Case Closed

NERA Economists' Role in *American Booksellers Association et al. v. Barnes & Noble, et al.*

On April 15, 1998 the American Booksellers Association (ABA) and twenty-six bookstore operators filed an antitrust lawsuit in the Northern District of California against Barnes & Noble (B&N) and Borders Group, Inc. (Borders). In April of this year, in the second week of trial, the parties announced that they had settled the matter under terms that were widely reported to be favorable to the defendant bookselling chains. NERA provided expert economic testimony on behalf of Borders.

The Major Issues

Plaintiffs alleged that the defendant chains receive secret discounts and other favorable terms from book publishers and wholesalers that are not available to independent bookstores. Plaintiffs contended that these practices harmed competition in the book industry and violated the Robinson-Patman Act and the California Business and Professional Code. NERA economists demonstrated that certain discounts were cost-justified and that any analysis of the competitive consequences of an alleged differential should take into account the costs of earning those discounts.

Of the several allegedly discriminatory terms, the largest dollar value was due to the additional discount for books delivered to warehouses operated by multi-location booksellers.1 Such warehouses, generally referred to as retail distribution centers (RDCs), are equipped and staffed to select, sort, package and ship books to individual stores. Some of the other alleged discriminatory terms were easier payment terms for defendants, larger payments to defendants for cooperative marketing programs, and special deals for defendants on specific titles.

Attorneys

Involved In The Case

NERA worked with Borders' Counsel Reginald Steer of the San Francisco office of Skjerven Morrill MacPherson, LLP and Paul Griffin of Pillsbury Winthrop, LLP, San Francisco. Counsel for Barnes & Noble included Mel Goldman and Penny Preovolos of Morrison and Foerster, LLP, San Francisco, and Daniel M. Petrocelli of O'Melveny and

Sources: "1998 Consumer Research Study on Book Purchasing," Prepared by the NPD Group, Inc. for the American Booksellers Association and the Book Industry Study Group. "1999 Consumer Research Study on Book Purchasing," Prepared by the NPD Group, Inc. for the American Booksellers Association and the Book Industry Study Group.

Economic Expert Testimony

The ABA offered expert economic testimony purporting to measure the difference in the effective price paid for books between defendants and plaintiffs and resulting damage to plaintiff bookstores. Plaintiffs argued that any differential between the prices paid for books by the chains and those faced by plaintiff stores was a source of lost profits and damages to independent bookstores. These claims were made without reference to defendants costs in earning those discounts. Plaintiffs' expert constructed an elaborate economic model that attempted to calculated lost sales and profits to stores based on average additional discounts that BGI and B&N allegedly received.

NERA's Role

Dr. Cox's testimony showed that the RDC discounts were cost-justified. More specifically, defendants saved publishers more money than the value of the additional discount. His testimony refuted plaintiffs' expert's calculation of the differential between what independent bookstores and Borders pay for books. Dr. Cox also described the changes in the bookselling industry and showed that for two areas of California the presence of a book "superstore" had no apparent impact on the net number of stores selling books in the area

Dr. Rapp, in his report, pointed out that differential pricing by sellers is a common occurrence in many industries. These pricing differences reflect differences in the cost of dealing with certain sellers, or a need to remain competitive. Dr. Rapp also asserted that the competitive impact model presented by plaintiffs' expert could not measure competitive impact for several reasons. These reasons included the fact that the model did not take into account the increased cost to Borders of operating its RDCs. Furthermore, it did not include the full array of potential competitors to general bookstores, such as internet and price clubs and it gave results which were inconsistent with economic principles.

Our Expert

Involved In The Case

Click here to view their online bios:
:: Dr. Richard Rapp
:: Dr. Alan Cox

Court Opinion

In summary judgment, US District Court Judge William Orrick ruled in part that plaintiffs and their economic expert had failed to show the causation of actual injury to plaintiffs. For example, plaintiffs had not accounted for the possibility that the additional RDC discount may be functional discounts or were cost-justified. He further found that the geographic market was not defined with enough detail and that the model used arbitrary values for certain variables. These and several other parts of his ruling were in agreement with the economic arguments contained in defendants' briefs. The judge did allow a bench trial on the issue of injunctive relief.

Trial and Settlement

In settling the case, Borders and Barnes & Noble each agreed to pay the ABA $2.35 million towards ABA's legal expenses. The defendants did not agree to change any of their business practices. While the case settled before any economic experts had the opportunity to testify in court, economic arguments made through briefs submitted by the defendants clearly had a crucial role in the outcome of the case.

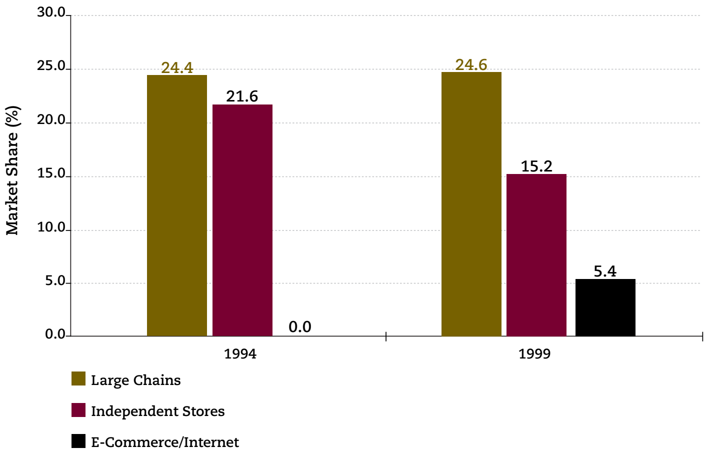
Book Industry Background

Book Retail Market Shares

Books are distributed to customers through several channels including, but not limited to, independent bookstores, national chain bookstores, book clubs, price clubs, and the internet.

Retailers buy books at discounts off the retail cover price. These discounts typically range from 40 to 50 percent off the cover price of the book. An additional discount was granted for books sent to processing warehouses operated by multilocation booksellers. In such warehouses, generally referred to as Retail Distribution Centers (RDCs), books are stored, sorted, packaged and shipped to the chain's stores.

Over the past few years there have been some shifts in consumer buying patterns, including increased sales through price clubs and a surge in book purchases over the internet. The proportion of adult books purchased from independent bookstores has fallen from 21.6 percent in 1994 to 15.2 percent in 1999. Market shares of the large chain bookstores rose only slightly in that period, while internet book purchases jumped from nothing in 1994 to 5.4 percent in 1999. (See chart) During this period, the overall sales of adult books grew at a modest annual rate of about 1 percent.



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