

## Circuit Judge Thomas Vanaskie's Antitrust Legacy: 2 Significant Cases

By Carl W. Hittinger and Julian Perlman

Judge Thomas I. Vanaskie recently retired from the federal bench, following more than 16 years as a district judge in the Middle District of Pennsylvania, including seven years as the chief judge, and more than eight years on the U.S. Court of Appeals for the Third Circuit. During that distinguished tenure, Vanaskie issued numerous opinions in two significant and complex antitrust cases that together spanned decades.

Foremost, in the late 1990s and through the 2000s, Vanaskie heard a major antitrust dispute between Santana Products and Bobrick Washroom Equipment and several other defendants (Carl W. Hittinger, the co-author of this article, served as lead counsel to Bobrick in that case). Santana alleged that Bobrick and other toilet partition manufacturers conspired to enforce a product standard that had the effect of excluding Santana's toilet partitions from the relevant market. Specifically, Santana alleged that Bobrick and others waged a campaign directed to customers for toilet partitions and the private standard-setting organizations whose testing methodologies and requirements are frequently adopted by state and local governments. Santana alleged violations of the Sherman Act as well as the Lanham Act related to false and misleading advertising, as well as several state common law business torts.

Vanaskie issued opinions with respect to a motion to dismiss Bobrick's third-party claim for contribution for its alleged violations of the Sherman Act and Lanham Act, *69 F.Supp.2d 678 (M.D.Pa. 1999)*, and ultimately Bobrick's cross-motion for summary judgment, *249 F.Supp.2d 463 (M.D.Pa. 2003)*.

Third-party Formica had produced a videotape of one of Santana's toilet partitions being set on fire with a lighter. Bobrick alleged that Formica encouraged Bobrick to use the videotape in its marketing efforts and that Formica failed to inform it that the videotape contained any of the alleged false representations and information. Formica

moved to dismiss the third-party claim on the basis that a party may not maintain an action for contribution for alleged violations of the Sherman Act and Lanham Act, among other arguments. Bobrick conceded that the Sherman Act does not permit third-party claims for contribution; thus, the key issue before the Court was whether a claim for contribution is permitted under the Lanham Act. Vanaskie noted the dearth of case law concerning this issue. Stating that the claim for contribution was being raised by a defendant in a Lanham Act suit, Vanaskie concluded that there is no right to contribution in such cases. This is because, to find such a right, the court would have to "allow parties violating the law to draw upon equitable principles to mitigate the consequences of their wrongdoing."

On Bobrick's subsequent cross-motion for summary judgment after three years of massive (181 depositions) and often acrimonious discovery, with the able assistance of a special master, Bobrick ultimately prevailed on Santana's antitrust claims. The threshold issue facing Vanaskie was the application of the *Noerr-Pennington* doctrine, which generally shields private parties from the antitrust laws in cases where their efforts to influence governmental action had anticompetitive effects. Bobrick and the other defendants argued that the *Noerr-Pennington* doctrine precluded liability for alleged injuries suffered by Santana resulting from decisions of governmental actors to adopt bid specifications that effectively excluded Santana's toilet partitions. Vanaskie observed that "protected 'petitioning' activity runs the gamut of efforts to persuade governmental actors, extending well beyond filing formal grievances directly with the government ... it encompasses not only direct lobbying of legislative and executive officials, but also publicity campaigns and other marketing efforts." Distinguishing the alleged conduct by Bobrick and other defendants from that at issue in the *Allied Tube* U.S. Supreme Court opinion, Vanaskie found that based on the undisputed factual record, Bobrick and the other defendants had no

control over the standard setting process. Thus, unlike the conduct in *Allied Tube*, Bobrick's alleged conduct was within the ambit of the *Noerr-Pennington* doctrine. Notably, the court found that the *Noerr-Pennington* doctrine shielded Bobrick's conduct from all of Santana's claims, both antitrust and Lanham Act, the latter being a holding of first impression. Furthermore, Vanaskie found that Bobrick was also entitled to summary judgment because Santana failed to adduce adequate evidence of harm to competition from the alleged conduct, stating that plaintiff "must show more than injury to itself" and that there was no factual or economic evidence of the effect on competition in the toilet partition market. After an inquiry by the court, Santana had withdrawn its economic experts' reports in the face of Bobrick's *Daubert* motions, thereby undermining its ability to show harm to competition. The Third Circuit unanimously affirmed Vanaskie's decision on Santana's antitrust claims. Vanaskie listed his detailed 83-page summary judgment Santana opinion as one of his most significant district court decisions in his Senate Judiciary Committee questionnaire when he was nominated to the Third Circuit.

