Vertical Integration and Artist Coercion: ‘Is Big Not Necessarily Bad, and is Small Not Necessarily Weak’?
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I. Introduction

In 2009, It’s My Party (IMP), a regional concert promoter, brought federal and state claims against global promoter, Live Nation Entertainment, Inc. (LN) under Sections §1 and §2 of the Sherman Act and the Maryland Antitrust Act.¹ The promoter alleged that LN unreasonably restrained trade by exercising its market and monopoly power in the promotion and concert venue service markets. The U.S. District Court for the District of Maryland rejected the plaintiff’s claims, granting summary judgment to defendant, LN, in which IMP then appealed. On February 4, 2016, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court’s ruling, dismissing the "per se" antitrust tying and monopolization claims brought by IMP.² Thus, the smaller company, IMP, failed twice in meeting a relatively low standard of defeating summary judgment³ in it’s attempt to prove LN’s violation of federal and state antitrust laws.

In addition to the importance of the analysis in this case, in light of this “big guy” victory, the prior merger of Live Nation and Ticketmaster should also be considered in conjunction with examining the courts conclusion. In 2009, the Department of Justice (DOJ) approved this merger with several conditions, requirements and modifications under the Hart-Scott-Rodino Act (HSR).⁴ By additionally examining the DOJ’s conditionary acceptance of Live Nation and

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³ Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (procedural summary judgment standard in antitrust cases to draw the line between per se and rule of reason cases).
⁴ 15 U.S.C. § 18a
Ticketmaster’s merger, the IMP v. LN case provides a context to analyze whether the modifications the DOJ proscribed had their effect. This article will examine the decisions of IMP v. LN, in conjunction with the DOJ’s approval of the LN merger to explore how judicial skepticism of antitrust law promoting anticompetitive conduct continues to reaffirm the precedent of sending these cases ‘back to the marketplace from whence it came.’

II. Background: Vertical Merger of Live Nation and Ticketmaster

On February 10, 2009, Ticketmaster Entertainment, Inc. (TM) and Live Nation, Inc. announced an agreement to merge and create a new entity called Live Nation Entertainment. Under the HSR Act, antitrust officials analyzed several factors in determining whether a merger would diminish competition by potentially driving ticket prices up or performer payments down. After review, the DOJ did not challenge the merger but instead required TM to license its ticketing software, divest ticketing assets to two different companies (AEG and Comcast-Spectator), and subject itself to anti-retaliation provisions. The DOJ concluded that the merger as originally proposed would have substantially lessened competition for primary ticketing in the U.S., resulting in higher prices and less innovation for consumers. However, with their post-review changes, the merger now allowed for strong competitors, offered concert venues with more and better choices for their ticketing needs, and provided a check on the merged company with anti-retaliation provisions. Specifically, the anti-retaliation provisions stated that the merged firm could not retaliate against any venue owner that chooses to use another company’s ticketing or promotional services, included restrictions on anticompetitive bundling and required...

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7 Id.
8 Eleanor Fox, CASES AND MATERIALS ON UNITED STATES ANTITRUST IN GLOBAL CONTEXT 427-429. (3rd ed. 2012)
9 Id.
adherence to firewalls that prevent the firm from using information from its ticketing business in its promotions or artist management business.\textsuperscript{10} While these compliance measures are intended to prohibit future anticompetitive behavior, there is the potential that it will not have the actual desired effect.\textsuperscript{11} The pact to combine the largest owner of concert venues and the dominant ticket seller "could be the biggest, most important deal that's ever happened in the music industry," Ray Waddell, a Billboard live entertainment tracker, said.\textsuperscript{12} To illustrate the industry potential, the live entertainment industry generated $2.8 billion in domestic ticket sales in the year before the merger. However, once Live Nation’s long-term contract with TM expired and Live Nation decided that it would now handle it’s own ticket sales, each company attempted to enter the other's business.\textsuperscript{13} This brought about the merger, which caused the two companies to end the battle for power in both markets and instead share it by combining the two. This prompted varying reactions, for example; on the one hand, Primary Wave Music Publishing CEO Larry Mestel believed that there would not be much of an effect and that in the struggling economy at the time, "ticket prices will be based on supply and demand."\textsuperscript{14} On the other hand, some antitrust experts thought it would be difficult to show that rivals such as AEG Live could compete against so much entertainment firepower. Joseph Simons, co-chair of the antitrust group at law firm Paul Weiss, stated, "The big question you want to ask is how upset will other concert promoters and the artists be?"\textsuperscript{15} Perhaps the answer to that question lies in the IMP v. LN case.

