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Exclusive Conduct in Response to Rivals' Complaints

The U.S. Court of Appeals for the Tenth Circuit ruled that a managed-care company could lawfully decide to exclude optometrists from its panels. A state appellate court stated that purchasers of tires did not have standing to bring price-fixing claims against makers of chemicals used to manufacture tires.

Other recent antitrust developments of interest included the European Court of First Instance's partial annulment of a ruling that charging higher prices for drugs intended for export was unlawful under European competition law.

Restraint of Trade

Optometrists in Utah sued a managed-care company alleging that they were excluded from the company's provider network in violation of federal antitrust laws. The optometrists asserted that ophthalmologists vigorously discouraged the managed-care company from including optometrists in its network because they provide many of the same eye-care services for 20 percent less than ophthalmologists.

A district court granted summary judgment for the defendants and the Tenth Circuit affirmed, stating that the optometrists did not present sufficient evidence to exclude the possibility that the managed-care company was acting independently rather than by agreement with ophthalmologists, citing the Supreme Court's 1984 *Monsanto* decision. The Tenth Circuit added that despite evidence that ophthalmologists did not want competition from optometrists, the managed-care company provided plausible independent reasons for its decision to deal with ophthalmologists only. For example, the company asserted that it had to include ophthalmologists in its provider network because they perform eye surgery in addition to services optometrists can provide and limiting the number of providers allows the managed-care company to negotiate lower payments.

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***Abraham v. Intermountain Health Care Inc.*, 2006-2 CCH Trade Cases ¶75,403**

Indirect Purchasers

A state appellate court ruled that purchasers of car tires lacked standing to bring Minnesota antitrust law claims against chemical companies alleged to have fixed the prices of chemicals used to manufacture tires. The court stated that although the state statute provided a cause of action for indirect purchasers, only participants in the allegedly restrained market had standing. The court observed that the term "indirect purchaser" would be stretched beyond reason if it were read to permit, for example, a garage sale purchaser of a second-hand desk to recover damages from iron suppliers whose products were made into bolts used to make the desk.

***Lorix v. Crompton Corp.*, 2006-2 CCH Trade Cases ¶75,439 (Minn. Ct. App.)**

Restrictions on Parallel Trade

A pharmaceutical company charged regulated prices to wholesalers intending to resell drugs in Spain and higher prices for drugs intended for export to other European countries. The European Commission ruled that the dual pricing practice violated Article 81 of the European Community Treaty because it constituted an agreement limiting parallel trade between Spain and other member states, particularly the United Kingdom, where drug prices are typically higher.

The drug company appealed and the European Court of First Instance annulled the EC's decision in part. The court stated that in the drug industry, where prices are often regulated, parallel trade would not necessarily result in lower prices to consumers. The court added that any negative

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effect on competition from restricting parallel trade in the drug company's products must be weighed against the argument that parallel trade reduced drug companies' ability to recover research and development costs and therefore discouraged innovation.

***GlaxoSmithKline Services Unlimited v. Commission of the European Communities*, T-168/01 (Sept. 27, 2006), available at curia.europa.eu**

Acquisitions

The Department of Justice announced that it had closed its investigation of the proposed acquisition of BellSouth Corp. by AT&T Inc., having determined that the combination is not likely to substantially lessen competition. AT&T is a provider of long distance and enterprise telecommunications services nationwide and the incumbent local exchange carrier in many parts of the midwestern, southwestern and western United States. BellSouth is the incumbent local exchange carrier in much of the southeastern United States.

The department stated that the presence of additional competitors, regulatory changes and the emergence of new local and long distance telecommunications technologies, such as voiceover IP (voiceover Internet Protocol, VoIP, is a technology that allows you to make telephone calls using a broadband Internet connection), indicated that the combination was not likely to harm consumers. The department noted that the parties supported their claims of substantial cost savings with documentation suggesting that these and other anticipated efficiencies are likely to be accomplished.

The department also stated that it investigated "net neutrality" concerns, that is, whether the proposed combination would likely favor its own internet content over that of its rivals, and concluded that the combination would not significantly increase concentration in broadband services markets. The merger is still subject to approval by the Federal Communications Commission.

***Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of BellSouth* (Oct. 11, 2006), available at www.usdoj.gov/atr**

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The European Commission (EC) announced its approval of a joint venture combining two chilled dairy dessert businesses, which produce yogurts, fresh cheeses and milky desserts in a number of European countries. The EC stated that the combination is not likely to significantly reduce competition because one of the parties to the joint venture targets the diet sector of the market while the other does not. The commission noted that retailers who sell private label chilled dairy desserts made by the merging parties will be able to constrain any price increases, since other suppliers of private label products are readily available.

***Mergers: Commission Approves Planned Creation of Joint Venture by Lactalis and Nestlé*, IP/06/1214 (Sept. 19, 2006), available at europa.eu.int.**

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The Federal Trade Commission (FTC) announced a proposed settlement of charges that the merger of two suppliers of scientific equipment would harm competition in the market for high-performance centrifugal vacuum evaporators, which are used for parallel synthesis by laboratories involved in the drug discovery process. The FTC alleged that the merging parties accounted for about 30 percent and 70 percent of the $10 million U.S. market. The commission stated that low-performance evaporators and other methods used in similar experiments are not viable alternatives and that a German-based supplier is not expected to become a significant U.S. competitor. Divestiture of the high-performance evaporator business of one of the parties was required by the consent decree.

***Thermo Electron Corp.* (File No. 061 0178, Oct. 17, 2006), available at www.ftc.gov**

Nonsolicitation Covenants

A California appellate court ruled unenforceable a nonsolicitation agreement preventing the seller of a business from soliciting all of the buyer's employees and customers rather than only the employees and customers of the acquired business. The court stated that under California law, the scope of a covenant not to compete in connection with the sale of a business must be limited to the sold business.

***Strategix, Ltd. v. Infocrossing West, Inc.*, 2006-2 CCH Trade Cases ¶75,412 (Cal. Ct. App.)**

Comment: Noncompetition covenants in the context of the sale of a business are generally evaluated under state laws and in many states are the subject of statutory provisions.

Immunities

A health and life insurance agent brought suit against insurance companies and an insurance agency claiming that they violated §1 of the Sherman Act by terminating their relationship with the plaintiff. The defendants sought to have the complaint dismissed, arguing that the alleged conduct is covered by the McCarran-Ferguson Act's exemption of the "business of insurance" from the antitrust laws. A district court denied the motion to dismiss, stating that claims of boycotts and coercion, which were sufficiently alleged in the complaint, are not exempt under the Act.

***Total Benefits Planning Agency Inc. v. Anthem Blue Cross and Blue Shield*, 2006-2 CCH Trade Cases ¶75,413 (S.D. Ohio)**