

Fit to be Tied?

Antitrust Implications of *Collins Inkjet Co. v. Eastman Kodak Co.*

Purchasers often make a significant upfront investment when they buy durable equipment such as printers and photocopiers. Further, in order to use such equipment, they often need to make aftermarket purchases of products (such as ink) and services (such as repairs) from the original equipment manufacturer (“OEM”) or aftermarket suppliers. The recent opinion issued by the U.S. Court of Appeals for the Sixth Circuit in *Collins Inkjet Co. v. Eastman Kodak Co.* may have implications for how these aftermarket products and services are priced.

At issue in this case is a practice known as “tying,” which is conditioning the sale of one product (the “tying product”) on the purchase of another (the “tied product”). Firms can tie in a variety of ways. For example, a firm may require customers who purchase one product to make all their purchases of another product from that firm. Alternatively, a firm may condition the price of one product on whether other products are also purchased. Tying is a common practice in the economy. In certain cases, however, tying can have anticompetitive consequences, such as when it excludes a competitor from the market for the tied product. Accordingly, tying may be challenged under several provisions of the U.S. antitrust laws.

Such was the case in *Collins Inkjet Co. v. Eastman Kodak Co.* Kodak sold Versamark printing systems that required customers to purchase specialized aftermarket printheads and ink over the course of the life of the system, typically 10 to 20 years. Kodak initially provided 100 percent of the printheads and ink, but later, Collins began to compete with Kodak for sales of ink. In 2013, Kodak announced a revised pricing policy under which it would start charging customers different prices for printheads based on the brand of aftermarket ink the customer purchased. Customers who purchased Kodak ink would pay lower prices for printheads than customers that purchased Collins ink. Collins brought an antitrust suit against Kodak alleging that the different prices charged for printheads was a tying arrangement that would force all customers to purchase Kodak ink.

The U.S. District Court for the Southern District of Ohio issued a preliminary injunction, stating that Collins was likely to show that all rational customers would be forced to purchase Kodak ink. The Court also found that Collins would suffer irreparable harm if a preliminary injunction was not granted. The appellate court affirmed the granting of the preliminary injunction, but stated that the lower court applied the wrong standard regarding the tying arrangement.

The appellate court ruled that for a bundled discount to constitute an unlawful tying arrangement under antitrust laws, a “discount attribution test” needed to be applied as follows. First, the difference in the price of printheads purchased by the two different groups of customers is calculated and attributed as a discount to Kodak ink. Second, if the discounted price of Kodak ink is below Kodak’s incremental cost of producing the ink, then the arrangement is an

unlawful tie. The appellate court found the records suggest that the size of the discount that would be applied to Kodak's ink prices would result in the attributed price being below incremental cost.

A key element in a tying case is that the plaintiff must prove the defendant has market power in the tying product, which in this case was the printer. Professor John Bowblis, an Academic Advisor to The Brattle Group and Associate Professor in the Department of Economics at Miami University (Ohio), provided expert testimony on this issue on behalf of Collins in the case before the district court. Professor Bowblis testified that there were two important factors that gave Kodak market power so that competition from other printer OEMs would be unlikely to constrain Kodak from increasing the price of aftermarket ink. First, during the period when Kodak sold Versamark printers (which ended in 2009), Collins was not yet a competitor in the supply of aftermarket ink. Customers choosing among printers from Kodak and other OEMs would not have had any reason to expect Kodak would change its aftermarket pricing policy years later. This lack of information reduced the competitive pressure on Kodak from other OEMs in the market for printers.

Second, once customers had purchased a Versamark printer, the high costs of switching printing systems, including but not limited to the cost of a new system, reduced the competitive pressure on Kodak from other OEMs in the market for printers. Dr. Bowblis's testimony demonstrated that as a result of these two factors—lack of information and high switching costs—Kodak's differential pricing policy essentially forced customers to purchase only Kodak ink.

The Sixth Circuit's opinion has gained attention in the antitrust community for two reasons. First, the Sixth Circuit set a standard in tying cases involving differential pricing, in that the "tied product" (in this case the ink) had to be sold below the defendant's cost. Second, the Sixth Circuit adopted the discount attribution test, which had been used in other cases, to determine if the standard was met. It remains to be seen if other circuit courts will follow the Sixth Circuit's lead, which may have implications for how aftermarket products and services are priced.

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Dr. Bowblis is an Associate Professor in the Department of Economics at Miami University (Ohio), where he teaches courses in health economics, antitrust, industrial organization, econometrics, and the economics of regulation. He has developed economic analyses, testified, and provided litigation support in matters involving mergers, price fixing, attempted monopolization of markets and aftermarkets, medical fraud, definition of relevant markets, and estimation of damages. He has conducted this work in a wide range of industries including airlines, basic food products, commercial printing, hospitals, long-term care providers, investment banking, motorsports, tobacco, and pharmaceuticals.

Dr. Bowblis's research interests include applied industrial organization, health economics, antitrust, and regulation, with a particular focus on regulatory and competition issues in the long-term care and the post-acute care industries.

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Dr. Abere has more than twenty-five years of experience providing economic research, data analysis, and expert witness testimony in cases involving antitrust, contracts, intellectual property, and other types of commercial litigation as well as regulatory proceedings. He has served as a consultant and expert witness on issues of liability, class certification, and damages, including as a court-appointed expert witness in U.S. Federal court.

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