\textbf{III. The IMP v. LN Case}

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\textsuperscript{10} Id.
\textsuperscript{14} Lieberman, supra note 12.
\textsuperscript{15} Id.
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i. Background

The plaintiff, IMP, is a local concert promoter operating in the Baltimore/DC area and the defendant, LN, is a concert promoter and venue operator in many cities across the country. IMP claimed that LN, by virtue of its national presence in the promotion and venues service markets, could coerce musical acts into playing less desirable LN venues as a prerequisite for access to desirable venues, or that they could instead take a packaged deal with pre-selected venues. More specifically, IMP alleged that LN was requiring artists to perform at LN’s amphitheater in the Baltimore/DC area in order for LN to promote them elsewhere, especially in areas where LN controlled the only amphitheater. They claimed this violated state and federal law by deliberately acquiring monopoly control of the market, which put IMP at a disadvantage in attracting artists to its venue.\(^\text{16}\)

The U.S. District Court for the District of Maryland rejected the plaintiff’s claims, ruling that it failed to provide sufficient factual support for its market definition or for its assertion that LN had engaged in the conditioning required for a tying claim. On appeal, IMP challenged the District Court’s grounds because these two issues involve factual inquiries not suited for summary judgment. IMP argued that a plaintiff need not show coercion to establish conditioning for a tying claim but instead that tying occurs any time a seller who has market power over product A offers it for sale together with product B.\(^\text{17}\) The Court of Appeals affirmed summary judgment and dismissed the tying claim, ruling that IMP had failed to raise an issue of material fact on the question of conditioning by failing to rule out LN’s efficiencies to support their circumstantial evidence of coercion.


\(^{17}\) Id.
ii. Monopolization

IMP’s monopolization claims alleged that LN had unlawfully acquired monopoly power in the concert promotion industry, which allowed them to monopolize the promotional and venue services market through anticompetitive measures. However, in the absence of a plausible market definition, courts are reluctant to discern the nature or extent of any anticompetitive injury.\(^\text{18}\) Thus, IMP faced the initial challenge of identifying exactly what market Live Nation was monopolizing. Whether a product commands a distinct market depends on whether it is “reasonably interchangeable,” with other products or the “extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the ‘cross-elasticity of demand.’”\(^\text{19}\) Here, two separate but related markets were established: the market for concert promotion and the market for concert venues, in which both consumers consist of contracting performing artists. In its market definition analysis, IMP characterized the promotion market as national and the venue market more narrow as major amphitheaters in the Washington-Baltimore area.\(^\text{20}\)

In refuting these definitions, the court outlined their own market analysis based on the promotion industry’s goal to boost ticket sales, and the artists’ demand for promotion services as the derivative of the public’s demand for concert performances.\(^\text{21}\) Thus, because concertgoers will typically not travel out of their region to attend a concert in response to higher ticket prices in their area, the district court found that, promoting shows is highly localized, and most promoters promote in specific locations.\(^\text{22}\) In support of this, LN showed that it operates its

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\(^{18}\) Id.


\(^{20}\) It’s My Party, Inc. 811 F.3d at 676.

\(^{21}\) Id. at 682-83.

\(^{22}\) Heerwagen v. Clear Channel Commc’ns, 435 8 F.3d 219, 228 (2d Cir. 2006), It’s My Party, 88 F. Supp. 3d at 492.
promotional services through a central hub and books the majority of its television advertising locally, with only about five percent spent on national advertising. The court found that this trumped IMP’s focus on how technology allows the promotion of concerts from anywhere, because without local knowledge and contacts, the technology is useless.23 Thus, the ability of national promoters to coordinate cross-country tours does not change the fact that they provide services and compete for business on a local basis, causing the relevant competition in this case to be between IMP and LN for the Washington-Baltimore area and the battle on ‘IMP’s own turf’.24

