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ANTITRUST

Expert Analysis

Supermarket Strike Profit-Sharing Not Immune

In an en banc decision, the U.S. Court of Appeals for the Ninth Circuit ruled that an agreement to share revenues among Southern California supermarket chains during a strike was not immune from antitrust challenge under a labor exemption, but due to the unusual context the arrangement could not be condemned summarily. The U.S. Court of Appeals for the Eighth Circuit rejected a Federal Trade Commission (FTC) challenge to a drug acquisition for failure to properly define the relevant product market.

Other recent antitrust developments of note include a decision by the U.S. Court of Appeals for the Sixth Circuit that a mid-conspiracy settlement did not preclude liability for a co-conspirator's subsequent actions in furtherance of the conspiracy, and an enforcement action charging an ATM manufacturer with fabrication of documents submitted to the government for premerger review.

Labor Exemption

In anticipation of a strike during contract negotiations between unions and several leading Southern California grocery store chains, the supermarkets entered into a mutual strike assistance agreement whereby if the unions decided to picket only one of the supermarkets, all of the supermarkets would lock out their union employees and share revenues during the strike. The revenue-sharing provision was intended to counteract an expected union "whipsaw" tactic of picketing only one or some of the employers, which would exert economic pressure on the picketed employers as their sales drop significantly.

The Attorney General of California brought an antitrust suit alleging that the revenue-sharing provisions unreasonably restrained trade in violation of §1 of the Sherman Act. The defendant supermarkets —including Albertsons, Ralphs and Vons (a Safeway subsidiary)—argued that their

By **Elai Katz**

agreement was immune from antitrust challenge by operation of the "non-statutory" labor exemption, which allows rival employers to coordinate their collective bargaining activities in some circumstances without risk of antitrust liability.

The judicially created exemption was crafted because courts recognized that federal policy encouraging collective bargaining by groups of employers and employees under federal labor laws could be undermined if antitrust laws prohibited coordination by multi-employer bargaining groups. The statutory labor exemption provides that labor unions are not combinations or conspiracies in restraint of trade, and exempts some union conduct from antitrust scrutiny.

> The Eighth Circuit rejected an FTC challenge to a drug acquisition for failure to properly define the relevant product market.

A three-judge panel on the Ninth Circuit ruled in 2010 that the supermarkets' conduct was not exempt and should be judged under an abbreviated standard rather than full rule of reason analysis.

Following a rehearing en banc (where the entire "bench" participates), a majority of judges on the Ninth Circuit again affirmed the district court's denial of summary judgment to defendants, rejecting the supermarkets' immunity defense and stating that profit-sharing is not a traditional or necessary part of multiemployer bargaining. The appellate court added that not all employer conduct during labor negotiations is insulated from antitrust review.

However, the en banc majority disagreed with the 2010 panel's application of a hybrid "per se-plus or quick look-minus analysis" to evaluate the legality of the profit-sharing agreement under the Sherman Act. The court stated that the restraint could not be summarily condemned under either a per se or "quick look" standard. Due to the uncommon context of an anticipated strike and the limited duration of the revenue-sharing agreement, set to expire two weeks after the end of any strike, the Ninth Circuit decided that the agreement must be subjected to full rule of reason analysis, including the requirement that the plaintiff present empirical evidence of anticompetitive effects in a relevant market.

California v. Safeway Inc., Nos. 08-55671/55708, 2011-1 CCH Trade Cases ¶77,522 (July 12, 2011)

Comment: Despite the determination that the supermarkets' conduct was not immune from antitrust scrutiny, the case will be dropped because California agreed not to pursue the case unless it could do so under an abbreviated mode of review.

More significantly, the several opinions produced by the dispute, each with a somewhat different take on the appropriate standard, raise doubts about the ability to reliably predict what standard of review might be applied to a given restraint under the "continuum" theory of antitrust analysis rather than the traditional binary approach, with its clear distinction between rule of reason and per se cases.

Drug Acquisition

The Eighth Circuit affirmed a district court's ruling against the FTC's challenge to a drug company's 2006 acquisition of a newly developed drug used to treat a heart condition in premature babies. (The company had acquired an off-patent drug used for the same purposes in 2005.) The district court had stated that the FTC failed to identify a relevant product market and did not demonstrate that the two drugs were in the same product market. The Eighth Circuit noted that the district court properly examined the applicable

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factors to determine a relevant market, including the "readiness and ability of consumers to turn to reasonable alternatives to the product in question."

Here, the lower court had found the relevant consumers were neonatologists, not hospitals, because even though the hospitals purchased the drugs, the neonatologists ultimately determined which drugs to use. According to the trial court, the evidence showed that neonatologists did not consider price in their selection of one drug over another, but rather differences between the drug's side effects, safety and track record. The lower court was also persuaded by the defense experts' testimony that the cross-price elasticity of demand between the two drugs was very low, and an increase in the price of one of the drugs was not likely to lead many consumers to switch to the other drug.

The Eighth Circuit stated that the district court's determinations were not clearly erroneous and thus it was irrelevant whether the appellate court would come to the same conclusion.

