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ANTITRUST

Expert Analysis

Price-Squeeze Monopolization Claim Jettisoned by High Court

By **Elai Katz**

The U.S. Supreme Court ruled that allegations of a price squeeze could not state a claim for monopolization without an independent antitrust duty to deal, adding to a line of cases limiting the range of conduct that can form the basis of a Sherman Act §2 claim. The U.S. Court of Appeals for the Tenth Circuit decided that a ski resort did not violate antitrust laws by shutting down a competing ski rental business that had been operating on property acquired from the resort.

Other recent antitrust developments of note included China's decision to block Coca-Cola's acquisition of a Chinese juice company, the first such disapproval of a merger under China's new antitrust law.

Price Squeeze

The Supreme Court severely limited the availability of a price squeeze theory as a basis for a monopolization or attempted monopolization claim. The court stated that absent an antitrust duty to deal with rivals, courts should not require a monopolist to charge its competitors wholesale prices that permit those competitors to make a profit when they compete with the monopolist at the retail level.

The case involved independent Internet service providers (ISPs) that alleged that the incumbent telecommunications firm charged the ISPs wholesale prices that were too high in relation to the retail prices the incumbent charged its high-speed Internet customers in competition with the ISPs. The U.S. Court of Appeals for the Ninth Circuit affirmed a district court ruling upholding the complaint. The Supreme Court granted certiorari to resolve a split among the circuits and reversed in a unanimous decision.

In an opinion authored by Chief Justice John G. Roberts, Jr., the Court stated that the wholesale component of the price-squeeze claim was foreclosed by its 2004 *Trinko* decision, which held that a monopolist may refuse to deal with rivals under most circumstances and that telecommunications regulations requiring cooperation with new entrants do not give rise to independent obligations under the antitrust laws.

The opinion went on to say that if a firm has no antitrust duty to deal with its rivals, then it also has no duty to deal with them under favorable terms.

In explaining the ruling, the Court emphasized the importance of "clear rules" that lawyers can explain to their clients, and expressed a concern about asking federal courts to police pricing decisions.

> The U.S. Supreme Court, in explaining its 'Pacific Bell' ruling, emphasized the importance of 'clear rules' that lawyers can explain to their clients.

Justice Stephen G. Breyer, joined by Justices John Paul Stevens, David H. Souter and Ruth Bader Ginsburg, concurred in the judgment and wrote that the case should have been remanded to consider whether the ISPs' predation claim could satisfy the strict predatory pricing test set forth in the Court's 1993 *Brooke Group* decision. The concurrence also raised doubts about the applicability of bright line rules when "the means of illicit exclusion, like the means of legitimate competition, are myriad."

***Pacific Bell Telephone Co. v. linkLine Communications Inc.*, 129 S. Ct. 1109, 2009-1 CCH Trade Cases ¶76,500**

Comment: In his observation that the "costs of antitrust enforcement are likely to be greater than the benefits" where "a regulatory structure exists to deter and remedy anticompetitive harm," Justice Breyer revisited a recurrent theme in the Supreme Court's recent antitrust jurisprudence.

Monopolization

The operator of a ski rental business located halfway up the slope in a Park City, Utah, ski resort (on property purchased from the resort) claimed that the resort closed down its business in violation of §2 of the Sherman Act.

The resort had invoked a restrictive covenant that prohibited use of the purchased property for ski rental without the resort's permission. The Tenth Circuit affirmed dismissal of the complaint and stated that the restrictive covenant was lawful when it was entered into in 1990, and that antitrust law does not lock the resort into its initial decision to allow third parties to provide ancillary services on a competitive basis.

The court observed that the rental business knew from the start that it could operate only by permission of the resort, on a year-to-year basis. The appellate panel distinguished the Supreme Court's 1985 *Aspen Skiing* decision, also involving monopolization by ski resorts, as in that case the defendant was willing to forsake short-term profits to achieve an anticompetitive goal. In contrast, the resort in this case had a valid business reason for the termination, according to the Tenth Circuit.

***Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 2009-1 CCH Trade Cases ¶76,499**

Comment: The decision reported immediately above suggests that under current §2 jurisprudence, a prior course of dealing by a monopolist—an often cited element of the *Aspen Skiing* case—may not be sufficient without more to obligate a dominant firm to continue dealing with rivals.

Attempted Monopolization

A district court upheld attempted monopolization claims brought by a resin producer against a manufacturer of machines and resins used in stereolithography, a process for the creation of a physical object, such as a model, by placing layer upon layer of liquid resin and using a laser to solidify the material into the desired form.

The plaintiff alleged that the defendant incorporated a radio frequency identification (RFID) feature in its new stereolithography systems that allows it to prevent the use of rivals' resins with its machines.

After noting that the plaintiff sufficiently alleged that the defendant possessed market

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power, with over 50 percent of the resin market, the court stated that the defendant's alleged conduct was plainly anticompetitive and intended to foreclose competition. The court rejected the defendant's argument that the technological restrictions it imposed promoted customer satisfaction, and pointed to allegations that a key customer was disappointed with the quality of defendant's resin and would have preferred to use plaintiff's resin instead.

***DSM Desotech Inc. v. 3D Systems Corp.*, 2009-1 CCH Trade Cases ¶76,485 (N.D. Ill.)**

Abuse of Dominant Position

Following an investigation by the Conseil de la Concurrence (now part of the French Competition Authority), the French national rail operator agreed to pay a substantial fine and provide rival online travel agencies with equal access to rail ticket reservation features.

