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ANTITRUST

BY WILLIAM T. LIFLAND AND ELAI KATZ

High Barrier for Predatory Buying Claims

The U.S. Supreme Court ruled that below-cost pricing and likely recoupment are necessary elements of predatory bidding claims under the antitrust laws. The New York Court of Appeals decided that state antitrust law claims seeking treble damages cannot be brought as class actions.

Other recent antitrust developments of interest included the European Court of Justice's ruling that an airline abused its dominant position by paying higher commissions to travel agents that met sales growth targets and a decision by the U.S. Court of Appeals for the Sixth Circuit that higher discounts offered to cigarette distributors that met market-share targets did not constitute price discrimination.

Predatory Bidding

A sawmill claimed that a rival violated §2 of the Sherman Act by bidding up the price of red alder sawlogs—allegedly buying more than it needed and raising the complaining sawmill's costs. A jury returned a verdict against the defendant and the U.S. Court of Appeals for the Ninth Circuit affirmed. The Supreme Court reversed, stating that similar legal analysis should apply to predatory bidding and predatory pricing, as both practices require absorption of short-term losses in the hopes of obtaining long-term gains.

Relying on its 1993 *Brooke Group* decision, the Court said that in order to prevail, plaintiffs asserting predatory bidding claims must show (1) that the predatory bidding increased the defendant's input costs to the extent that the price of the relevant output was below cost and (2) that the defendant had a dangerous probability of recouping the losses incurred in bidding up input prices.

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The Court stated that *Brooke Group* was meant to address the concern that antitrust claims could perversely chill procompetitive conduct, such as legitimate price reductions.

***Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 2007-1 CCH Trade Cases ¶75,601**

Class Actions

A purchaser of tires brought a class action alleging that manufacturers of rubber-processing chemicals conspired to fix prices in violation of New York's Donnelly Act. The plaintiff sought to recover treble damages, claiming that artificially inflated prices for rubber chemicals sold to tire manufacturers trickled down to retail buyers of tires.

New York's highest court affirmed the lower courts' dismissal of the claims and stated that CPLR 901(b), which does not permit a class action to recover a penalty unless expressly authorized by statute, barred the New York state antitrust law claim. The court concluded that the Donnelly Act's threefold damages should be regarded as a penalty and observed that the Legislature determined that when a statute already provides an incentive to bring actions through an enhanced award, there is no need for class actions, which are designed in large part to encourage suits where individual recovery would otherwise be too small.

The Court of Appeals noted that U.S. Supreme Court statements that treble damages under federal antitrust laws are remedial rather than punitive are not persuasive because the issues arise from different language in New York's statutory scheme.

***Sperry v. Crompton Corp.*, 2007-1 CCH Trade Cases ¶75,618**

Abuse of Dominance

The European Court of Justice affirmed the European Commission's ruling that an airline with a dominant share of the United Kingdom air transport market violated Article 82 of the European Treaty by implementing a "fidelity-building" scheme that paid a higher commission to travel agents that increased their sales of the airline's tickets. The court noted that meeting the airline's targets for sales growth led to an increase in the commission on all of the airline's tickets sold by the agent, not only those tickets sold after the target was met, thereby resulting in a substantial economic incentive to sell a few more of the dominant airline's tickets and making it difficult for airlines with small market shares to motivate the agent to sell a few more of their tickets. The court stated that the scheme rewarded loyalty—that is, selling fewer competitor tickets—rather than efficiency and did not have an objective economic justification. The court also stated that the scheme violated the prohibition on discriminatory conduct by a dominant firm because two agents that sold the same volume of tickets could receive a different commission.

***British Airways plc v. Commission of the European Communities*, C-95/04 P (March 15, 2007), available at curia.europa.eu**

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Price Discrimination

Distributors alleged that a cigarette manufacturer's incentive program violated the Robinson-Patman Act by providing deeper discounts to other distributors. The complaining distributors asserted that they could not meet the program's market-share targets required to obtain the best prices because their customers, mostly retailers in rural low-income areas, bought little of the somewhat-higher-priced cigarettes.

A district court granted summary judgment to the cigarette maker and the Sixth Circuit affirmed. The appellate court stated that the discount program was functionally available to all distributors, large or small, because participation did not depend on the volume of a distributor's sales of the defendant's cigarettes. The Sixth Circuit added that the demands of the purchaser's customers—a factor which is outside the seller's control —cannot render a discount functionally unavailable. The Sixth Circuit noted that a discount equally and realistically available to all purchasers of a like commodity does not constitute price discrimination under the Robinson-Patman Act.

***Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.,* 2007-1 CCH Trade Cases ¶75,619**

Immunities

Title insurance companies alleged that registers of deeds in five Michigan counties violated §1 of the Sherman Act by refusing to provide title records in nonpaper format unless the recipient agreed not to resell the records. A district court ruled that the challenged practices are exempt from antitrust liability under the state action immunity doctrine. The Sixth Circuit reversed, stating that the statutory monopoly granted to the registers in the collection and maintenance of official title documents does not foreseeably or logically result in the displacement of competition in the distribution of title information.

***First American Title Co. v. DeVaugh,* 2007-1 CCH Trade Cases ¶75,604**

Jurisdiction

Foreign purchasers of monosodium glutamate (MSG) sought to recover damages from an alleged global price-fixing and market allocation conspiracy. A district court dismissed the claims for lack of subject matter jurisdiction and the U.S. Court of Appeals for the Eighth Circuit affirmed because the plaintiffs had not shown that the U.S. effect of the global cartel proximately caused their injuries. The court stated that proximate causation (rather than "but for" causation) is required to satisfy the statutory language of the Foreign Trade Antitrust Improvements Act (FTAIA) providing that the domestic effect of foreign conduct must "give[] rise to" an antitrust claim. The court rejected the plaintiffs' contention that the proximate cause standard is satisfied by the fact that, in the absence of supra-competitive domestic prices, the defendants would not have been able to charge supra-competitive prices abroad because less-expensive products would have been shipped abroad from the United States.

***In re Monosodium Glutamate Antitrust Litigation,* 2007-1 CCH Trade Cases ¶75,588**

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In another case arising under the FTAIA, consumers claimed that they paid inflated prices for computers, alleging that the manufacturer of microprocessors contained in the computers unlawfully monopolized the market in violation of §2 of the Sherman Act and state antitrust laws. The microprocessor maker moved to dismiss the foreign conduct claims for lack of subject matter jurisdiction. The district court granted the motion, stating that the chain of events alleged—that the weakening of the defendant's principal rival resulted in higher microprocessor prices to foreign manufacturers of computers that were eventually sold to the U.S. market and led to high retail prices in the U.S.—is insufficient to create the direct, substantial and reasonably foreseeable domestic effect required by the FTAIA.

The district court also dismissed state law claims based on alleged foreign conduct and rejected the plaintiffs' argument that state laws are not limited by any statutory provisions similar to the FTAIA. The court noted that the FTAIA would be undermined and congressional intent subverted if state laws were interpreted to reach conduct beyond the reach of federal antitrust laws.

***In re Intel Corp. Microprocessor Antitrust Litigation,* 2007 WL 685564 (D. Del. March 7, 2007)**

Restraint of Trade

A manufacturer of tile installation products, including grout and mortar, stopped supplying a distributor that resold the products at low prices after other distributors complained to the manufacturer and committed to serve the terminated distributor's customers. The terminated distributor brought suit against the manufacturer alleging per se violations of §1 of the Sherman Act and claiming that rival distributors formed a horizontal group boycott and entered into a vertical price fixing agreement with the manufacturer.

A district court granted summary judgment to the defendant and the U.S. Court of Appeals for the Seventh Circuit affirmed. The appellate court stated that the evidence presented —including communications between distributors and the coordinated "sales blitz" that began as soon as the plaintiff was terminated—was as consistent with independent action as with a conspiracy among the distributors to coerce the manufacturer to terminate plaintiff. The court noted that the complaint only named the manufacturer as a defendant.

The Seventh Circuit also stated that although there was no question that the manufacturer and its other distributors acted in concert on nonprice issues, such as retention of customers served by the terminated distributor, a reasonable jury could not infer an agreement to fix prices from the evidence presented.

***Miles Distributors, Inc. v. Specialty Construction Brands, Inc.,* 2007-1 CCH Trade Cases ¶75,584**

Comment: Although rule-of-reason cases are difficult for plaintiffs to win, at times efforts to fit challenged agreements into per se categories can be counterproductive, as in the case reported immediately above.

Predatory Pricing

The French competition authority, the Conseil de la Concurrence, fined a branded drug company €10 million ($13.2 million) for charging predatory prices to drive a generic rival from the injectable antibiotic market. The Conseil stated that the branded drug company sold its product at prices below the cost paid by the French subsidiary and that following the generic rival's exit from the market, prices were raised sufficiently to recover most of the losses from the predation period in two years.

The Conseil added that the drug-maker's policy had a broader objective—developing an aggressive reputation aimed at deterring small generic drug-makers from entering the hospital drug market—and that other generic drug-makers were in fact deterred from introducing generic alternatives.

The Conseil observed that this is the first French case to impose fines for predatory pricing.

***Decision No. 07-D-09 of March 14, 2007 regarding practices implemented by GlaxoSmithKline France*, available at www.conseil-concurrence.fr**