliminary injunction. *In re Microsoft Antitrust Litigation*, 237 F.Supp.2d 639 (D. Md. 2002). The preliminary injunction required Microsoft to distribute Java's software with every copy of its operating system and its Internet Explorer Web browser.

The District Court held that preliminary relief was necessary in order to ensure competition between Microsoft and Sun in the nascent middleware market. Without the effective distribution of the Sun product, a "serious risk" existed that the middleware market — a network industry that could be governed by a single software standard — would "tip" in favor of Microsoft during the pendency of the litigation, essentially depriving Sun of the ability of seeking effective relief for Microsoft's alleged anti-competitive actions.

The conservative 4th Circuit reversed the grant of the injunction, holding that the harm of market-tipping did not constitute an immediate threat to Sun. Rather, the harm was a future and speculative threat, making preliminary relief unnecessary. The 4th Circuit also held that a previous Supreme Court decision likely extinguished the theory of antitrust liability — monopoly leveraging — pursued on this motion. See *United States v. Spectrum Sports*, 506 U.S. 447 (1993); but see *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir. 1979) (seemingly still accepting monopoly leveraging as a cause of action).

The *Sun* court refused to review whether Microsoft's actions in the operating-systems market caused any present market distortion in the middleware market to the detriment of Sun under Sun's other antitrust claims (such as its attempt-to-monopolize claim). Sun did not pursue its injunction on these other claims in the lower court.

The 4th Circuit repeatedly emphasized the high standard associated with the granting of preliminary injunctions in antitrust cases. For example, it held that, "[p]reliminary injunctions are extraordinary interlocutory remedies that are granted in limited circumstances and then only sparingly."

Further, the court noted that mandatory preliminary injunctions — requiring entities to deal with their competitors, suppliers or purchasers — are even more extraordinary interlocutory remedies. Such remedies usually are sought where competitors claim that their exclusion from an essential facility will cause them to go bankrupt.

The 4th Circuit, however, recognized that there are appropriate times to issue a preliminary injunction in an antitrust action. Specifically, the court held that a mandatory preliminary injunction is appropriate if it is "linked in fact or by [an] established legal theory to the final relief that [the plaintiff] seeks."

According to the court, "The limited circumstances [that are appropriate for a preliminary injunction] amount to the demonstration of a need to protect the status quo and to prevent irreparable harm during the pendency of the litigation to preserve the court's ability in the end to render a meaningful judgment on the merits. If that need is not presented, then a preliminary injunction should not be considered. But if the need is demonstrated, then the entry of a preliminary injunction rests in the discretion of the district court. . . ."

Of course, in order to receive preliminary relief, the plaintiff must prove that it is likely to succeed on the merits. In order to do this in an antitrust case, the plaintiff must present economic evidence (generally, expert testimony) during the preliminary injunction hearing that demonstrates that the challenged practice likely has led to greater prices, reduced output, lower quality or reduced incentives to innovate. Thus, the hearing is essentially a minitrial.

Attaining preliminary relief is crucial for cash-strapped businesses that have been destroyed through anti-competitive means. Without it, companies generally will not be a in position to cure the harmful effects caused by exclusionary practices.

While the 4th Circuit correctly noted that preliminary relief generally is not granted, it also was correct in noting that preliminary relief can be awarded under the right circumstances. Practitioners should take note of do's and don'ts set forth in *Sun* when pursuing preliminary relief in an antitrust matter.

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