

May 2014

*Practice Group(s):**Antitrust,
Competition and
Trade Regulation*

Kodak Lives: New Jersey Jury Finds Antitrust Violation in the Aftermarkets for Maintenance of Avaya Products

By Douglas F. Broder, Anthony P. La Rocco, Anthony P. Badaracco, Ashley L. Turner

On March 27, 2014, a New Jersey federal jury found that Avaya, Inc. (“Avaya”), a leading manufacturer of enterprise telephone systems, violated the federal antitrust laws by trying to eliminate competition from independent services providers (“ISPs”) for maintenance of its systems.¹ The verdict confirms that potential antitrust liability for conduct affecting the aftermarket for service and maintenance of a single brand of products—established in the U.S. Supreme Court’s 1992 *Kodak* decision² but long thought to be an outlier in United States antitrust jurisprudence—is alive and well.

In *Kodak*, the Court held for the first time that independent providers of aftermarket services for the products of a single manufacturer could prove the existence of a relevant aftermarket for those services under the right circumstances. In that case, the plaintiffs were ISPs that offered maintenance services and parts for Kodak-brand photocopiers.

The ISPs sued under two theories of antitrust liability: (1) that *Kodak* violated Section 1 of the Sherman Act by tying the availability of replacement parts for its copiers to customers’ agreement to buy service from Kodak instead of buying from an ISP; and (2) that Kodak violated Section 2 of the Sherman Act by monopolizing the aftermarkets for parts and services for its copiers. Kodak’s primary defense was that there could never be separate aftermarkets for parts or services of a single manufacturer’s products because the manufacturer faced competition from other manufacturers in the market for sales of those products that prevented it from exercising monopoly power in the aftermarkets.³

But the Supreme Court disagreed, holding that the ISP plaintiffs could proceed to trial on their antitrust claims because parts and services for the products of a single manufacturer could be in separate markets from the market for sales of the products themselves.⁴ The Court found that such separate markets are likely to exist, and that a manufacturer can exercise monopoly power in them, where the aftermarket parts and services are sold separately and demanded separately by consumers,⁵ where consumers are unable to accurately predict the overall cost of a product (including parts, service, and maintenance) over its useful life, and where it is costly for customers to simply switch to another brand’s products to avoid being exploited by the manufacturer.⁶

¹ See *Avaya, Inc. v. Telecom Labs, Inc.*, 1:06-cv-2490(JEI) (D.N.J.).

² *Eastman Kodak Co. v. Image Tech. Services, Inc.*, 504 U.S. 451 (1992).

³ 504 U.S. at 481–82.

⁴ *Id.* at 477–79.

⁵ *Id.* at 462–63.

⁶ *Id.* at 473–78.

Kodak Lives: New Jersey Jury Finds Antitrust Violation in the Aftermarkets for Maintenance of Avaya Products

Following this decision, in 1996, the ISP plaintiffs took their monopolization claims to trial and won.

But anyone who expected a torrent of successful aftermarket claims in *Kodak's* wake was disappointed—and those manufacturers who may have feared such a torrent were comforted—when, for nearly two decades, every ISP plaintiff that brought a *Kodak*-style claim was defeated at or before the summary judgment stage. Commentators wrote that these defeats had “reduced the *Kodak* decision to little more than historical interest.”⁷ The co-author of the leading antitrust treatise noted that the lower federal courts had “bent over backwards to construe *Kodak* as narrowly as possible.”⁸ Others wrote that *Kodak's* “influence was short-lived”⁹ and that it had been “narrowed to the point where it is simply no longer an effective weapon for antitrust plaintiffs.”¹⁰

And so by the advent of the current decade, a manufacturer might understandably wonder whether it continued to be possible for an ISP plaintiff to win a single-brand aftermarket antitrust case—or whether *Kodak* was simply an outlier whose time had passed. The case of Avaya serves as a reminder that *Kodak* remains viable.

Avaya, which started life as Western Electric (the equipment arm of AT&T), is a leading manufacturer of private branch exchange (“PBX”) and predictive dialer system (“PDS”) telephony solutions. Both products are complex, expensive, and last for many years—as long as two decades or more—requiring maintenance throughout the systems’ long post-warranty periods. This means that many of the conditions that the *Kodak* Court identified as tending to indicate the existence of separate aftermarkets are present. Telecom Labs, Inc. and Continuant Inc. (together, “TLI/C”) are ISPs that provide post-warranty maintenance for Avaya-brand PBXs and PDSs as well as similar products made by other manufacturers.

