

## ANTITRUST

BY WILLIAM T. LIFLAND AND ELAI KATZ

### *Football Scholarship Restrictions Could Restrain Trade*

The U.S. Court of Appeals for the Seventh Circuit ruled that the transfer of business from a non-union firm to a union firm did not constitute antitrust injury. A district court held that restrictions on the number of football scholarships to be awarded by colleges could constitute an unlawful restraint of trade. Other recent antitrust developments of interest included a decision by the Federal Trade Commission (FTC) to close an investigation into an acquisition of cable system assets by two cable companies and the approval by the European Commission of the combination of two athletic shoemakers.

#### Antitrust Injury

A non-union firm providing drilling services to limestone quarries charged a union representing employees of rival drilling firms with violating the Sherman Act by forcing customers to transfer their business to a union firm. The district court granted summary judgment in the defendants' favor and the Seventh Circuit affirmed. The appellate court stated that the plaintiff did not suffer antitrust injury because the mere transfer of business from one company to another, without an effect on competition, was not an injury of the type the antitrust laws were intended to prevent. The court noted that customers were not charged more for drilling services by the union firm and that the evidence showed that the plaintiff

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continued to perform drilling work in nearby quarries.

*Tri-Gen Inc. v. International Union of Operating Engineers, Local 150*, 2006-1 CCH Trade Cases ¶75,086

#### Restraint of Trade

Walk-on college football players at Division I-A schools brought an antitrust suit alleging that a bylaw of the National Collegiate Athletic Association (NCAA) limiting to 85 the number of football scholarships awarded by each school constituted an unreasonable restraint of trade in violation of the Sherman Act.

The court refused to dismiss the suit on the basis that the challenged bylaw was a non-commercial rule not subject to the Sherman Act. The district court distinguished precedents that have upheld NCAA rules protecting amateurism in college athletics by requiring students to attend class or regulating entry to professional drafts. The court noted that the complaint alleged that the scholarship restrictions were designed to control costs rather than advance amateurism.

The court also rejected the NCAA's contention that the complaint failed to allege a properly defined relevant market, stating that the football players alleged a

sufficient "input" market in which schools compete for amateur football players. The court declined to dismiss the suit on the alternate ground that the complaint did not sufficiently allege injury to consumers or competition and observed that artificially depressing the cost of an input could cause competitive harm.

*In re NCAA I-A Walk-On Football Players Litigation*, 2006-1 CCH Trade Cases ¶75,084 (W.D. Wash.)

#### Acquisitions

The FTC issued a statement discussing the closing of an investigation into the planned acquisition of a bankrupt firm's cable system assets by Comcast Corp. and Time Warner Cable Inc., providers of cable television services in various parts of the country. The proposed transactions also include swaps of cable systems between Time Warner Cable and Comcast, providing them with control of adjacent cable systems in certain metropolitan areas, which the statement described as part of a "clustering" trend in the cable industry. The statement indicates that the FTC majority considered and rejected the possibility that by bringing together adjacent geographic markets Time Warner Cable or Comcast would be more likely to enter into distribution agreements with regional sports networks that could effectively foreclose their competitors—including satellite, overbuilders and telephone distributors of content—from carrying regional sports networks or raise the cost to their rivals of carrying these networks.

In a separate statement, two commissioners indicated, however, that they

would have sought narrowly tailored relief to address the concern that the transaction might lead to more costly or limited access to sports programming for rival content providers. The separate statement suggested that the FTC might have considered requiring nonexclusive and nondiscriminatory contracts for the distribution of regional sports programming. The transactions must also be approved by the Federal Communications Commission, which has not yet concluded its review.

