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FEBRUARY 10th - 12th, 2014

TOP TOPICS: WAGE AND HOUR CLASS ACTIONS, PATENT TROLLING, RATE PARITY

Arthur Chinski, Buchalter Nemer

Mark Cramer, Buchalter Nemer

Imran Hayat, Michelman & Robinson

PRESENTERS

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Arthur Chinski – Shareholder, Buchalter Nemer

- Chair of the Firm's Restaurant, Food and Beverage, and Hospitality Practice
- adjunct Professor of Law at Southwestern University School of Law, where he has taught Entertainment Industry Labor and Employment Law

Mark Cramer – Shareholder, Buchalter Nemer

- collaborates with clients, their executives, and in-house counsel to formulate and implement customized litigation strategies
- advises clients on how to manage actual and potential business disputes

Imran Hayat – Senior Counsel, Michelman Robinson

- skilled in both litigation and transactional matters, & has litigated issues in banking, real estate, entertainment and intellectual property
- recently obtained an important decision, believed to be the first of its kind, on remand of *Mabry v. Superior Court*

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WAGE & HOUR CLASS ACTIONS

Arthur Chinski
Buchalter Nemer, P.C.

WAGE & HOUR CLASS ACTIONS

- **RECENT DEVELOPMENTS IN WAGE AND HOUR CLASS ACTION AND FLSA COLLECTIVE LITIGATION**

PROCEDURAL ISSUES

- **What Claims Are Susceptible To Class Action Treatment?**
  - **Arbitration Class Action Waivers**
  - **Individualized Damages May Defeat Class Certification**
  - **Mooting**
  - **Independent Contractor Claims May Not Be Subject To Employee Arbitration Agreements**
  - **Prevailing Party Fee Provision May Invalidate Arbitration Agreement**

RECURRING WAGE & HOUR CLASS AND/OR COLLECTIVE ACTION LITIGATION ISSUES

- Tips and Tip Pooling Arrangements
- Uniforms and Maintenance
- Non-Work Minimum Pay Issues
  - Reporting Time Pay
  - Split Shift
  - Shift Differentials
  - Reimbursement
- Employee Misclassification

RECURRING WAGE & HOUR CLASS AND/OR COLLECTIVE ACTION LITIGATION ISSUES

- **Employee Misclassification**
  - California Wage Order 5-2001, Section 1(B)(1) - **Executive Exemption**
  - California Wage Order 5-2001, Section 1(B)(2) - **Administrative Exemption**
  - FLSA Test
    - **Executive Exemption**
    - **Administrative Exemption**

RECURRING WAGE & HOUR CLASS AND/OR COLLECTIVE ACTION LITIGATION ISSUES

- **Meals and Rest Period**
  - Meal Periods
  - Rest Periods

ON THE HORIZON - EMERGING TRENDS IN WAGE AND HOUR LITIGATION

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- Paycards
- Standby/On-Call
- Reimbursement of Costs/Expenses Associated with BYOD Programs
- Recovery Periods
- Suitable Seating

WHAT'S NEXT?

ARTHUR CHINSKI, Shareholder

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- Arthur Chinski is a Shareholder of Buchalter Nemer, A Professional Law Corporation. He has been active in the Firm's administration and at differing times has been Chair of Buchalter Nemer's Labor and Employment Practice Group, a Member of the Firm's Board of Directors and the Firm's Co-General Counsel for Labor and Employment legal issues. He represents private and public companies and management in all areas of employment relations and labor law in a broad spectrum of industries. He has appeared in federal and state courts and before governmental agencies throughout the United States.

- He is currently Chair of the Firm's Restaurant, Food and Beverage, and Hospitality Practice and represents a number of national private and public restaurant chains and food and beverage related manufacturing and retail companies. His practice includes Wage and Hour Class Action defense litigation and litigating and giving advice in the prevention and/or the defense of discrimination, wrongful termination, wage and hour, OSHA, and harassment and retaliation claims, claims arising under the National Labor Relations Act, and other employment related claims and issues. He also represents businesses in collective bargaining and response to Union organizing drives.

- Mr. Chinski has chaired or appeared at numerous labor and employment law programs designed for attorneys and management. These include programs for the California Continuing Education of the Bar, Beverly Hills Bar Association, Los Angeles County Bar Association, the University of California, the Human Resources Institute presented by the Institute of Business Law. He was also recognized as a 2013 Top Rated Lawyer in Labor & Employment by *American Lawyer Media* in conjunction with Martindale Hubble, and he appeared in *Fortune Magazine*.