Vanaskie also presided over the Pressure Sensitive Labelstock (PSL) antitrust litigation, which involved a complicated fact scenario in the adhesive label industry. The origin of the dispute was in UPM-Kymmene Corp.'s construction of the world's most advanced paper-making machine, which UPM pursued without customer commitments to purchase the increased supply its plant would create. The plaintiffs, purchasers of PSL, alleged that defendant Avery Dennison Corp. knew of this machine and that UPM needed customers. Avery, it was alleged, concluded that UPM might be willing to alter its plans to build a factory in North Carolina that would compete with Avery if Avery agreed to purchase paper from UPM. Allegedly an agreement was reached, but thereafter UPM proceeded with its plans for a factory in North Carolina. Importantly, following the completion of the plant, UPM made an offer to purchase Morgan Adhesives Co., a subsidiary of the Bemis Company, Inc.

Given the size of the transaction, the proposed acquisition triggered a Hart-Scott-Rodino Application to the Federal Trade Commission, wherein the companies were required to show that the planned merger would not negatively impact competition and consumers in the PSL market.

Interestingly, during the review of that application, investigators uncovered evidence of improper communications among these competitors, and permission for the merger was denied. Ultimately a federal judge upheld the FTC's position, but the Department of Justice declined to pursue antitrust violations. Thereafter, purchasers of PSL filed civil antitrust complaints across the country alleging the aforementioned acts and other efforts to suppress competition and elevate prices for PSL. Ultimately, these cases were consolidated and assigned to Vanaskie in the Middle District of Pennsylvania.

Vanaskie was asked to certify a class of plaintiffs who alleged common issues and that they all purchased PSL at higher prices than would have otherwise prevailed in a competitive market. Vanaskie observed that antitrust conspiracy allegations generally lend themselves to the class action mechanism, where the focus is on the defendants' conduct and not the conduct of the individual class members. "In this regard, courts consistently hold that proof of the existence and scope of an antitrust conspiracy entails common proof because the inquiry necessarily focuses on the defendants' conduct ... some courts and commentators suggest that whether a conspiracy exists is a common question that is thought to predominate over other issues in the case" as required under Rule 23. Further at issue was whether the putative class had alleged common questions with regard to antitrust injury. The court did not decide whether the "*Bogosian* short-cut" applied, pursuant to which, if a nationwide conspiracy is proven the result of which was to increase prices to a class of plaintiffs, an individual plaintiff could prove antitrust injury simply by proving that it made purchases at the higher price. Rather, the court focused on expert submissions which plausibly established that the putative class met its burden at the pleading stage.

Subsequently, Vanaskie was presented with a renewed motion to dismiss in the wake of *Bell Atlantic v. Twombly*, in which the Supreme Court considered what a plaintiff must plead to state a claim under Section 1 of the Sherman Act. The court observed that "the pleading must be considered in its entirety; the claims presented need not be alleged with particularity, but there must be sufficient factual averments that place the defendants on notice of the bases for the claims; and plaintiff's entitlement to relief on the bases for the claim presented against a particular defendant must be plausible.

Specifically, the question presented in the context of a Section 1 claim is whether the complaint alleges enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” Notably, refusing to jump on the *Twombly* docket clearing bandwagon, Vanaskie rejected the argument that the plaintiff had to assess each allegation of the complaint separately, noting that “nothing in *Twombly* ... contemplates this ‘dismemberment’ approach.” Ultimately, defendants in the PSL antitrust litigations settled for more than \$45 million, bringing to a close the second antitrust saga presided over by Vanaskie.

All in all, Vanaskie’s judicial antitrust legacy displays a thoughtful and fair application of the antitrust laws to precedential and complex issues that should serve as a role model to other judges to get it right. Stay tuned.

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