

Rule of Reason and Market Power Re: Antitrust, Tortious Interference and Patent Infringement

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Applying the laws of the U.S. Court of Appeals for the Seventh Circuit in an appeal that no longer contained a patent claim, the U.S. Court of Appeals for the Federal Circuit affirmed the grant of summary judgment on Desotech's five antitrust claims, tortious interference claims and their claims under the Illinois Uniform Deceptive Trade Practices Act (UDTPA). ***DSM Desotech Inc. v. 3D Systems, Inc.***, Case No. 008-1531 (N.D. Ill.), *aff'd*, Case No. 13-1298 (Fed. Cir., Apr. 18, 2014) (Schall, J.).

DSM Desotech (Desotech) is a manufacturer of resins used in stereolithography (SL) machines, and 3D Systems Corp. (3DS) is a manufacturer of both various models of SL machines and the resins used in those machines. SL machines are a type of "rapid-prototyping technology which construct prototypes specifically by solidifying resin in a cross-section of each layer of a prototype until the design is completed. Other technologies, such as 3D printing, digital light processing and additive or subtractive technologies are also considered to be "rapid-prototyping technology." While these technologies perform largely the same purpose, they differ in size, speed and accuracy.

The dispute between Desotech and 3DS arose over 3DS's practice of equipping some of its machines with Radio Frequency Identification (RFID) capability to detect the resin being used in a 3DS SL machine. If the resin was not a 3DS-approved resin, then the machine shut down. While Desotech had two of its resins approved by 3DS, negotiations on the approval of additional Desotech resins broke down. Desotech filed suit, alleging multiple federal and state antitrust claims (including monopolization, attempted monopolization, tying and restraint of trade), state law tortious interference claims and patent infringement.

The district court granted the defendants motion for summary judgment on the antitrust claims, concluding that Desotech had failed to put forth sufficient evidence that either the SL machines or the SL resin constituted an independent market, that 3DS's conduct was anticompetitive and that Desotech had suffered an antitrust injury. The court also dismissed one of the tortious interference claims. The parties then stipulated to dismissal of the other tortious interference claims and the patent infringement claim and this appeal followed.

On appeal, although a patent claim no longer existed, the Federal Circuit explained that its jurisdiction remained with respect to the remaining claims pursuant to 28 U.S.C. § 1295(a)(1).

Further, the Federal Circuit applied 7th Circuit precedent in reviewing the grant of summary judgment, which in this case was a *de novo* standard.

The Federal Circuit noted that the primary antitrust claims included both *per se* and rule of reason tying claims. Desotech alleges that 3DS tied sales of resin, the tied product, to sales of SL machines, the tying product. They further contended that 3DS enacted its tying scheme through contracts, which would invoke *per se* antitrust liability and through its RFID technology (a technological tie), which would invoke rule of reason analysis. To prevail on either claim—and the claims of monopolization, attempted monopolization and restraint of trade—Desotech would need to prove that SL machines constituted an independent product market for antitrust purposes. For the purposes of summary judgment, however, Desotech only needed to put forth sufficient evidence for a reasonable jury to find a distinct product market.

To find a distinct product market in the 7th Circuit, a plaintiff must “set forth economic evidence [such as data and analyses] showing whether products are good substitutes for one another.” Desotech, however, relied on the “practical indicia” of identifying the existence of a product market set forth in the seminal (1962) Supreme Court decision in *Brown Shoe*: distinct prices, the product’s peculiar characteristics and uses, industry or public recognition of the submarket as a separate economic entity, and sensitivity to price changes. Even though the Federal Circuit eventually explained that the undisputed facts that support these four indicia as alleged by Desotech are not supportive enough of their claim to survive summary judgment, the Court also noted that the district court properly granted summary judgment solely based upon the fact that the 7th Circuit does not accept such practical indicia to prove a market.

Desotech also argued the existence of a distinct product market for SL resin. Under this theory, a manufacturer without power in a primary market may still have power in an aftermarket if the purchase of the primary product “locks in” the customer to purchasing from the manufacturer in the aftermarket. Desotech argued that after purchasing an expensive SL machine from 3DS, a purchaser is unable to switch machines to alternative technologies due to the high cost of switching. The Federal Circuit noted under the 1992 Supreme Court case of *Kodak v. Image Tech. Servs., Inc.* lock-in theory, only purchasers of the primary market product who were unaware of the lock-in before purchasing the device are relevant to the lock-in analysis. In this case, only seven of 268 customers purchased their SL machines before learning of the RFID lock. The Court determined that since only seven of 268 customers were locked in, there were not substantial number of customers locked in to the product to be able to exert market power. Therefore, because Desotech failed to prove an independent market for SL machines or resins, the Federal Circuit affirmed the district court’s grant of summary judgment.

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