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ANTITRUST

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Territorial Exclusivity for Truck Dealers

The U.S. Court of Appeals for the Third Circuit ruled that a jury should have been permitted to consider a truck dealer's claim that a manufacturer and other dealers conspired to restrain competition among dealers assigned to different territories. The Fifth Circuit affirmed "quick look" condemnation by the Federal Trade Commission (FTC) of collective negotiation of independent physicians' fees.

Other recent antitrust developments of note included the U.S. Supreme Court's decision to review a ruling that a price squeeze is a viable monopolization theory after the FTC and the Department of Justice expressed opposing views on the matter.

Vertical Restraints

A dealer of heavy-duty trucks brought suit alleging that a truck manufacturer and other dealers conspired to allocate markets and fix prices in violation of §1 of the Sherman Act by preventing competition among dealers in different nonexclusive territories and denying requests for discounts from dealers competing to make a sale in another dealer's territory. A district court granted the truck maker's motion for judgment as a matter of law on the §1 claim at the close of evidence at trial.

The Third Circuit reversed, stating that the lower court erred by refusing to consider evidence of a conspiracy from before the statute of limitations period. The appellate court noted that although the dealer was barred from seeking to recover damages for injuries suffered before 1998, it was entitled to present pre-1998 evidence of the formation of a conspiracy.

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The Third Circuit stated that the complaining dealer presented sufficient evidence of a vertical agreement between the manufacturer and other dealers, whereby the manufacturer would delay or deny sales assistance to any dealer seeking to make an out-of-region sale, facilitating a horizontal price-fixing agreement among the dealers and that the trial court should have allowed a jury to consider the conspiracy claim under the rule of reason. The appellate court added that the dealer presented evidence that the dealers were the source of the restraint and that the manufacturer had market power, two factors identified by the Supreme Court in its 2007 *Leegin* decision as possible indicators of unlawful vertical price fixing under the rule of reason.

The Third Circuit affirmed the district court's grant of summary judgment on the dealer's claim that the refusal to provide it with discounts when it competed for business in another dealer's territory constituted unlawful price discrimination, stating that the Robinson-Patman Act does not apply to the sale of a customized product through a competitive-bidding process as only one sale occurs in each case.

***Toledo Mack Sales & Service Inc. v. Mack Trucks Inc.*, No. 07-1811, 2008 U.S. App. LEXIS 12741 (June 17, 2008)**

Comment: The examination of a horizontal conspiracy among dealers in the decision reported immediately above may have diverted the court from considering whether the manufacturer's conduct should have been analyzed as a nonprice vertical restraint. Following the Supreme Court's 1977 *Continental T.V. v. GTE Sylvania* decision, other courts and commentators have said that a manufacturer's distribution of its products through exclusive territories without more, while subject to the rule of reason, is often permissible under the antitrust laws.

Price Squeeze

The Supreme Court decided to review a decision by the Ninth Circuit recognizing the viability of a price squeeze claim. The Ninth Circuit's 2007 decision in *linkLine Communications v. Pacific Bell* upheld claims that an incumbent telecommunications firm created a price squeeze in violation of §2 of the Sherman Act by charging rival Internet service providers a wholesale price that was too high—compared to the prices charged to the incumbent's retail customers—for the Internet providers to be able to compete profitably.

The Department of Justice had urged the Supreme Court to grant certiorari to reverse the Ninth Circuit's decision, stating that such a price-squeeze theory, where the alleged monopolist does not have a duty to deal under the antitrust laws, cannot be reconciled with modern antitrust jurisprudence and threatens to chill retail price cutting by vertically integrated firms.

The FTC had announced that it declined to join the Department of Justice's brief and stated that claims of a predatory price squeeze in a partially regulated industry remain viable after the 2004 *Trinko* decision, where the Supreme Court stated that an incumbent telecommunications provider did not violate the Sherman Act by refusing to deal with rivals. The FTC noted that review at the pleading stage would deprive the Supreme

Court of a fully developed record, particularly if the appropriate measure of the defendant's cost might be addressed. The commission also observed that price squeeze theories have been embraced for 60 years and that in the *linkLine* case, the downstream retail market for high-speed Internet access was not regulated, unlike in *Trinko*.

***Pacific Bell Tel. Co. v. linkLine Communications Inc.*, No. 07-512 (June 23, 2008); Statement of the Federal Trade Commission regarding the Petition for a Writ of Certiorari (May 23, 2008), available at www.ftc.gov; and Brief for the United States as Amicus Curiae (May 22, 2008), available at www.usdoj.gov/atr**

Collective Fee Negotiation

The Fifth Circuit affirmed a decision by the FTC that an organization of independent physicians in Ft. Worth, Texas, violated federal antitrust law by collecting and disseminating minimum proposed rate information and negotiating with third-party payors on behalf of otherwise competing member physicians.