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PATENT TROLLS

LEGISLATIVE DEVELOPMENTS

Mark T. Cramer
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HospitalityLawyer.com
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AGENDA

- The Problem With Trolls
- Pending Legislation
- What You Can Do

Patent Troll

Patent Extortionist

Patent Pirate

Patent Shark

Patent Holding Company

Non-Practicing Entity (NPE)

Patent Assertion Entity (PAE)

Re: Infringement of Innovative Wireless Solutions, LLC's U.S. Patent Nos. 5,912,895, 6,327,264 and 6,587,473

Dear Sir or Madam:

I am writing on behalf of Innovative Wireless Solutions, LLC ("IWS"). IWS is the assignee of all right, title, and interest in U.S. Patent Nos. 5,912,895 (the "'895 Patent"), 6,327,264 (the "'264 Patent"), 6,587,473 (the "'473 Patent") (collectively "the IWS Patents"). The IWS Patents generally relate to a wireless access point ("WAP") that connects to an Ethernet network.

In addition to directly infringing the IWS Patents, your company is also inducing others to infringe the IWS Patents by offering wireless Internet access, advertising that wireless Internet access, and encouraging others to use that wireless Internet access. These other entities include your company's guests, customers, and end users, whose connection of their wireless devices to your network and use of the wireless Internet access constitutes direct infringement of the IWS Patents.

KEY PROVISIONS FOR THE HOSPITALITY INDUSTRY

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FEE SHIFTING

TRANSPARENCY

DISCOVERY LIMITS

STAY, TROLL. STAY.

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When You Get A Troll Letter...

HOSPITALITY CHECKLIST

- Consult legal counsel
- Issue document retention notice
- Notify insurance
- Contact vendors
- Review relevant contracts
- Identify trade associations or similarly-situated businesses

POTENTIAL STRATEGIES

- Sit Back
- Push Back
- Attack

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Top Topics: , Wage and Hour Class Actions, Patent Trolling, Rate Parity

By Imran Hayat | lhayat@mrllp.com

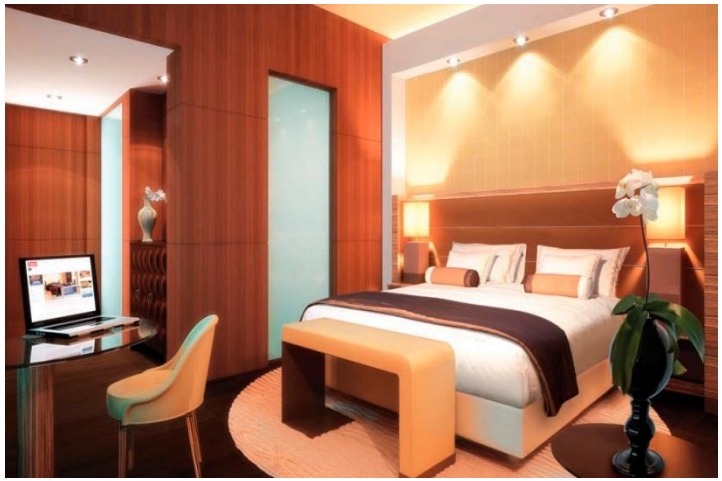
MICHELMAN & ROBINSON, LLP
ATTORNEYS AT LAW

What is Rate Parity

Resale price maintenance (“RPM”) or “rate parity” are often used interchangeably to refer to an arrangement pursuant to which a seller (manufacturer, distributor or franchisor) and a reseller (distributor, dealer, retailer or franchisee) reach an agreement on the resale price that the reseller will charge for a given product. Resale price maintenance agreements can set either the minimum or maximum price at which products will be sold.

Rate Parity for Hotels

With respect to the hotel industry, the terms RPM or rate parity are used to refer to the practice whereby hotels and OTAs agree that the OTA will make a non-packaged room reservation available at a predetermined price. For the vast majority of American legal jurisprudence, RPM was deemed, under any terms, illegal.



Historically Rate Parity Deemed Illegal Per Se

- ***Dr. Miles Medical Co. v. John D. Park & Sons Co (1911)***
  - Agreements between a manufacturer and its distributors to sell products at a minimum resale price violate Section 1 of the Sherman Act
- ***Leegin Creative Leather Products, Inc. v. PSKS* (2007)**
  - The U.S. Supreme Court overturned *Dr. Miles* application of the per se rule to vertical resale price maintenance agreements, and held that the rule of reason is the accepted standard in a vertical non-price restraint case for testing whether a practice unreasonably restrains trade in violation of Section 1 of the Sherman Act

The Rule of Reason

"To prove a Section 1 violation under rule of reason analysis, [plaintiffs] must show that the defendants' activities caused an injury to competition." *Doctor's Hosp., Inc. v. Southeast. Med. Alliance, Inc*. (5th Cir. 1997).

The Rule of Reason (cont.)

