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MONOPOLY LEVERAGING THEORY

Expert Analysis

Monopoly Leveraging Theory Rejected by Ninth Circuit

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The U.S. Court of Appeals for the Ninth Circuit ruled that, in light of the U.S. Supreme Court's recent price-squeeze opinion, a monopoly leveraging claim could not be asserted by purchasers of HIV drugs without allegations of a refusal to deal or below-cost pricing. The U.S. Court of Appeals for the Second Circuit decided that a public hospital was shielded from antitrust scrutiny under the state action immunity doctrine but that physicians practicing at the hospital would have to show that they were actively supervised to benefit from the doctrine.

Other recent antitrust developments of note included the New York Court of Appeals' decision that the Attorney General could seek damages in court on behalf of victims of a bid rigging scheme even though the victims had agreed to arbitration.

Monopoly Leveraging

HIV patients and their medical plans brought antitrust claims against the maker of a drug that boosts the effectiveness of protease inhibitors, drugs used to fight HIV. The drug company that sells the booster drug also sells it in a single pill combined with a protease inhibitor. Several other firms offer protease inhibitors, but only the defendant has the right to sell the booster drug. The plaintiffs alleged that the defendant increased the price of its standalone booster drug while maintaining a relatively low price for its combined, "boosted" protease inhibitor, thereby leveraging its monopoly in the booster drug to attempt to monopolize the boosted protease inhibitor market.

The Ninth Circuit decided that the monopoly leveraging allegations did not state a cognizable claim and reversed the district court's orders denying motions to dismiss and for summary judgment. The appellate panel stated that the alleged anticompetitive conduct was the functional equivalent of the price squeeze the Supreme Court found unobjectionable in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 129 S.Ct. 1109 (2009). The Ninth Circuit noted that the plaintiffs did not allege refusal to deal at the booster level or below-cost pricing at the boosted level.

Doe 1 v. Abbott Laboratories, No. 08-17699, 2009 WL 1926322 (July 7, 2009)

State Action Immunity

Cardiothoracic surgeons alleged that a public hospital in Westchester County, New York, conspired with other cardiothoracic surgeons to disadvantage the plaintiffs' practice in violation of §1 of the Sherman Act. The district court dismissed the claims on the pleadings on the ground that state action immunity applied to all defendants, and the Second Circuit affirmed in part and reversed in part. The appellate court stated that the hospital, which was created by state statute with broad powers to perform the essential public function of operating a hospital, constituted a state subdivision, akin to a municipality, and was afforded immunity from antitrust liability when acting pursuant to a "clearly articulated and affirmatively expressed" state policy.

> Claims were rejected in 'Abbott Laboratories' in light of this year's 'linkLine' decision by the U.S. Supreme Court.

The court added that the defendant surgeons' exclusive agreement with the hospital was shielded as well because immune governmental entities must be permitted to contract with private parties without being exposed to "tangential attacks" on their authorized conduct. But claims that the surgeon defendants engaged in anticompetitive acts beyond the scope of the exclusive contract would not qualify for state action immunity until the surgeon defendants demonstrate to the trial court that they were actively supervised by the hospital.

Lafaro v. New York Cardiothoracic Group, PLLC, No. 08-4621-cv (July 1, 2009)

Arbitration

The Attorney General of New York brought an enforcement action alleging a bid rigging conspiracy in violation of the Donnelly Act by life settlement providers— firms that buy life insurance policies from policy owners and ultimately receive the death benefit when the insured dies. The state sought injunctive relief and damages on behalf of the owners of life insurance policies who have been injured. The defendants sought to compel arbitration of the claims for victim-specific relief because individual policy holders had arbitration clauses in their contracts.

The New York Court of Appeals affirmed the lower courts' denial of the motion to compel arbitration and emphasized that the Attorney General had not entered into any contract with the defendants' agreeing to arbitrate. The Court, citing *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002), stated that a government agency is not required to give up its enforcement authority in favor of arbitration if it has not agreed to arbitrate. The Court added that victim-specific relief constitutes part of the vindication of a public interest.

Cuomo v. Coventry First LLC, 2009 WL 1851007 (June 30, 2009)

Resale Price Maintenance

Consumers who purchased baby products, such as strollers and car seats, alleged that a

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national retailer orchestrated the implementation of vertical minimum price-fixing agreements with major manufacturers in violation of §1 of the Sherman Act. The consumers claimed that when the national retailer faced vigorous competition from discount Internet sellers of baby products, it coerced its suppliers to prohibit discounting, resulting in higher prices to consumers.

The district court granted the plaintiffs' motion to certify a class and rejected the defendants' arguments that the proposed class did not satisfy the predominance requirement of Federal Rule of Civil Procedure 23(b)(3). The court stated that proof that the alleged restraint was unreasonable under the rule of reason, as required by the recent Supreme Court decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007), could be presented at trial through evidence common to the class. The court observed that evidence that the resale price maintenance arrangements were instigated by a dominant retailer rather than manufacturers suggests an anticompetitive purpose and was not specific to individual consumers.