Further, IMP’s definition of the venue market contained very narrow specifications in which the plaintiff’s Merriweather Post Pavilion (MPP) and the defendant’s Jiffy Lube Amphitheatre (Nissan Pavilion) were the only venues that fit their market description. The court found that this, again, artificially amplified the defendant’s market power because IMP had not shown any evidence that artists will to stick to amphitheaters in the event of a price increase. Because IMP could not justify that amphitheaters comprise their own market, the court found there was an insufficient basis for excluding “reasonably interchangeable” venues such as arenas or stadiums from the market definition.25 The court concluded that consumer preference does not show would they would do in response to an increase in price, but instead, because artists regularly perform at all kinds of venues, any artist dissatisfied with LIN’s conditioning of amphitheaters could perform at another venue.26

Overall, both courts agreed that the plaintiff’s market definitions were designed to bolster its monopolization and tying claims, by artificially exaggerating LN’s market power and by

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23 Id. at 491.
24 It's My Party, Inc. 811 F.3d at 682.
25 Id. at 683.
26 It’s My Party, 88 F. Supp. 3d at 497.
shrinking the scope of the artists’ choices. Circuit Judge J. Harvie Wilkinson III stated that IMP’s faulty market definition was ‘blind to the basic economics of concert promotion’, and IMP could have instead portrayed itself as a modest regional outfit who’s resources pale in comparison.27 Thus, by instead choosing a national vs. local power structure, IMP’s market analysis was deemed implausible which caused their monopolization claims to fail.28

iii. Tying

A section §1 Sherman Act offense of tying involves conditioning the sale of one product on the sale of a separate and distinct product.29 Traditionally considered a quasi “per se” violation, a tying offense allows a presumption of competitive harm when a seller with market power in the tying product market conditioned that sale on the purchase of the tied product, regardless of pro-competitive justifications and the lack of evidence of harm.30 Thus, a plaintiff alleging an unlawful tying arrangement need show only that: (1) the defendant linked two separate and distinct product markets; (2) the defendant conditioned the sale of one product on the purchasing of a different, "tied" product; (3) the seller possessed sufficient market power in the tying product; and (4) the tying arrangement affected a "not insubstantial" amount of commerce in the tied product market.

IMP articulated it’s “per se” tying claim as, LN (1) had the requisite market power in a "national promotion market" and in a number of local "amphitheater-only venue markets" and (2) would not provide its services in these "markets" unless the artist played the Nissan Pavilion on the Baltimore/DC stop on a tour. Further, IMP argued that a plaintiff need not show coercion

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27 It's My Party, Inc. 811 F.3d at 682.
30 Wilson Sonsini Goodrich & Rosati, supra note 16.
to establish the conditioning necessary for a tying claim because tying occurs any time a seller who has market power over one product offers it for sale together with another product.

The court of appeals rejected IMP’s arguments, affirming that coercion is required because merely offering two products in a single package and allowing each to enhance the appeal of the other, is not alone coercive. Judge Wilkinson stated that "pure speculation" isn't enough to carry a coercion claim.31 He based this on the fact that IMP’s own evidence suggested that some artists on LN-promoted tours chose Merriweather (only 14 percent of the time), and highlighted LN’s strengths, stressing that courts need to rule out alternative market-based explanations for why artists might have preferred to use LN’ venues, like better compensation or superior facilities.32 Ultimately the court wanted to avoid the possibility that sellers would be guilty of anticompetitive conduct if buyers freely chose to buy their products together, and so that competitors were not foreclosed from selling alternatives.33 Thus, in order to defeat a motion for summary judgment, the court held that where circumstantial evidence of coercion is being offered, the plaintiff has an obligation to rule out the various procompetitive reasons that customers might accept the packaged sale.34 Therefore, without any direct evidence of coercion, IMP had no Sherman Act claims.

IV. Significance

This case is important for its recognition of the value of vertical integration and collaboration, which simultaneously highlights the growing judicial skepticism of the “per se” rule for tying. Throughout the court of appeals opinion, Judge Wilkinson expounded on the many potential benefits of packaging complementary products. Thus, he turned away from a

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31 It’s My Party, Inc. 811 F.3d at 685.
32 Gardner, supra note 30.
33 Wilson Sonsini Goodrich & Rosati, supra note 16.
34 It’s My Party, Inc. 811 F.3d at 682.
tying offense and instead analogized the practice to vertical integration, which has “generally been permitted despite its apparent similarity to tying.”\(^{35}\) Going even further, the court identified the potential harms of the challenged conduct being shoehorned into a “per se” tying claim. As a unique “per se” offense, tying does not require proof of significant market foreclosure in the tied product market and thus it is an attractive claim for a competitor to use as a weapon against a more successful rival.\(^{36}\)