- **Under the rule of reason, the court must examine the effect of the alleged restraint on competition, considering all the circumstances, "including the facts peculiar to the business and the history of, reasons for, and market impact of the restraint . . . ." *Royal Drug Co. v. Group Life & Health Ins*. Co.**

The Rule of Reason (cont.)

- **It must also balance the "anticompetitive evils of a restrictive practice . . . against any procompetitive benefits or justifications within the confines of the relevant market." *Southeast. Med. Alliance***

The Claims

- **Plaintiffs' Claims**
  - Plaintiffs need only "nudge" their allegations across the line from conceivable to plausible;
  - Defendants had a common motive to eliminate price competition;
  - The OTA Defendants had the market power to force the Hotel Defendants to do it;
  - Defendants had the opportunity and means to conspire at industry conferences and did so by discussing price restrictions and "rate parity";
  - An unprecedented and coordinated pricing agreement resulted in which price competition and discounting were replaced by higher retail prices market-wide;
  - All Defendants policed and enforced the conspiracy in a "mafia" like manner;
  - For the foregoing reasons, the activities engaged in by the Hotel and OTAs are per se illegal.

The Claims (cont.)

- **The Defendants' Response**
  - The allegations of the complaint show fierce interbrand competition, i.e.,
  - The OTA provided consumers seeking to book a room in any given city and on any given night, a vast number of options from which to choose based on brand, location, room size, and price;
  - Interbrand restrictions are permitted as the Supreme Court has recognized that to protect and enhance the paramount competition between a seller and its competitors, the seller must carefully manage how its offerings are sold across various distribution channels (i.e., "intrabrand"). See *Leegin*

The Claims (cont.)

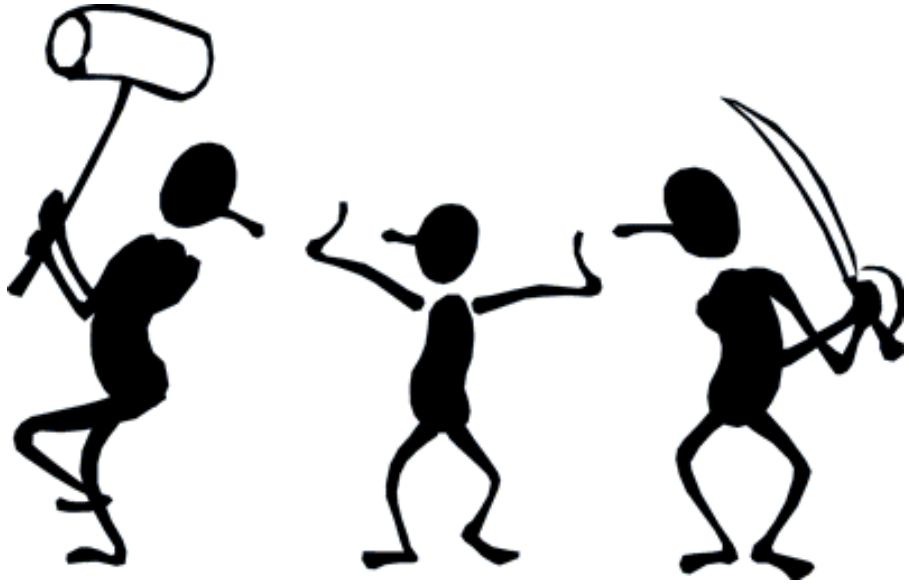
- **The Defendants' Response (cont.)**
  - No "resale" occurs as no "good" exists in the traditional sense; the OTA are merely acting as agents for who hotels can legally set a price. *See United States v. Gen. Elec.* Co. (1926);
  - Plaintiffs fail to identify an unreasonable restraint of trade or a legally sufficient relevant antitrust market as required by law. *See Tanaka v. Univ. of S. Cal.* (9th Cir. 2001) (affirming dismissal of Sherman Act claim for failure to properly allege a plausible relevant market and the existence of anticompetitive effects within that relevant market);
  - Plaintiffs cannot show a conspiracy based on allegations which simply amount to claims that Defendants had the opportunity to conspire; and
  - Plaintiffs state antitrust and consumer protection claims fail for the same reasons above.

What Now?

The Court has heard arguments from the parties but has yet to rule. RPM complaints require a fact intensive inquiry and it would appear that Plaintiffs will be able to pursue their claims on the merits. If this occurs and further evidence is adduced, it will become clearer if the agreements between the Hotel and OTA Defendants constitute RPM and whether such RPM is legal.

Arbitration

In the interim, the Court has made one thing clear in ruling on OTA Defendant Travelocity's Motion to Compel Arbitration: Where Plaintiffs were required to assent, and complied, to a User Agreement containing a valid arbitration clause and a class waiver, those Plaintiffs must arbitrate their claims.



Thank You

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