**Comcast Corp., Time Warner Cable Inc., and Adelphia Communications Corp., CCH Trade Reg. Rep. ¶15,846 (Jan. 31, 2006)**

*Comment:* Although the U.S. antitrust agencies are not obligated to explain their reasoning for deciding not to challenge an acquisition, when such explanatory statements are issued, antitrust practitioners and the general public benefit from a better understanding of the agencies' merger analysis and, in the case of the statements reported immediately above, their view of the nature of competition in evolving industries. These statements also provide an opportunity for practitioners to learn of the kinds of merger remedies under discussion at the agencies.

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The FTC announced a proposed settlement of its challenge to the planned acquisition of a generic drug maker by a rival. The FTC stated that the proposed combination would have resulted in creating the world's largest generic drug supplier and would have produced anticompetitive effects in 15 overlapping markets where the number of competing generic suppliers would be reduced. The FTC observed that each additional generic supplier can have a competitive impact on the market. The commission added that the branded versions of each of the 15 generic drugs, which are significantly more expensive than their generic equivalents, no longer significantly constrain the generic drugs' pricing. The proposed settlement requires divestiture of the 15 drugs to two FTC-

approved buyers, both established generic drug manufacturers.

**Teva Pharmaceutical Industries Ltd. and IVAX Corporation, CCH Trade Reg. Rep. ¶15,840 (Jan. 23, 2006)**

*Comment:* In the matter reported immediately above, the FTC stated that the relevant product markets for certain generic drugs do not include the branded version of these drugs, even though they must be, as a matter of federal drug law, therapeutically equivalent. Market definition is always a fact-specific exercise and, in particular market contexts, branded and generic products may be properly classified in the same relevant market. Adding to the complexity in analyzing these markets, the FTC has asserted in other cases that branded drug makers view generic versions of their products as direct competitors.

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The European Commission (EC) approved, without conditions, the acquisition of Reebok International Ltd. by Adidas-Salomon AG, both global suppliers of sports and leisure footwear, clothing and equipment. The EC stated that although both Reebok and Adidas are significant participants in the market for athletic footwear in Europe, its investigation showed that Adidas and Reebok have slightly different brand and pricing positions.

While Adidas is seen as a professional technically oriented brand and is positioned in medium- to high-price points, Reebok targets young people and women and is stronger in the low- to medium-price points. The EC also noted that Adidas has strong European roots and that Reebok has a weaker image in Europe. The EC found that in the market segments where both companies have strengths, the merged entity would not be able to increase prices due to intense competition from a number of strong rivals. U.S. antitrust agencies did not raise any objections to the transaction.

**Mergers: Commission Clears Acquisition of Reebok by Adidas, IP/06/70 (Jan. 24, 2006), available at [europa.eu.int](http://europa.eu.int)**

Independent video retailers alleged that Blockbuster Inc., a national video rental chain, conspired with the home-video affiliates of five major movie studios to deny favorable terms and conditions to distributors for independent retailers in violation of California antitrust and price discrimination law. The independent retailers claimed that they were not given an opportunity to participate in revenue-sharing arrangements under which Blockbuster purchases videocassettes at a low initial price in exchange for a portion of its rental revenues and a commitment to carry all of the studio's videos.

A California appellate court affirmed the trial court's summary adjudication for the defendants on the conspiracy claim under California antitrust law, finding that the evidence presented did not tend to exclude the possibility of independent, rather than collusive, conduct. The appellate court reversed summary judgment for defendants on the price discrimination claim under California's Unfair Practices Act, which prohibits the secret payment of rebates or unearned discounts and the secret extension of special services or privileges not extended to all purchasers on like terms and conditions. The court stated that a plaintiff need not purchase upon "like terms and conditions" in order to state a California price-discrimination claim when the purchaser has been given no choice but to buy upon fundamentally different terms and conditions. The court added that a plaintiff could satisfy the secrecy requirement of the Unfair Practices Act even though the general parameters of the agreements were reported in the press, if key economic points were withheld.

**Eddins v. Redstone, 2006-1 CCH Trade Cases ¶75,088 (Cal. Ct. App. 2d Dist.)**

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