The court agreed with plaintiffs that impact, in the sense that each class member made a purchase at a supra-competitive price, could be shown on a class-wide basis and distinguished the U.S. Court of Appeals for the Third Circuit's decision in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), stating that, unlike purchasers of industrial chemicals, consumers do not individually negotiate retail prices of baby products.

The court also rejected the defendants' argument that impact could not be proved on a classwide basis because consumers may have placed different and individualized value on non-price services offered by a higher priced bricks-and-mortar retailer, such as product demonstrations and immediate availability. The court stated that the traditional retail services provided were not caused by the price restraints because they were not initiated by the manufacturers but rather by the dominant retailer and that the retailer would have offered those services even in the absence of resale price maintenance.

McDonough v. Toys "R" Us, Inc., No. 06-0242 (E.D. Pa. July 15, 2009)

Collective Negotiations

The Federal Trade Commission (FTC) announced the settlement of charges that an association of hundreds of independent physicians in Berkeley and Oakland, California, violated §5 of the FTC Act by collectively negotiating fee-for-service rates with insurance companies on behalf of its members.

The commission asserted that the association orchestrated collective negotiations—rather than acting merely as a conduit under a lawful messenger arrangement—by making proposals and accepting or rejecting offers without consulting with individual members. The FTC observed that the association did not engage in any clinical or financial integration of its members' practices that might have served to justify collective action.

The FTC noted that it was not challenging the association's "capitated payments" group contract, whereby the association received a flat monthly fee per patient for medical services by its members. The commission stated that because the capitated payments program involved financial integration, the association was treated as a single entity rather than a group of competing doctors in that context.

Alta Bates Medical Group, Inc., File No. 051 0260, CCH Trade Reg. Rep. ¶16,307 (June 4, 2009), also available at www.ftc.gov

> The enforcement action in 'United States v. Malone' serves as a reminder that even acquisitions that do not raise substantive antitrust issues, such as the exercise of options by an executive, must comply with the complex Hart-Scott-Rodino Act rules to avoid the possibility of substantial fines.

Disparagement

A designer and manufacturer of high-end swimwear alleged that a rival violated federal and state antitrust laws by conspiring with the national governing body of the sport of swimming in the United States to promote the rival's products and disparage the plaintiff's swimwear products. A district court denied the defendants' motion to dismiss the complaint for failure to assert a claim.

The court stated that the complaint's definition of the relevant market as the market for high-end competitive swimwear and accessories sold to competitive swimmers was plausible because competitive swimmers would not likely switch to casual swimsuits due to an increase in the price of a high-end suit, which can cost between $400 and $500.

The court stated that the complaint supported a claim of a combination to exert coercive pressure on consumers beyond mere disparagement of a competitor's product, which does not generally rise to the level of an antitrust claim. The court noted, for example, that the head coach of the national team, who was employed by the swimming organization and was also a spokesman for the defendant swimwear maker, allegedly said that swimmers competing for a spot on the team should wear the defendant's swimsuits unless they wanted to watch the Olympics on television. The court added that allegations of the coach's involvement enabled the plaintiffs to overcome the presumption that disparaging statements by rivals have a de minimis effect on competition.

The court also rejected arguments that the Sports Act provided implied immunity from antitrust scrutiny for the alleged conspiracy. The court stated that the Sports Act's requirement that governing bodies provide information about equipment design did not conflict with the application of antitrust law to the conduct described in the complaint.

TYR Sport Inc. v. Warnaco Swimwear Inc., 2009-1 CCH Trade Cases ¶76,639 (C.D. Calif.)

Premerger Notification

The FTC announced the settlement of charges that a senior media executive violated the Hart-Scott-Rodino (HSR) Act by failing to submit filings and observe the appropriate waiting period before consummating acquisitions of stock in companies that he headed. The complaint alleged that the executive had previously violated the HSR Act and that he improperly exercised options during the waiting period triggered by his corrective filing. The complaint noted that the executive should not have relied on an outdated informal FTC interpretation regarding the acquisition of voting securities of a subsidiary.

United States v. Malone, CCH Trade Reg. Rep. ¶45,109, No. 5032, 2009-1 CCH Trade Cases ¶76,659 (D.D.C. June 23, 2009); "FTC Obtains $1.4 Million Civil Penalty for Premerger Filing Violations" (June 23, 2009), available at www. ftc.gov

Comment: The enforcement action reported immediately above serves as a reminder that even acquisitions that do not raise substantive antitrust issues, such as the exercise of options by an executive, must comply with the complex HSR rules to avoid the possibility of substantial fines.