MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

Is Your App Antitrust Compatible?

BY DIONNE LOMAX

In this technology age, there appears to be an App for everything – all designed to make certain aspects of our lives more convenient. As developers and technology gurus continue to develop Apps for everything from exercise, to shopping, to insurance, applicable laws and regulations must be adhered to even in the new age of technology. As our transactions increasingly transition to online technology, the same laws that prohibit conduct that unreasonably interferes with competition among sellers and buyers – the antitrust laws-- continue to apply.

The overarching purpose of the U.S. antitrust laws is to protect competition, which is viewed as the country's mechanism for allocating resources. Antitrust violations can lead to serious penalties, including: (1) criminal penalties which can include fines of up to $100 million for corporations and fines up to $1 million and/or ten years imprisonment for individuals for each offense; (2) the cost of responding to investigations or lawsuits; (3) huge treble damages exposure, where prevailing plaintiff can be awarded attorney's fees and three times their actual damages; and (4) the cost of reversing or unwinding important business strategies.

Among the host of antitrust issues that may arise as companies seek to achieve top-of-mind status with consumers and vigorously compete for market share in the online marketplace, one issue of particular interest is whether, and the extent to which certain add-ons or products consumers are required to purchase in order to acquire the product or service offered with the App raises claims of unlawful tying. Such issues have and can arise in the insurance context where insurers seek to offer insurance via an App.

Tying is conditioning the sale of one product (the tying product) on the buyer's agreement to buy another product (the tied product) from the seller. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). According to the Supreme Court, tying can cause competitive harm by denying "competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).

Tying arrangements can be challenged as a per se violation of the antitrust laws (where the competitive harm is presumed) or they can be analyzed under the "rule of reason" (which assesses the competitive impact of an arrangement by balancing the likely anticompetitive effects against the procompetitive benefits). However, more often than not, courts have analyzed tying arrangements under the "rule of reason."

In order to prevail on a tying claim under the "rule of reason" a plaintiff must show the following: (1) the tying product and the tied product are separate products; (2) the seller coerces the buyer to also purchase the tied products; (3) the seller has market power in the tying product; (4) the tying arrangement has an anticompetitive effect by reducing competition in the tied product, and (5) there is no valid business justification for the tying arrangement. *Jefferson Parish*, 466 U.S. at 29-31; *In re: Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 415 (S.D.N.Y. 2005) (plaintiff must demonstrate actual adverse effect on competition to succeed on rule of reason tying claim).

Take, for example, a life insurance product offered to consumers on-the-go via an App (i.e., episodic insurance), and additional product(s) or services offered in conjunction with the App. The life insurance product would be categorized as the tying product and the tied product(s) would be the additional services offered with the App.

The separate products issue requires an initial determination of if, in fact, there is separate demand for the two items (i.e., does the arrangement link two distinct product markets that are "distinguishable" in the eyes of buyers?). Thus, the analysis is whether or not any of the additional proposed services would be viewed as the "business of insurance" because they are incidental to the assumption of risk and are integral to the policyholder relationship. If the services are the type of services that are typically performed pursuant to an insurance contract and are not generally sold separately in the industry, then the service is unlikely to be deemed a separate product in an antitrust tying analysis. For example, if the services an insurer seeks to tie to its episodic insurance App include claims advocacy services, consulting (support services), and other services that appear to be services offered incidental to the "business of insurance," it is unlikely that these additional services would be viewed as separate products with separate consumer demand from the provision of insurance. As such, a claim of anticompetitive tying is unlikely to prevail.

The tying inquiry does not end with the "separate products" issue. Critical components of the analysis also include determining whether the seller has market power in the "tying" product as well as analyzing the effect, if any, the tying arrangement has in the tied product market. Both of these issues are key elements of any tying analysis. Even if the seller is deemed to possess market power (the ability to price above the competitive level) in the tying product, an assessment of the impact the tying arrangement is likely to have in the market for the sale of the additional service(s) must also occur. Thus, a determination that a product is a separate product does not automatically mean an antitrust violation has occurred if a service is tied to the episodic insurance App. If a service is tied to the episodic insurance App, but there is reason to believe there is robust competition in the market for that service, then the tying arrangement may not have an anticompetitive effect in the tied market.

It is apparent that the advent of new and sophisticated ways to compete for the consumer's dollar using Apps and other technologies may require these and other types of antitrust analyses in order to ensure that companies are not at risk of violating the antitrust laws.