The appellate court stated that the organization's conduct, taken as a whole, constituted price fixing even though individual physicians were free to reject contract terms negotiated by the organization. The court observed that the physicians, who made up between 60 and 80 percent of physicians in some specialties in one north Texas county, had agreed to refrain from independent negotiations while the organization was bargaining with payors and that the ultimate fees agreed upon were higher than the minimum fees many physicians indicated they would have been willing to accept.

The Fifth Circuit endorsed the FTC's application of an "inherently suspect" or "quick look" analysis, rather than using the traditional per se or rule of reason standards of review and stated that the net anticompetitive effects of the challenged practices were obvious. The court also observed that the FTC decided against per se condemnation in this case because professionals are involved and the commission did not want to discourage efficiency-enhancing collaborations among physicians.

***North Texas Specialty Physicians v. FTC*, 2008-1 CCH Trade Cases ¶ 76,146**

Comment: In some circumstances, courts and regulators apply a "quick look" or "inherently suspect" standard of review because they deem engaging in a full-blown rule-of-reason analysis to be too costly or time consuming, but in other instances, perhaps including the decision reported immediately above, such truncated review is applied because of some hesitation to subject certain restraints (or categories of defendants) to per se condemnation.

Acquisitions

The Department of Justice announced the closing of an investigation into a proposed joint venture that would combine the domestic operations of two major beer brewers. The department stated that the joint venture is likely to significantly reduce the firms' cost of brewing and distributing beer and create a more effective competitor.

***Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Joint Venture Between SABMiller plc and Molson Coors Brewing Co.*,** CCH Trade Reg. Rep. ¶50,229 (June 5, 2008), also available at www.usdoj.gov/atr

Comment: The Department of Justice continues to give significant weight to verifiable, transaction-specific efficiencies in its evaluation of horizontal mergers.

The FTC announced the settlement of its challenge to a series of acquisitions by a provider of employment information management services. The commission alleged that a series of relatively small transactions that amounted to acquiring virtually all of its competition gave the acquirer market power in the relevant markets for unemployment compensation management and verification of income and employment services.

The commission stated that it examined the cumulative effect of relatively small transactions even though they may not have been problematic individually. The settlement requires the buyer to permit customers to terminate long-term contracts and precludes enforcement of some noncompetition and nonsolicitation covenants with employees. The commission noted that even though divestitures are the preferred form of relief for unlawful mergers, in this case the remedy is intended to encourage the movement of market share to competitors through customer self-selection.

***Talx Corp.*, CCH Trade Reg. Rep. ¶16,137 (April 28, 2008), also available at www.ftc.gov**

North Carolina's largest hospital chain announced that it would abandon its proposed acquisition of a rival after the FTC and the attorney general of the state of Virginia challenged the transaction. The commission attempted to block the merger by combining a request for a preliminary injunction in federal district court with an expedited FTC administrative hearing, with one of the agency's commissioners sitting as the administrative law judge. The FTC emphasized that the buyer had nearly 75 percent of the estimated inpatient revenue in northern Virginia and that the merger would enable it to control approximately 80 percent of this market.

***FTC v. Inova Health System Foundation*, CCH Trade Reg. Rep. ¶¶16,146, 16,147 (No. 08-CV-460, E.D. Va.; FTC Docket No. 9326)**

Pleadings

A district court denied a motion to reconsider, in light of the Supreme Court's 2007 *Twombly* opinion, a prior decision not to dismiss a complaint brought by 18 municipalities alleging a natural gas price-fixing conspiracy. The court stated that, unlike the *Twombly* complaint, the municipalities identified years and locations where the alleged agreement was reached and provided historical supply and demand data showing that the defendants created an artificial shortage. The court observed that a complaint is not required to "exclude the possibility of independent business action" to survive a motion to dismiss on the pleadings.

***City of Moundridge v. Exxon Mobil Corp.*, 2008-1 CCH Trade Cases ¶76,147 (D.D.C.)**

Antitrust Injury

Dairy farmers alleged that milk processors and marketers conspired to reduce the prices for raw milk in violation of federal antitrust laws. The defendants moved to dismiss on several grounds, including failure to sufficiently plead antitrust injury. The district court upheld the complaint and rejected the defendants' contention that, because the alleged conspiracy depressed rather than raised the price of milk, no harm to the ultimate consumer was alleged. The court observed that injury to competition can occur by monopsony or buyers acting in concert to artificially lower prices just as it may result from monopoly or collusion by sellers to raise prices.

***In re Southeastern Milk Antitrust Litigation*, 2008-1 CCH Trade Cases ¶76,165 (E.D. Tenn.)**