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McWane Cert. Loss Leaves Uncertainty For Exclusive Dealing

By **Jeff Zalesin**

Law360, New York (March 21, 2016, 9:19 PM ET) -- The U.S. Supreme Court's decision on Monday not to review an Eleventh Circuit finding that McWane maintained monopoly power through a rebate policy disappointed some antitrust lawyers who had hoped for guidance on what to tell clients who are grappling with exclusive contracting.

McWane Inc., a maker of pipe fittings and other industrial products, had asked the high court to consider questions about when monopoly power can be found and what kinds of exclusive-dealing arrangements a dominant company must avoid. McWane was far from the only company asking such questions, leading some attorneys to root for the justices to take the case.

"These areas of distribution policies and loyalty rebates have become so prevalent over the years, and it would be very helpful for some better, more generalized guidance to be out there so that people would have a sense of whether they were in trouble and should consult an antitrust lawyer, rather than call someone up and have them say, 'It depends,'" said Lisl J. Dunlop, an antitrust partner at Manatt Phelps & Phillips LLP. "We say that an awful lot."

Dunlop said that compared to some other regimes, U.S. antitrust law allows businesses considerable latitude to enter exclusive agreements. Yet, many types of exclusive contracts pose potential antitrust risks for firms with large market shares, and companies have trouble determining whether they have crossed the line, she said.

McWane's antitrust woes stemmed from the company's so-called Full Support Program, a policy under which distributors of certain domestically produced pipe fittings had to buy exclusively from McWane or risk being cut off or denied rebates. The Federal Trade Commission found the program anti-competitive by a 3-1 vote in 2014, even as the commission **threw out other antitrust claims** against the company.

According to the FTC, McWane implemented the exclusive-dealing policy in response to the risk that it would lose ground to competitors in the market for domestic pipe fittings. Star Pipe Products Ltd., a McWane rival, did manage to enter the market, but Star maintained that its growth was inhibited by the Full Support Program.

The Eleventh Circuit backed the FTC in **an April opinion**, finding that the agency's conclusion was supported by evidence of McWane's "overwhelming market share" and pricing power, as well as high barriers to entry in the market for domestic fittings. The panel said that Star had picked up about 10 percent of sales in the market between 2009 and 2011 but that evidence didn't overthrow the FTC's finding of monopoly power.

In its **attempt to take the case to the Supreme Court**, McWane argued that Star's successful entry should have been enough to show a lack of monopoly power. The company

also said that its exclusive agreements were presumptively legal because they were "terminable at will and short-term" and that the deals were designed for the legitimate purpose of keeping McWane's domestic foundry in business.

After the Supreme Court **declined to entertain those arguments**, some antitrust experts described the case as a missed opportunity, including Joshua D. Wright, the former FTC commissioner who was the lone dissenter from the agency's McWane decision.

Wright, who is now a law professor at George Mason University, said in a Monday email to Law360 that exclusive dealing is "the last vestige of the pre-economic era of antitrust." The FTC's case lacked economic evidence to directly show competitive harm, he said.

"The true benefit of the Supreme Court taking an exclusive dealing case like McWane is not so much about resolving a particular circuit split here or there but rather to resolve a fundamental choice about the direction of antitrust law," Wright said. "The movement over the last 40 years has been toward deeper integration of economics rather than to reject economic evidence. I suspect and hope in that regard, McWane will be an outlier. There will no doubt be more opportunities to address the flaws in exclusive-dealing law soon enough."

Some antitrust practitioners said they were also hoping the Supreme Court would take the case, even if the didn't necessarily share Wright's views on the merits of the case.

Steven J. Cernak, of counsel at Schiff Hardin LLP, said that a Supreme Court decision in the McWane case could have provided valuable guidance on determining whether an exclusive deal was anti-competitive.

"I think there's an agreement that sometimes they're pro-competitive, and sometimes they're anti-competitive, but there's no real agreement on which is which, and I don't think the FTC opinion or the Eleventh Circuit opinion was very clear about exactly when these sorts of arrangements are anti-competitive," Cernak said.

One problem, according to Cernak, is a lack of clarity about how to weigh evidence showing that an exclusive-dealing arrangement partially, but not totally, foreclosed competition.

Cernak pointed out that in the McWane case, the issue was not that McWane maintained exclusive deals with every potential customer in the market for domestic pipe fittings, rendering it impossible for anyone else to make a sale. Instead, McWane's policy allegedly tied up some significant portion of the market's buyers, making it hard for rivals to sell enough domestic fittings to operate in that market with sufficient efficiency.

Such an arrangement might be anti-competitive, but it isn't "obviously anti-competitive," Cernak said. The FTC decision did not offer clarity about what percentage of the market would have to be bound to McWane or how low Star's market share would have to stay to support a finding that the deals were anti-competitive, Cernak added.

While some antitrust lawyers saw the rejection of McWane's Supreme Court appeal as a letdown, others were less invested in the fate of the case.

Jonathan Lewis, a partner at BakerHostetler, said it is challenging to advise clients with large market shares on whether to enter exclusive contracts. But more Supreme Court cases in the area would not change the reality that exclusive-dealing law is inherently fact-intensive, calling for an individualized look at each client's situation, he said.

Ultimately, McWane's problem may have had more to do with the facts of the case than any broad legal principle, Lewis suggested.

"It's easy to play Monday morning quarterback, but had they done something on the pricing

front, as long as it was above cost, and Star had a difficult time competing ... that may have been a lot better of a record for them to defend," he said.

Robert G. Kidwell, a member of Mintz Levin Cohn Ferris Glovsky & Popeo PC, also said that factual issues may have made McWane's Supreme Court petition an uphill battle. But the high court's decision to pass on this case by no means ends the fight over some of the core legal issues McWane raised, he said.

"The question of what is an anti-competitive exclusive dealing arrangement is an open question, and it's going to have the heck litigated out of it," Kidwell said.

McWane is represented by Miguel A. Estrada, Cynthia E. Richman and Lucas C. Townsend of Gibson Dunn, Joseph A. Ostroyich, William C. Lavery, Aaron M. Streett and Evan A. Young of Baker Botts LLP, Lee E. Bains Jr., Thomas W. Thagard III and Prim F. Escalona of Maynard Cooper & Gale PC, and J. Alan Truitt of Kazmarek Mowrey Cloud Laseter LLP.

The FTC is represented by Solicitor General Donald B. Verrilli Jr. as well as Jonathan E. Nuechterlein, Joel Marcus and Theodore Metzler.

The case is McWane Inc. v. Federal Trade Commission, case number 15-706, in the Supreme Court of the United States.

--Editing by Katherine Rautenberg and Christine Chun.