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ANTITRUST

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Monopolist May Appoint Exclusive Distributor

The U.S. Court of Appeals for the Second Circuit indicated that an alleged monopolist's appointment of an exclusive distributorship for its lumber products did not violate the antitrust laws. A district court ruled that plaintiffs presented sufficient evidence at trial to support a finding that generic anti-anxiety drugs constituted a separate relevant market to the exclusion of brand name versions of the same drugs.

Other recent antitrust developments of interest included approval by the Federal Trade Commission (FTC) of the combination of two of three domestic munitions producers subject to the acquiring firm's divestiture of its 50 percent interest in the third producer.

Exclusive Distribution

A former distributor of green hem-fir lumber, a durable combination of woods often used in homebuilding, claimed that its supplier violated federal antitrust laws by terminating all but one of its distributors. The complaint alleged that since the supplier held a monopoly share of the green hem-fir lumber market, its designation of an exclusive distributor eliminated competition among resellers to the detriment of lumber customers. A district court dismissed the suit on the pleadings and the Second Circuit affirmed, stating that the complaint did not allege the kind of harm to competition required to constitute a monopolization claim or a vertical, non-price restraint of trade claim.

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The appellate court reasoned that a monopolist has the ability to charge monopoly prices without the help of a distributor, and therefore detriment to competition cannot be asserted by alleging expansion of monopoly power to downstream distributors.

***E&L Consulting, Ltd. v. Doman Industries, Ltd.*, 2006-2 CCH Trade Cases ¶75,530**

Relevant Market

A jury found that a generic drug maker's exclusive arrangements with suppliers of the active ingredient in two anti-anxiety drugs violated Illinois, Massachusetts and Minnesota antitrust laws by preventing other generic drug makers from obtaining the necessary active ingredient. The defendant sought a judgment as a matter of law in its favor on the grounds that the relevant market should not have excluded brand-name products. The district court denied the motion, stating that plaintiffs presented sufficient evidence from which a reasonable jury could conclude that the relevant market was limited to generic products, including testimony that generic business executives did not consider the branded price in setting their own price and that generic drugs were promoted and marketed very differently from brand-name drugs. The court expressed the opinion that all functionally interchangeable products do not necessarily belong in the same relevant market.

***In re Lorazepam & Clorazepate Antitrust Litigation*, 2006-2 CCH Trade Cases ¶75,534 (D.D.C.)**

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A district court dismissed class action claims that Michigan cemeteries acted unlawfully in requiring purchasers of burial plots to buy monuments from the same cemetery. The court rejected the view that a single cemetery could constitute a cognizable relevant geographic market and stated that the complaint did not contain any allegations relating to reasonable substitutes. The court observed that commercial economic realities indicated that cemeteries compete with other cemeteries in the same city or county.

***Michigan Division-Monument Builders of North America v. Michigan Cemetery Ass'n*, 2006-2 CCH Trade Cases ¶75,515 (E.D. Mich.)**

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Acquisitions

The FTC announced the settlement of its challenge to the proposed acquisition of a munitions-maker by a rival, which would reduce from 3 to 2 the number of domestic firms that load, assemble and pack mortar rounds and artillery shells. The commission obliged the acquirer to divest its 50 percent interest in the third loader, leaving two independent firms in the market.

***General Dynamics Corp.*, CCH Trade Reg. Rep. ¶15,962 (Dec. 28, 2006), also available at www.ftc.gov**

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The European Commission (EC) announced the opening of an in-depth, Phase II investigation into the proposed acquisition of Aer Lingus by Ryanair, the two main airlines operating out of Ireland. The EC noted that Ryanair is a low-fare airline and that Aer Lingus recently introduced a low-fare operation. The EC added that it did not have sufficient time to evaluate an improved proposal to remedy its concerns submitted at a late stage during the initial, Phase I investigation.

Mergers: Commission Opens In-depth Investigation Into Ryanair's Take-over of Aer Lingus, IP/06/1867 (Dec. 20, 2006), available at ec.europa.eu/comm/competition

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The proposed acquisition of Pfizer's consumer healthcare business by Johnson & Johnson was permitted to proceed with the following divestiture conditions imposed by antitrust regulators in the United States, Canada, Europe and Australia—

FTC:

- H-2 blockers, used to treat heartburn
- hydrocortisone anti-itch treatment
- diaper rash ointment

Canadian Competition Bureau:

- diaper rash ointment

EC:

- dermatological fungal treatment (in Italy)
- daily-use mouthwash (in Greece)
- nicotine replacement therapy

Australian Competition and Consumer Commission:

- nicotine replacement therapy
- worm treatment
- anti-diarrheal products

***Johnson & Johnson and Pfizer*, CCH Trade Reg. Rep. ¶15,958 (Dec. 20, 2006), also available at www.ftc.gov; *Commissioner of Competition v. Johnson & Johnson*, CT-2006-011 (Dec. 20, 2006), available at www.ct-tc.gc.ca; *Mergers: Commission Approves Proposed Acquisition of Pfizer's Consumer Healthcare Business by Johnson & Johnson, Subject to Conditions*, IP/06/1726 (Dec. 11, 2006), available at ec.europa.eu/comm/competition; and *ACCC Accepts Divestitures by Johnson & Johnson* (Dec. 22, 2006), available at www.accc.gov.au**

Comment: The settlements of challenges to the acquisition reported immediately above demonstrate that global mergers' impact on competition in particular product markets may either have a similar effect around the world or differ substantially in distinct local markets and in the view of different regulators.

Resale Price Maintenance

The Australian Competition and Consumer Commission announced the settlement of its enforcement action against a computer supplier for violating the statutory prohibition against resale price maintenance. The commission stated that the supplier threatened to stop supplying two dealers unless they raised their prices to the supplier's recommended retail price. The commission noted that retailers' ability to sell products below recommended prices encourages price competition at the retail level, which benefits consumers.

***Optima Technology Solutions Pty Ltd.* (Dec. 5, 2006), available at www.accc.gov.au**

Comment: The U.S. Supreme Court has agreed to consider arguments that minimum resale price maintenance schemes having net procompetitive effects should no longer be subjected to per se condemnation.

Restraint of Trade

A marketer of prepaid telephone cards claimed that a telecommunications firm's alleged scheme to divide the market between maritime and non-maritime customers was a per se violation of §1 of the Sherman Act. The U.S. Court of Appeals for the Third Circuit affirmed dismissal of the claim, stating that even though the defendant also marketed prepaid phone cards, the relationship subject to the alleged restraint was primarily vertical and the complaint was thus defective in the absence of allegations of anticompetitive harm in a relevant market.

***AT&T Corp. v. JMC Telecom, LLC*, 2006-2 CCH Trade Cases ¶75,513**

Comment: The decision reported immediately above serves as a reminder to private practitioners that antitrust plaintiffs risk dismissal unless they set forth an economically plausible theory of harm to competition at the pleading stage.