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ANTITRUST

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Open-Source License Not Anticompetitive

The U.S. Court of Appeals for the Seventh Circuit indicated that a software license obliging the licensee to grant free licenses for improvements did not unreasonably restrain trade. The Supreme Court of Texas upset a jury verdict because there was no evidence that favorable soft drink marketing agreements with a leading supplier had an adverse effect on competition.

Other recent antitrust developments of interest included a settlement of charges by the Federal Trade Commission (FTC) that the acquisition of a chain of funeral homes and cemeteries by a rival was likely to lessen competition and a ruling by the U.S. Court of Appeals for the Eighth Circuit that consumers did not suffer antitrust injury from drug-makers' alleged conspiracy to prevent imports from Canada.

Restraint of Trade

A computer programmer claimed that licensing open-source software under a general public license—which requires creators of derivative works to provide licenses without charge, thereby allegedly deterring price competition— unreasonably restrained trade. A district court dismissed the complaint for failing to allege that the complaining programmer suffered antitrust injury and the Seventh Circuit affirmed on the grounds that the general public license did not restrain trade because its very low price was permanent and lost profits could not be recouped even if rivals were driven from the market. The court also noted that the allegedly unlawful license is in fact a cooperative agreement facilitating the creation of new works, adding that a determination that the challenged conduct was lawful could be made on the basis of a "quick look."

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***Wallace v. International Business Machines Corp.*, 2006-2 CCH Trade Cases ¶75,480**

Carbonated soft drink bottlers claimed that a leading bottler unreasonably restrained trade and monopolized the market in violation of Texas antitrust law by entering into agreements with retailers to favor the leading bottler's products in exchange for payments and discounts. Although the retailers were not prohibited from selling competing products, the agreements typically required prominently located displays near check-out stands and lower retail prices for the leading bottler's products.

A jury returned a verdict in favor of the plaintiffs and the court enjoined the defendant from using a variety of marketing practices that disfavor competing soft drink products where plaintiffs operated.

The court of appeals affirmed and the Supreme Court of Texas reversed on two grounds: first, that the allegations of injury to the complaining bottlers outside of Texas were not actionable under the Texas Free Enterprise and Antitrust Act, even though the defendant made decisions about the marketing practices and negotiated the agreements in Texas and, second, that the complaining bottlers demonstrated only that the defendant's practices could have had anticompetitive effects but did not show that the marketing agreements actually had an adverse effect on competition. The court added that evidence that the challenged conduct made it more difficult for other bottlers to compete was not a substitute for evidence quantifying the adverse effects of the agreements in a relevant market.

***The Coca-Cola Co. v. Harmar Bottling Co.*, 2006-2 CCH Trade Cases ¶75,464**

Acquisitions

The FTC announced a settlement of its challenge to the proposed merger of the two largest funeral home and cemetery chains in the country. The FTC's complaint alleged that even though the combined firm would account for only 15 percent of all funeral home revenues nationwide, the merged firm will either have a market share approaching 100 percent or operate the first- and second-choice providers for certain types of consumers in a number of geographic markets. The commission stated that in some local markets, the relevant product market is limited to funeral homes or cemeteries that cater to particular

"customs-conscious" consumers, such as the Jewish, Chinese-American or African-American communities.

The settlement requires divestitures of 40 funeral homes and 15 cemeteries and termination of operating agreements in additional markets.

***Service Corporation International and Alderwoods Group, Inc.*, CCH Trade Reg. Rep. ¶15,954 (Nov. 22, 2006), available at www.ftc.gov.**

Antitrust Injury

Consumers alleged that domestic drug-makers conspired in violation of §1 of the Sherman Act to prevent brand name drugs sold by Canadian pharmacies from entering the U.S. The Eighth Circuit affirmed dismissal of the complaint. The appellate court stated that plaintiffs' injury—having to pay higher prices due to the absence of competition from imports of Canadian drugs—was caused by federal law prohibiting such importation rather than by the drug-makers' conduct.

***In re Canadian Import Antitrust Litigation*, 2006-2 CCH Trade Cases ¶75,508**

Relevant Market Definition

A Queens real estate broker claimed that a cooperative building's practice of rejecting prospective purchasers unless they were represented by a particular realtor violated New York's antitrust statute, the Donnelly Act. The Appellate Division, Second Department, reversed the trial court's denial of the defendants' motion for summary judgment and stated that the plaintiff did not demonstrate that the alleged arrangement to appoint the defendant as the co-op's exclusive broker impaired competition in a properly defined relevant market.

The court rejected the plaintiff's assertion that the relevant product market was limited to the sale of co-op shares in one building, since plaintiff's business covered a much wider geographic area, and, in any event, "a single building cannot constitute a relevant geographic market under the Donnelly Act."

***Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 2006-2 CCH Trade Cases ¶75,461**

Pre-Emption

A Brazilian cigarette manufacturer brought suit alleging that Kentucky statutes implementing a nationwide settlement of states' claims against leading cigarette companies were preempted by the Sherman Act. The plaintiff argued that the Kentucky legislation reduces incentives to lower prices because cigarette manufacturers must pay the state a higher fee if their market share increases.

> An in-store advertising services provider that buys shelf space from retailers and then provides ad services to consumer goods makers said a rival used its dominant position to form a "group boycott."

A district court dismissed the Brazilian manufacturer's complaint and the U.S. Court of Appeals for the Sixth Circuit affirmed. The appellate panel stated that facilitation, or even encouragement, of anticompetitive conduct is not enough to warrant pre-emption. Instead, state legislation must "mandate or authorize" unlawful conduct "in all cases." The statutes at issue merely provided incentives but did not require anticompetitive conduct, according to the court, because cigarette makers could have chosen to lower prices and make higher payments to the state. The court added that it was therefore unnecessary to consider whether the statute is saved from preemption by the state-action immunity doctrine.

***Tritent International Corp. v. Kentucky*, 2006-2 CCH Trade Cases ¶75,469**

Group Boycott

An in-store advertising services provider—a firm that buys shelf space from retailers and uses it to provide advertising services to consumer goods manufacturers—claimed that a rival used its dominant position to form a "group boycott" with several retailers to deal exclusively with the dominant rival, thus foreclosing the plaintiff from a substantial portion of the market. A district court denied the defendants' motion to dismiss, stating that plaintiff's amended complaint adequately pleaded a per se group boycott claim by asserting that the retailers participating in the alleged horizontal conspiracy accounted for at least 87 percent of the in-store market.

***Insignia Systems Inc. v. News America Marketing In-Store, Inc.*, 2006-2 CCH Trade Cases ¶75,477 (D. Minn.)**

Indirect Purchasers

The Supreme Court of Nebraska ruled that consumers lacked standing to bring claims against credit card companies for tying debit card services to credit card services in violation of Nebraska's antitrust statute. The court noted that even though indirect purchasers are authorized to bring claims under the state's law, plaintiffs still had to satisfy traditional antitrust standing requirements. The court stated that the plaintiffs' injuries—paying higher prices for products purchased from merchants that allegedly paid inflated fees for debit and credit card processing services —were too derivative and remote to confer standing.

***Kanne v. Visa U.S.A. Inc.*, 2006-2 CCH Trade Cases ¶75,473**

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