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ANTITRUST

BY WILLIAM T. LIFLAND AND ELAI KATZ

Energy Merger Is Temporarily Blocked

The Federal Trade Commission (FTC) obtained a temporary restraining order preventing the combination of energy distributors in New Mexico. A district court ruled that the Department of Justice's settlements of its challenges to two mergers involving telecommunications firms were in the public interest.

Other recent antitrust developments of note included the release of a report on modernization of antitrust laws and a district court's dismissal of monopolization claims against an Internet search engine.

Acquisitions

A district court issued a temporary restraining order enjoining the acquisition of an oil refiner by a rival. The FTC alleged that the proposed transaction would lessen competition in the bulk supply of light petroleum products, which include gasoline, diesel and jet fuel, to northern New Mexico. The commission claimed that the merger would combine two of the five significant suppliers in the region and prevent the acquired firm from implementing its plans to increase production levels. The court stated that despite its concern that the evidence may not ultimately support a finding that the merger is likely to lessen competition, the FTC sufficiently demonstrated a likelihood of success to warrant preserving the status quo until it could be determined whether the merger is anticompetitive.

FTC v. Foster, No. CIV 07-352 JB (D.N.M. April 13, 2007)

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In proceedings under the Tunney Act, a district court approved the settlements of antitrust challenges to two mergers of telecommunications companies. The court stated that the Department of Justice provided a factual basis for concluding that the settlements were reasonable.

The court rejected arguments by amici curiae that the settlements should not be approved because they address the effect of the mergers only in situations where the number of competitors is reduced from two to one but not 3-to-2 or 4-to-3. The court ruled that, in its Tunney Act review, it could not look beyond the complaint, which alleged anticompetitive effects in 2-to-1 situations only, unless the allegations are drafted so narrowly as to make a "mockery" of judicial power. The court added that in order to be in the public interest a settlement is not required to "perfectly" remedy alleged antitrust violations because there may be underlying weaknesses in the government's case.

United States v. SBC Communications, Inc. and *United States v. Verizon Communications, Inc.*, 2007-1 CCH Trade Cases ¶75,655 (D.D.C.)

The Department of Justice announced the proposed settlement of its challenge to a rival's planned takeover of a producer of ready-mix concrete and other building materials. The department alleged that the proposed transaction would substantially lessen competition for building materials in certain metropolitan areas in Florida and Arizona where competition is sparse. The settlement requires the divestiture of plants in Florida and Arizona to a department-approved buyer.

Cemex S.A.B. de C.V., CCH Trade Reg. Rep. ¶¶45,107, 50,941 (April 4, 2007), also available at www.usdog.gov/atr

Review of Antitrust Laws

The Antitrust Modernization Commission, a 12-member bipartisan commission established by Congress to review federal and state antitrust laws and determine whether they should be modernized, released its report to the president and Congress. The commission concluded that the state of U.S. antitrust enforcement is fundamentally sound, but made several proposals for changes. Among the recommendations included in the report were:

- a proposal that Congress repeal the Supreme Court's 1977 *Illinois Brick* decision and its 1968 *Hanover Shoe* decision in order to allow both direct and indirect purchasers to recover damages;
- a recommendation for legislation that would permit nonsettling defendants subject to joint and several liability to obtain a reduction of claims against them reflecting the amounts paid by settling defendants;
- a proposal for legislation to allow claims

for contribution among nonsettling defendants;

- a recommendation to ensure that the same standard applies to the FTC and the Department of Justice when seeking preliminary relief in merger cases; and
- a proposal to repeal the 1936 Robinson-Patman Act.

Antitrust Modernization Commission Report and Recommendation (April 2, 2007), available at www.amc.gov

Relevant Market Definition

The operator of a Web site claimed that a leading Internet search engine removed the link to the operator's Web site from search results in violation of §2 of the Sherman Act. A district court dismissed the complaint for failure to allege a properly defined relevant market. The court stated that the alleged "search market" cannot constitute a market for antitrust law purposes because plaintiff did not allege that the search engine sold its search services and did not cite any authority suggesting that antitrust law is concerned with competition in the provision of free services. The court also stated that the alleged "search ad market" is unduly narrow because there is no basis for distinguishing search-based advertising from other forms of advertising on the Internet.

