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Circuit Frees Kodak Of Antitrust Decree (New York Law Journal)

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Circuit Frees Kodak Of Antitrust Decree

Change in 'Market Power' Cited in Ruling

BY DEBORAH PINES

EASTMAN KODAK CO. should be freed from two long-standing antitrust consent decrees because the aim of enhancing competition in the amateur film market largely has been achieved, a federal appeals panel has ruled.

The ruling, from the U.S. Court of Appeals for the Second Circuit in *U.S. v. Eastman Kodak*, 94-6190, found the Rochester, N.Y.-based photographic giant no longer possesses "market power" over world sales of film and film processing services as it did when the decrees were signed in 1921

and 1954.

The 34-page ruling, written by Second Circuit Judge Roger J. Miner and filed late Friday, also clarified the applicable standard for lifting or modifying antitrust consent decrees. It was joined in by Second Circuit Judge Dennis Jacobs and a visiting judge, Southern District Judge Miriam Goldman Cedarbaum.

The ruling affirmed legal and factual conclusions reached last year by Western District Chief Judge Michael Telesca after a nine-day hearing in Rochester. Over objections from the U.S. Justice Department, Judge Telesca granted a motion made by

Excerpt From the Decision

Judge Roger J. Miner wrote that "an antitrust defendant [generally] should not be relieved of the restrictions that it voluntarily accepted until the purpose of the decree has been substantially effectuated, or when time and experience demonstrate that the decree is not properly adapted to accomplishing its purposes." Applying that standard, he held that the decrees should be lifted, chiefly because "the marketplace for film has changed considerably in the last 80 years."



PHOTOGRAPH BY FAYE ELLMAN

Eastman Kodak to terminate the two consent decrees.

The first was entered in 1921 after a district court found Kodak had monopolized the sale of cameras and

photographic supplies. It imposed various restrictions including a bar on Kodak's selling "private label" film. Such film is marketed under a brand

Continued on page 2, column 1

End to Kodak Antitrust Decree

Continued from page 1, column 6

name other than Kodak's, typically that of a retail outlet. The second decree, entered in 1954, prevented Kodak from selling its film in a "bundle" with its photofinishing services.

Changed Conditions

Judge Miner's ruling first set out the standard for terminating or modifying antitrust consent decrees.

He noted Kodak argued for applying a somewhat flexible standard for modifying decrees, as set forth in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). That permitted modification when the equities such as a "significant change in circumstances" warrant modification.

The government, meanwhile, argued for applying a stricter standard from *U.S. v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968). That indicated a consent decree may not be changed by a defendant "if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved."

Drawing upon both *Rufo* and *United Shoe*, Judge Miner wrote that modification of an antitrust consent decree may be appropriate sometimes even though the aim of a decree has not fully been achieved.

But generally, he wrote, "an anti-trust defendant should not be relieved of the restrictions that it voluntarily accepted until the purpose of the decree has been substantially effectuated, or when time and experience demonstrate that the decree is not properly adapted to accomplishing its purposes."

Applying that standard, Judge Miner found the decrees governing Kodak should be lifted. He found "the marketplace for film has changed considerably in the last 80 years." As one example, he noted that while Kodak in 1954 controlled 90 percent of the color film and film processing sales in the U.S., today Kodak accounts for 67 percent of U.S. film sales and 30 percent of the film processing.

Furthermore, he noted, worldwide Kodak accounts for 36 percent of film sales, followed closely by Fuji, which has 34 percent of the market. After the two leaders, three other companies split world sales: Konica (16 percent), Agfa (10 percent) and 3M (4 percent).

Diane P. Wood, Catherine G. O'Sullivan, Robert B. Nicholson and Robert J. Wiggers, U.S. Department of Justice in Washington, D.C., represented the government. David M. Lascell of Hallenbeck, Lascell, Norris & Zorn in Rochester, and Robert B. Bell of Wiley, Rein & Fielding in Washington, D.C., represented Kodak.