The court of appeals concluded its opinion by highlighting the potential for anticompetitive effects and consequences that can ironically arise from antitrust lawsuits. Both courts downplayed the evidence of anticompetitive conduct with this pro-integration focus and shut down the analysis at the relevant market stage, even though they repeatedly acknowledged LN’s size and capabilities. Both court's willingness to grant summary judgment on the fact-intensive market definition question and its discussion on the benefits of bundling complementary products leaves tying's per se treatment dismal for the future. This provides precedent to shut down these types of actions early, or as the court of appeals stated, ‘To help prevent antitrust law from being hijacked for such anticompetitive ends’.\(^{37}\) For example, this ruling is relevant to a current case dealing with the same topic of artist coercion in the same region in the context of a movie theater competing with the national film giant Regal.\(^{38}\) Additionally, district court judges in this circuit now have a basis to consider the benefits of an alleged tying practice and to reject indefensible market definition allegations before permitting a plaintiff to defeat summary judgment on a per se tying claim.

\(^{35}\) Id.

\(^{36}\) Wilson Sonsini Goodrich & Rosati, supra note 16 (stating most “per se” offenses involve coordination by competitors that harms customers, while tying is a “per se” offense that permits one competitor to challenge the relations another competitor has with its customers.)

\(^{37}\) It's My Party, Inc. 811 F.3d at 690.

\(^{38}\) Gardner, supra note 30, Eriq Gardner, Regal Said to Have Abused Movie Theater Monopoly in Nation's Capital, HOLLYWOOD REPORTER, (Jan. 27\(^{th}\) 2016) http://www.hollywoodreporter.com/thr-esq/regal-said-have-abused-movie-859747
In addition, both judges consistently state that the size of LN is not alone an issue; however, the DOJ’s modifications for the 2010 merger included anti-discrimination provisions and a 10-year heightened scrutiny for bundling issues, and thus shouldn’t these facts provide a presumption that size is not just the issue?\(^{39}\) For example, District Court Judge Motz conceded that LN utilizes its size and global reach to sign artists to exclusive contracts and steer them to perform in venues that it owns, but that does not constitute a monopoly.\(^{40}\) The appellate court agreed in focusing on LN’s sale of promotion and venue booking together as a benefit of vertical integration, stating that without anticompetitive conduct, even monopoly power can be a legitimate advantage.\(^{41}\) “The ‘sweeping attack’ upon LN’s size in this action cannot without more suffice to prove an antitrust infraction,” the court said as it determined that there was not ‘more’ by critiquing the quality of plaintiff’s evidence. The judge believed that the evidence against LN was just a result of cherry-picking facts, and the fact that artists played at both the plaintiff’s and defendant’s theaters disproved their arguments against LN.\(^{42}\)

Even though the LN and TM merger combined the venue, ticketing and promotional market, the court still placed an extreme focus on IMP’s implausible market definition in separating these markets, as causing a distortion of LN’s market power. The court’s arguments for power distortion are less convincing when LN’s power and size is frequently acknowledged and its merger history has already questioned the anticompetitive effects of concentrating these two powerhouses into one. Regardless, the court maintained its focus on the relevant market and a disregard for the tying offense avoiding the need for any analysis of LN’s actual ability to discriminate. Despite this victory here, LN will not escape antitrust challenges, as the online

\(^{39}\)Viswanatha, supra note 11.


\(^{41}\) It’s My Party, Inc. 811 F.3d at 690, citing Trinko, 540 U.S. at 407-08.

\(^{42}\) Wilson Sonsini Goodrich & Rosati, supra note 16
ticket seller, Songkick has recently filed suit against the company for similar complaints regarding LN’s use of power to intimidate other companies, venues, and artists.\footnote{Ryan Gaughnder, \textit{Concert ticket startup Songkick slaps Live Nation with antitrust lawsuit}, \textit{LA Times} (Dec. 22, 2015)\texttt{http://www.latimes.com/entertainment/envelope/cotown/la-et-et-songkick-ticketmaster-lawsuit-20151222-story.html}}