Kinderstart.com LLC v. Google, Inc., 2007-1 CCH Trade Cases ¶75,643 (N.D. Cal.)

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An operator of high-speed ferries from the Ohio mainland to the town of Put-in-Bay on an island in Lake Erie brought suit alleging that a rival ferryboat-operator drove it out of business by excluding it from access to a ferryboat dock in violation of the Valentine Act, Ohio's antitrust law.

The court of appeals affirmed the trial court's grant of summary judgment to the defendant and stated that plaintiff's proposed relevant market—high-speed, late-night ferry service to downtown Put-in-Bay—was too narrow. The court noted that another ferryboat service should be included from the market even though it operated slower ferries that dock at less-convenient locations and only during daytime hours, but at substantially lower prices. The court noted that it would not be possible to determine whether customers would respond to a price increase by the defendant after plaintiff went out of business by taking the slower ferry and that witnesses testified that the slower ferry competed against the parties to the litigation.

Island Express Boat Lines, Ltd. v. Put-in-Bay Boat Line Co., 2007-1 CCH Trade Cases ¶75,634 (Ohio Ct. App.)

Antitrust Injury

A subscriber to San Francisco newspapers brought an antitrust challenge to a series of transactions between major local newspapers that allegedly served to divide markets and eliminate competition. A district court denied the defendants' motion for summary judgment for lack of antitrust injury. The court stated that plaintiff presented evidence that he is an active consumer in the Bay Area newspaper market, where anticompetitive conduct was alleged, and that evidence of imminent price increases was not necessary to demonstrate antitrust injury. The court also noted that the threatened loss of diversity of content in newspapers is an injury of the type the antitrust laws were designed to prevent, even in the absence of economic harm, because Congress expressed its desire to promote the availability of multiple news sources by its enactment of the Newspaper Preservation Act.

Reilly v. Medianews Group, Inc., 2007 WL 1068202 (N.D. Cal. April 10, 2007)

Territorial Restrictions

The European Commission (EC) announced that it had sent a Statement of Objections to major record companies and an online music retailer alleging that distribution agreements requiring consumers to buy and download digital music only from the online store designated for their country of residence violated Article 81 of the European Treaty. The EC alleged that consumers are restricted in their choice of where to buy music and precluded from the benefits of different selections and lower-priced music available to residents of other member states. The commission noted that the Statement of Objections does not claim that the online retailer has a dominant position and does not challenge its interoperability policies.

Competition: European Commission confirms sending a Statement of Objections against alleged territorial restrictions in on-line music sales to major record companies and Apple, MEMO/07/126 (April 3, 2007), available at ec.europa.eu/comm/competition

Bid Rigging

The Department of Justice announced that maintenance and insulation service companies pleaded guilty to rigging bids for contracts to supply services to hospitals in New York City. The department stated that the conspirators attempted to create the appearance of a competitive bidding process by designating a low bidder for a given contract and using each other's letterhead to submit non-competitive bids.

Insulation Service Companies and Executive Plead Guilty to Bid Rigging at New York City Hospitals (April 4, 2007), available at www.usdoj.gov/atr

Industry Surveys

The Department of Justice stated that it has no present intent to challenge a benchmarking survey of small- and medium-sized trucking companies whereby operational and financial information would be collected and then shared in aggregate form with survey participants and others. The department noted that only aggregated information will be shared, that steps will be taken to preserve the confidentiality of the data collected, and that data will be at least three months old when the report is issued.

The department also noted that the trucking industry is unconcentrated and highly competitive and observed that, with appropriate safeguards, benchmarking surveys can be procompetitive because industry-participants can use such information to gain efficiencies and set their prices more competitively.

Business Review Letter to National Association of Small Trucking Companies and Bell & Co. (April 9, 2007), available at www.usdoj.gov/atr