In June of 2006, Avaya brought more than a dozen claims against TLI/C for maintaining its systems as an ISP. TLI/C, represented by K&L Gates LLP, filed counterclaims against Avaya on August 21, 2006 in the United States District Court for the District of New Jersey, alleging that Avaya attempted to, and in fact, did monopolize the aftermarkets for post-warranty maintenance of Avaya-brand PBXs and PDSs. TLI/C also alleged that Avaya tied the availability of patches and upgrades for Avaya-brand PBXs and PDSs to the purchase of Avaya-brand post-warranty maintenance or to customers’ agreement not to purchase maintenance from an ISP.

As *Kodak* had done two decades earlier, Avaya argued that competition from the primary market—the market for sales of PBXs and PDSs—restrained its ability to exercise monopoly power in the aftermarkets for post-warranty maintenance of these systems. But despite

⁷ Jonathan I. Gleklen, *The ISO Litigation Legacy of Eastman Kodak Co. v. Image Technical Services: Twenty Years and Not Much to Show for It*, 27 ANTITRUST 56 (2012); see also *id.* at 62 (“Twenty years after the *Kodak* decision, ISO plaintiffs have little to show for it.”).

⁸ Herbert Hovenkamp, *The Reckoning of Post-Chicago Antitrust*, in *Post-Chicago Developments in Antitrust Law* 1, 8 (Antonio Cucinotta et al. eds., 2002).

⁹ Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 301, 310 n.39 (*Kodak* “was the zenith of the Post-Chicago School’s influence over antitrust law in the United States. However, that influence was short-lived.”).

¹⁰ David A.J. Goldfine & Kenneth M. Vorrassi, *The Fall of the Kodak Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 ANTITRUST L.J. 209, 209 (2004); *id.* at 231 (“The lower courts, in effect, have overruled *Kodak* by pulling its teeth.”).

***Kodak* Lives: New Jersey Jury Finds Antitrust Violation in the Aftermarkets for Maintenance of Avaya Products**

years of discovery and several failed attempts by Avaya to dismiss TLI/C's case, the matter went to trial on September 9, 2013.

Each side put on dozens of witnesses and introduced hundreds of documents, and after six and a half months of trial, the jury returned a verdict for TLI/C on its claims for attempted monopolization of the market for post-warranty maintenance of Avaya-brand PBXs and for tying of patches for Avaya-brand PDSs to customers' purchase of Avaya-brand maintenance of those systems or their agreement not to purchase maintenance from an ISP. The jury awarded \$20 million in damages, which will be automatically trebled to \$60 million by statute, along with TLI/C's attorney's fees and costs.

Post-trial briefing is currently underway, and an appeal will likely follow. But no matter the final result, the jury's verdict against Avaya clearly indicates that *Kodak* remains viable and that, with the right facts and good lawyering, an ISP plaintiff can win a single-brand aftermarket antitrust case. Manufacturers simply cannot assume that their aftermarket policies are immune from antitrust scrutiny. Rather, they should continue to exercise caution to avoid antitrust liability for actions that may hamper independent competition for service and maintenance of their own products. K&L Gates is uniquely well positioned to assist manufacturers in assessing and mitigating the risk of such liability.

Authors:

Douglas F. Broder

Douglas.broder@klgates.com
+1.(212) 536-4808

Anthony P. La Rocco

Anthony.larocco@klgates.com
+1.(973) 848-4014

Anthony P. Badaracco

Anthony.badaracco@klgates.com
+1.(212) 536-3973

Ashley L. Turner

Ashley.turner@klgates.com
+1.(973) 848-4018

***Kodak* Lives: New Jersey Jury Finds Antitrust Violation in the Aftermarkets for Maintenance of Avaya Products**

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt
Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto Paris
Perth Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco São Paulo Seattle Seoul Shanghai Singapore Spokane
Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates practices out of 48 fully integrated offices located in the United States, Asia, Australia, Europe, the Middle East and South America and represents leading global corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

© 2014 K&L Gates LLP. All Rights Reserved.