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Price Discrimination Among Different Food-Seller Types

Reversing a district court's judgment, the U.S. Court of Appeals for the Third Circuit ruled that a food wholesaler had proffered enough evidence of rivalry with a food facility manager to proceed with a Robinson-Patman Act claim. A different panel of the Third Circuit upheld a judgment that a marketer of hair-care products had not been shown to have colluded against the plaintiff.

Other recent antitrust developments of note included charges by the European Commission (EC) that a computer-chip manufacturer unlawfully sought to exclude its main rival from the market.

Price Discrimination

A food distributor claimed that a manufacturer of food products violated §2(a) of the Robinson-Patman Act by extending lower prices to a food facility management company than to the distributor. A district court granted summary judgment to the defendants for failure to show competitive injury and the Third Circuit reversed, stating that although the two firms performed different functions within the food services industry, the plaintiff showed that they had similar customers, such as hospitals and schools that run institutional cafeterias, and sought to take business from each other. The court noted that the management company could rebut the inference of competitive injury by proving that the price differential did not cause the plaintiff's lost sales or profits.

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***Feesers, Inc. v. Michael Foods, Inc.*, No. 06-2661, 2007 U.S. App. LEXIS 19294 (Aug. 14, 2007)**

Group Boycott

An operator of hair salons and beauty supply stores that was terminated by a supplier of "salon-only" products for diverting sales to nonsalon retail channels alleged that the supplier orchestrated a group boycott of the plaintiff among hair-care product distributors in violation of New Jersey antitrust law.

The Third Circuit affirmed the district court's grant of summary judgment to the defendants and stated that the evidence presented by the plaintiff showed only an opportunity to conspire and consciously parallel behavior. Internal documents setting a policy not to sell to plaintiff and correspondence with alleged coconspirators were ruled inadequate evidence of a conspiracy.

***Cosmetic Gallery, Inc. v. Schoeneman Corp.*, No. 05-3679, 2007 U.S. App. LEXIS 17149 (July 19, 2007)**

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A provider of information technology solutions for real estate listings alleged that a trade association of New York City real estate brokers excluded the plaintiff from the market in violation of §1 and §2 of the Sherman Act.

The district court denied the defendants motion for summary judgment on plaintiff's §1 claims. The court noted that per se group boycott claims require identification of a properly defined relevant market and stated that a genuine issue of fact existed as to whether the relevant geographic market could be limited to listings technology services in Manhattan, where, according to the plaintiff, the favored providers have significant market share and national firms face substantial barriers to entry.

The court granted summary judgment to defendants on plaintiff's §2 claims, stating that they were based on a theory of a "shared monopoly" not favored by the U.S. Court of Appeals for the Second Circuit.

***Klickads, Inc. v. Real Estate Board of New York, Inc.*, 04 Civ. 8042, 2007 U.S. Dist. LEXIS 57305 (SDNY Aug. 6, 2007)**

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State Antitrust Laws

Purchasers of an antibiotic drug brought suit alleging that the brand owner agreed with generic drug companies to delay the entry of generic competition in violation of Wisconsin antitrust law. The trial court dismissed the claims on the grounds that the state statute applied only to intrastate commerce.

The Supreme Court of Wisconsin ruled that the complaint should not have been dismissed and stated that a complaint challenging anticompetitive conduct that occurred outside the state must allege impact in Wisconsin—not merely nationwide impact—but the harm to consumers in Wisconsin did not have to be distinguishable from or disproportionate to the impact in other states to state a claim under Wisconsin's antitrust law. The court noted that the complaint alleged that the restraint of trade affected at lease thousands of Wisconsin consumers.

***Meyers v. Bayer AG*, 2007-2 CCH Trade Cases ¶75,774**

Monopolization

The EC announced that it sent a Statement of Objections charging a leading manufacturer of computer chips with engaging in an anticompetitive strategy to exclude its principal rival from the x86 personal computer processing units (CPU) market, constituting an abuse of dominant position in violation of Article 82 of the European Treaty. The commission alleged that the computer-chip maker (1) offered substantial discounts to computer manufacturers' conditioned upon exclusive or nearly exclusive arrangements, (2) paid computer manufacturers to delay or cancel the launch of products containing the rival's CPU and (3) offered to sell some CPUs below cost.

***Competition: Commission Confirms Sending of Statement of Objections to Intel*, MEMO/07/314 (July 27, 2007), available at ec.europa.eu**

Tying

Cable service subscribers brought suit alleging that a cable provider's practice of requiring a subscription to basic cable television in order to receive FM radio or music cable services constituted unlawful tying in violation of state law. A California appellate court affirmed summary adjudication in favor of the cable provider and stated that because the plaintiffs, one of whom was blind, did not want to buy cable television programming (the allegedly tied product) even from another seller, the tie or bundle could not adversely impact competition. The court observed that no part of the cable television programming market that would otherwise have been open to other sellers had been foreclosed by the alleged tie.

***Belton v. Comcast Cable Holdings, LLC*, 2007-1 CCH Trade Cases ¶75,765 (Cal. Ct. of Appeal)**

Antitrust Compliance Policies

The Department of Justice brought criminal charges against a paper manufacturer alleging its participation in a price fixing conspiracy. The district court granted the defendant's motion to exclude portions of its antitrust compliance policy from evidence to be presented to the jury. The court stated that the policy contained legal conclusions as to the interpretation of the Sherman Act that would undermine the district court's role as the sole source of law and may mislead the jury and prejudice the defendant.

***United States v. Stora Enso North America Corp.*, 2007-1 CCH Trade Cases ¶75,763 (D. Conn.)**

Discovery

In an action alleging an unlawful arrangement to fix the interchange fee charged by members of an automated teller machine (ATM) network, plaintiffs sought to compel the production of materials about other ATM networks and foreign ATM transactions. The district court stated that although such information may enable useful comparisons with the challenged domestic network, this benefit is outweighed by the burden involved.

***In re ATM Fee Antitrust Litigation*, 2007-1 CCH Trade Cases ¶75,760 (N.D. Cal.)**

Refusal to Deal

The operator of a social networking Web site alleged that a rival blocked its users from linking to video and other content residing on the plaintiff's Web site. The district court stated that Internet-based social networking Web sites in the United States were a plausible relevant market and that plaintiff sufficiently alleged that defendant had monopoly power with over 80 percent of visits to social networking Web sites in a market with high barriers to entry due to network effects. The court nevertheless dismissed the complaint because even a monopolist can lawfully refuse to deal in some circumstances. The court added that the defendant's previous practice of generally permitting users to link to any other Web sites did not constitute a prior course of dealing sufficient to bring the claims within the Supreme Court's 1985 *Aspen Skiing* decision as there was no formal or informal arrangement between plaintiff and defendant.

***LiveUniverse, Inc. v. MySpace, Inc.*, 2007-2 CCH Trade Cases ¶75,782 (C.D. Cal.)**