FTC v. Lundbeck Inc., No. 10-3458/3459, 2011-2 CCH Trade Case ¶77,570 (Aug. 19, 2011)

Comment: The decision reported immediately above demonstrates that courts continue to require a precise, even an exacting, definition of a relevant product market at the outset in evaluating the legality of mergers, even though the FTC and Department of Justice's revised merger guidelines reflect a move away from identifying a relevant market as the first step in merger analysis.

Relevant Market Definition

The Ninth Circuit affirmed dismissal of claims that exclusive dealing arrangements between health care providers and the California corrections department violated the Sherman Act and the Cartwright Act, California's antitrust law. The appellate court observed that an antitrust complaint can be dismissed if its market definition is "facially unsustainable" and stated that the complaint should have explained why medical services for prisoners in Central California were not interchangeable with medical services for other incarcerated people in that region.

Colonial Medical Group Inc. v. Catholic Health Care West, 2011-2 CCH Trade Cases ¶77,540 (not designated for publication)

Continuing Conspiracy

A Nashville, Tenn., carpet dealer brought a federal suit alleging that a rival dealer and one of the main local suppliers of production-homebuilder carpet conspired to drive the complaining dealer out of the market by refusing to supply it with carpet. The rival dealer moved to dismiss the complaint, arguing that a 2007 agreement settling previously asserted state law claims precluded the complaining dealer from recovering damages. But the U.S. Court of Appeals for the Sixth Circuit disagreed.

The appellate court stated that the complaining dealer could seek to recover from its rival for the supplier's alleged refusal to deal after the 2007 settlement agreement was signed. The court noted that the settlement agreement did not effectuate withdrawal from the preexisting conspiracy and that a co-conspirator defendant could be liable for post-settlement conduct by another conspirator in furtherance of the conspiracy.

Watson Carpet & Floor Covering v. Mohawk Industries Inc., Nos. 09-6140/6173, 2011-1 CCH Trade Cases ¶77,505

Comment: Practitioners should consider whether, in the settlement of antitrust conspiracy claims, their clients should contemplate formally withdrawing from the alleged conspiracy in appropriate circumstances.

Standing

The U.S. Court of Appeals for the Second Circuit ruled that a firm that had a financial interest in mobile communications patents lacked antitrust standing to bring Sherman Act claims against telecommunications companies, affirming the district court's dismissal of the complaint on the pleadings. The appellate court stated that the plaintiff owned no more than the contractual right to a percentage of the patent owner's proceeds and therefore its injury was merely derivative of any injury to the patent-holder.

Siti-Sites.com Inc. v. Verizon Communications Inc., No. 11-65, 2011-1 CCH Trade Cases ¶77,517 (summary order)

Premerger Review

An automated teller machine (ATM) manufacturer agreed to plead guilty and pay a criminal fine for obstruction of justice relating to a premerger filing and investigation by the Department of Justice. The manufacturer, Nautilus Hyosung Holdings Inc., allegedly submitted fabricated 4(c) documents—internal documents analyzing the competitive impact of the proposed transaction—to the department during the premerger review process of a now abandoned merger with a competing manufacturer of ATM systems. The department alleged that an executive of a company affiliated with Nautilus altered and directed employees to alter corporate documents to obscure the anti-competitive impact of the proposed acquisition on the market for ATMs in the United States.

United States v. Nautilus Hyosung Holdings (D.D.C. Aug. 15, 2011), CCH Trade Reg. Rep. ¶45,111 No. 5199, also available at http://www.justice.gov/atr

Internet Music

The largest music recording companies—Sony BMG, Warner Music Group, EMI and Universal Music Group—moved to dismiss claims that they conspired to fix the prices, terms and restrictions on the use of music sold online (hereinafter Internet music). After noting that in *Starr v. Sony BMG*, 592 F.3d 314 (2d Cir. 2010), the Second Circuit determined that substantially similar allegations in earlier iterations of the complaint satisfied the pleading standard set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the district court turned to other, previously unaddressed grounds advanced by the record labels to dismiss the Sherman Act claims.

The court rejected the record labels' argument that a 2005 settlement agreement—resolving a class action alleging a conspiracy to fix the price of compact discs (CDs)—barred Internet music claims arising during the settlement period because the alleged Internet music conspiracy before the court was unrelated to the CD conspiracy asserted in the prior suit.

The court then stated that the CD-purchaser class—alleged to have been injured by paying higher prices for CDs than they would have paid if Internet music prices were not artificially elevated—lacked standing because the complaint did not allege a direct, nonconclusory link between Internet music pricing and CD pricing.

In re Digital Music Antitrust Litigation, 2011-1 CCH Trade Cases ¶77,536 (S.D.N.Y. July 18,2011)

Horse Racing

The New York Legislature passed an act that would have exempted from federal and state antitrust law joint agreements among racing associations involving the sale of broadcast rights and the coordination of dates and times, as long as those agreements were approved by the state racing and wagering board. The authors of the bill stated that "the need to preserve the State's ailing racetracks should, however, outweigh any limited anti-competitive effects of any joint marketing or horse race production agreements."

The bill was vetoed by Governor Andrew Cuomo on Aug. 4, 2011.

An Act to amend the racing, pari-mutuel wagering and breeding law, in relation to antitrust exemptions for horse racing agreements, A.3705/S.623 2011).