The Conseil stated that the rail operator had favored its own online travel agency and did not grant competitors access to promotional features or the ability to allow customers to print tickets at home in violation of Article 82 of the European Treaty.

***SNCF makes commitments before the Conseil de la Concurrence to bring online travel agencies on equal footing with its subsidiary Voyages-sncf.com*, Press release and decision 09-D-06 (Feb. 5, 2009), available at www.autoritedelaconcurrence.fr**

Acquisitions

In its first major merger challenge under the recently enacted Antimonopoly Law, the Chinese Ministry of Commerce blocked the acquisition of the largest Chinese juice company by the United States-based Coca-Cola Co.

The ministry stated that the combination would have enabled the buyer to use its dominance in the carbonated soft drink market to reduce competition in the juice market through tying, bundling or other exclusive arrangements. The ministry added that the merger would have given the buyer control over two major juice brands and would have hindered small- and medium-sized juice makers' ability to compete.

***Ministry of Commerce (MOFCOM) statement regarding Coca-Cola Co.'s proposed acquisition of China Huiyuan Juice Co.* (March 18, 2009), available at www.mofcom.gov.cn, unofficial. English translation available at blogs.wsj.com/chinajournal**

Comment: Challenges to mergers on the basis of "conglomerate effects," that is, the theory that combining two firms with substantial power in adjacent or complementary but not directly competitive markets can lessen competition, have been disfavored in the U.S. and require a high standard of proof in Europe, in part because they require the balancing of potentially substantial efficiencies against a prediction that the merged firm will engage in anticompetitive conduct.

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The Federal Trade Commission (FTC) announced the settlement of charges that Whole Foods Market's completed acquisition of Wild Oats would substantially lessen competition in violation of §7 of the Clayton Act in a market defined as "premium natural and organic supermarkets."

The settlement requires the divestiture of 32 stores, about one third of the stores acquired in the merger, and the Wild Oats brand to a buyer or buyers approved by the FTC. The resolution of the dispute, which included substantial litigation over the relevant market definition, came over 18 months after the consummation of the merger.

***Whole Foods Market Inc.*, Dkt. No. 9324 (March 6, 2009), available at www.ftc.gov**

The Chinese Ministry of Commerce blocked the acquisition of the largest Chinese juice company by the U.S.-based Coca-Cola Co. stating that the combination would have enabled the buyer to use its dominance in the carbonated soft drink market to reduce competition in the juice market through tying, bundling or other exclusive arrangements.

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The European Commission approved the acquisition of two female sanitary protection firms by a United States-based firm that sells similar products. The Commission stated that even though the buyer and sellers supplied leading tampon brands in France, they were not head-to-head competitors because the buyer's tampons were sold exclusively in pharmacies and the sellers' tampons were sold in supermarkets, at lower price points. The Commission determined that the two distribution channels constituted separate relevant markets.

***Mergers: Commission clears proposed acquisition of Vania and Polivé by Johnson & Johnson*, IP/09/283, COMP/M.5411 (Feb. 18, 2009), available at ec.europa.eu/competition**

Relevant Market

Cardiologists in Little Rock, Ark., brought suit alleging that the operator of five Arkansas hospitals unlawfully excluded the cardiologists from an important insurance network after they opened a competing hospital.

The district court dismissed the complaint for failing to properly define a relevant market. The court stated that the relevant product market could not be restricted to cardiology patients who have private insurance because how a purchaser pays for a product is irrelevant to the interchangeability analysis. The court observed that the complaining cardiologists' potential customers are all patients, including those covered by Medicare or Medicaid and those who pay out-of-pocket.

***Little Rock Cardiology Clinic, P.A. v. Baptist Health*, 573 F. Supp. 2d 1125, 2009-1 CCH Trade Cases ¶76,473 (E.D. Ark. 2008)**

Canadian Legislation

The Canadian parliament enacted substantial amendments to Canada's Competition Act, bringing some of that country's competition law into closer alignment with U.S. antitrust law.

Mergers. The new merger review process will resemble the U.S. premerger regulations under the Hart-Scott-Rodino Act, with a 30-day initial waiting period during which time the deal cannot close. The competition authority can issue a "second request" extending the waiting period until 30 days after the requests for additional information have been satisfied. Straightforward transactions may still opt for an abbreviated advance ruling, an option that is not available under U.S. law. The basic size-of-transaction threshold for obligatory premerger filings is being increased to $70 million Canadian from C$50 million.

Restraints of Trade. Under the revised law, predatory pricing, price discrimination and resale price maintenance are no longer criminal offenses. However, under a new criminal conspiracy offense, "naked" agreements on price, output or market allocation will be unlawful per se, eliminating the prior requirement that the challenger show anticompetitive impact in such cases.

The per se conspiracy offense will be subject to certain defenses, such as the challenged agreement being "ancillary" to a legitimate arrangement. Although Canadian criminal fines have been increased to C$25 million, they are still substantially lower than U.S. and European fines.

***Budget Implementation Act, 2009*, Bill C-10 (Competition Act, Part 12), enacted March 12, 2009, available at www.parl.gc.ca**

Information Exchange

The FTC settled charges that a trade association of manufacturers, distributors and dealers of musical instruments encouraged the exchange of competitively sensitive information among its members.

The Commission asserted that the trade association organized and set the agenda for meetings and programs where its members, competing musical instrument retailers, discussed strategies for implementing manufacturers' minimum advertised pricing policies, restricting retail price competition, and securing higher retail prices.

***National Association of Music Merchants Inc.*, File No. 001 0203 (Mar. 4, 2009), available at www.ftc.gov**