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Beyond Truth, and Toward Repose: Price Increases Following "Merger to Monopoly" Do Not Rekindle Statute of Limitations

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***Z Technologies Corp. v. Lubrizol Corp.**,* No. 2:12-cv-12206 (6th Cir., May 23, 2014).

In February, 2007, Lubrizol Corporation made a "**merger to monopoly"** acquisition of the assets of a competitor. The acquisition established a monopoly in the market for **petroleum wax-based oxidates**. After the acquisition, Lubrizol increased prices for oxidates in March, July and November, 2007, and again in May, July and September of 2008. In the aggregate, Lubrizol increased its oxidate prices approximately 70% following the acquisition.

Following the price increases, in February 2009, the Federal Trade Commission filed an action challenging the merger under Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act. In April 2009, Lubrizol entered into a consent agreement and promised to divest the assets acquired to a third company.

In May 2012, Z Technologies ("Z") filed an action under the Sherman Act, Clayton Act and Michigan antitrust laws for damages allegedly inflicted by Lubrizol's price increases. However, Z's action was filed approximately five years and three months after the acquisition. Z claimed that it had suffered antitrust injury as a result of purchases of petroleum wax-based oxidates at monopoly prices.

In response to Lubrizol's motion to dismiss on statute of limitations grounds, Z contended that the applicable statute of limitations had been extended because the price increases were "continuing violations". The district court rejected the argument, holding that the price increases were not "new and independent" injuries, and thus were barred by the four-year statute of limitations of Section 4(B) of the Clayton Act.

A good argument can be made that under traditional industrial organization economics, the price increases were at monopoly prices, were allocatively inefficient, and transferred consumer rents to producers. This assumes, however, that the price increases were not vitiated by the remedial actions which ensued from the entry of the Federal Trade Commission's consent decree with Lubrizol. In the seminal case of ***Reiter v. Sontone Corp***., 442 U.S. 330 (1979), the Supreme Court held that consumers who pay more for goods acquired for personal use are injured in their "business or property" within the meaning of Section 4 of the Clayton Act, where the price paid was a monopoly price. In the instant case, both parties agreed that the acquisition by Lubrizol was a "merger to

monopoly" acquisition, and that it exercised monopoly power prior to the completion of the remedial process which followed from the sale of the acquired company pursuant to the FTC consent order.

However, it may be exceedingly difficult under any number of scenarios to determine whether the acquisition of a monopoly through a "merger to monopoly" would result in injury to "business or property" of a purchaser, absent a showing that the price paid was the result of the exercise of monopoly power. Here, the price increases paid by Z were more than four years after the acquisition, and three years after the entry of the Federal Trade Commission consent order. What result? Is the "continuing violation" exception available to extend the running of the statute? The Sixth Circuit answered the question in the negative, and affirmed the District Court's dismissal.

As to the "continuing violations doctrine", the court held that in order for the statute of limitations to be restarted, it would be necessary to show the commission of a "new" overt act that caused the plaintiff damage. Here, there could be no such showing. The court held that the continuing violation doctrine did not apply in a "merger-monopolization" context, as it would in a conspiracy or monopoly maintenance context. What is the rationale, and what is the difference? Borrowing from the exhaustive treatment of the subject in Section 320 of Areeda & Hovenkamp "Antitrust Law", price increases following a merger to monopoly scenario would be the order of the day and would be expected. The "overt act" of noticeability would be the merger itself, and price increases soon after the acquisition would trigger the statute, while continuing price increases, and particularly price increase after the expiration of the four year statute of limitations period, would not. As pointed out by Messrs. Areeda and Hovenkamp, there is a strong public policy in place that favors "repose", which will not reward those who "sleep on their rights". Here, Z was well aware for a period of five years of the Lubrizol acquisition, and the entry of the consent decree. However, it did not act until the four year statute had taken its course. Here, repose required the dismissal of Z's action. The subsequent price increases were real, but did not constitute "new" or continuing injury. This is what statutes of limitations do. They incentivize the bringing of action in a reasonably timely fashion to allow the market and its participants to move on.

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