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ANTITRUST

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Cable Subscribers Must Arbitrate Antitrust Claims

The U.S. Court of Appeals for the First Circuit ruled that a cable television service agreement may require arbitration of subscribers' antitrust claims but the arbitration clause may not prevent subscribers from recovering treble damages or bringing their claims as a class.

The U.S. Court of Appeals for the Fourth Circuit held that purchasers of computers with preinstalled software lack standing to bring federal antitrust damage claims against the software provider. Other recent antitrust developments of interest included the Department of Justice's (DOJ) decision to oppose the Federal Trade Commission's (FTC) petition for Supreme Court review of an appellate court ruling vacating an FTC order.

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Arbitration

Boston-area cable television subscribers brought suit in federal court alleging that a cable provider divided markets and eliminated regional competition in violation of state and federal antitrust laws. The cable provider sought to compel arbitration pursuant to a clause in the service agreement and the district court ruled that the agreement did not require arbitration of claims arising before the subscribers received an updated notice of terms and conditions with an arbitration clause.

Reversing the district court, the First Circuit ruled that the arbitration clause was enforceable retroactively but that certain provisions of the arbitration agreement should be invalidated because they contradict statutory antitrust law. The provisions invalidated included a ban on treble damages (for federal claims only) and a provision precluding prosecution of claims as a class. On the other hand, the appellate court ruled that an arbitrator could resolve disputes regarding the enforceability of other clauses in the arbitration agreement, including a one-year limitations period and a restriction on discovery.

***Kristian v. Comcast Corp.*, 2006-1 CCH Trade Cases ¶75,203**

Indirect Purchasers

Purchasers of computers with preinstalled Microsoft software alleged that Microsoft used its monopoly power to charge supra-competitive prices for operating system and application software and deny end-users the benefit of superior technologies in violation of §2 of the Sherman Act. A district court dismissed the plaintiffs' money-damages claims, stating that plaintiffs were barred from seeking recovery of overcharge damages under the Supreme Court's 1977 *Illinois Brick* decision. The plaintiffs appealed, contending that although they purchased computers with Microsoft software from retailers and computer makers, the *Illinois Brick* doctrine should not apply because they had a direct contract with Microsoft in the form of end-user license agreements and were entitled to receive a refund from Microsoft in the event they did not agree to the terms of the end-user license.

The Fourth Circuit affirmed, observing that neither the contract with Microsoft nor the right to direct reimbursement from Microsoft eliminates the risks of duplicative recovery and the complexity of apportioning damages, which the *Illinois Brick* doctrine is designed to prevent. The court ruled that the plaintiffs' claims for damages not due to overcharges—such as the denial of the benefit of technologically superior products—were too speculative and remote to satisfy the standing requirement of a Sherman Act claim brought under §4 of the Clayton Act.

The Fourth Circuit also stated that the district court did not abuse its discretion in dismissing the plaintiffs' claims for injunctive relief for failing to pursue those claims with diligence. The court accepted Microsoft's argument that plaintiffs' delay in articulating the injunctive relief they sought prejudiced Microsoft by preventing coordinated consideration of injunctive remedies in the United States' action against Microsoft.

***Kloth v. Microsoft Corp.*, 2006-1 CCH Trade Cases ¶ 75,201**

Restraint of Trade

After the FTC had ruled that a patent infringement settlement agreement constituted an unreasonable restraint of trade, the U.S. Court of Appeals for the Eleventh Circuit vacated the FTC's order and the FTC sought the Supreme Court's review. At the invitation of the Supreme Court, the DOJ submitted its views as a friend of the court. The department stated that the petition for a writ of certiorari should be denied because the facts of the case do not present an appropriate opportunity for the court to determine the proper standards for distinguishing legitimate patent settlements from illegitimate ones.

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The department argued that the fact that an alleged infringer received a payment from the patent holder to settle a patent dispute is not sufficient to establish that the agreement is unlawful and that courts evaluating such settlement agreements should take into account the relative likelihood of success of the parties in the patent litigation, albeit without conducting a full trial on the merits. The department stated that the commission's approach may place undue weight on the subjective views of the parties rather than a more objective assessment of the strength of the claims.

***FTC v. Schering-Plough Corp.*, No. 05-273 (Brief for the United States as Amicus Curiae, May 2006)**

Comment: Over the many decades that the FTC, an independent commission, and the DOJ, an instrument of the Executive Branch, have shared jurisdiction over the enforcement of federal antitrust laws, the agencies have adopted similar antitrust policies most of the time. In the matter reported immediately above, however, it appears that the disagreement between the DOJ and the FTC might lead to different results depending on which antitrust agency investigates allegedly anti-competitive conduct.

Injury

Plaintiffs attempted to organize trade fairs in the United States for foreign manufacturers of oriental rugs in an effort to enable domestic retailers to buy directly from foreign manufacturers without involving the importers or other intermediaries. Plaintiffs' trade fairs were not successful and they brought suit alleging that an association of rug importers and its members conspired to thwart these endeavors and to persuade others not to deal with plaintiffs in violation of §1 of the Sherman Act. Following a trial, the jury found that the defendants had conspired to restrain trade but also determined that the conspiracy did not cause injury to the plaintiffs, rendering a verdict for the defendants. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the district court's denial of a motion for a new trial, rejecting the plaintiff's contention that the jury's determination was without "plausible explanation."

The appellate court stated that the jury's verdict was not against the great weight of the evidence, which revealed alternative explanations for the failure of the fairs, including difficulty in obtaining visas for foreign sellers, the cost of attending fairs and failure to advertise the fairs in the most appropriate publications.

***Carpet Group International v. Oriental Rug Importers Association, Inc.*, 2006-1 CCH Trade Cases ¶75,191**

Acquisitions

The Department of Justice announced an agreement to resolve some potential competitive concerns related to a hostile takeover bid that would combine the world's two largest steel producers, Mittal Steel Company NV and Arcelor SA. The department stated that the agreement requires the divestiture of Canada's largest steelmaker, which was recently acquired by Arcelor, or alternative assets if the department concludes that the combination would violate §7 of the Clayton Act by substantially lessening competition. The agreement also provides that the department will continue to investigate the proposed combination while Mittal's tender offer for Arcelor proceeds.

Comment: Investigations of the competitive impact of hostile takeover bids may encounter timing concerns dictated by securities regulations and the bidder's efforts to persuade the target's shareholders to accept the tender offer, which may cause antitrust agencies to accept piecemeal relief to allay competitive concerns.

***Mittal Steel Company NV and Arcelor SA*, (May 12, 2006) available at www.usdoj.gov/atr**

Relevant Market Definition

The United Kingdom Competition Commission closed its investigation of the completed acquisition of a private-label carbonated soft drink manufacturer by a rival. In a detailed report of its analysis, the commission found that private-label carbonated soft drinks are in a separate relevant product market from brand name soft drinks such as Coca-Cola and Pepsi, even though the products themselves are nearly identical and private label soft drinks were introduced in order to discipline the prices of branded soft drinks.

The commission stated that the price gap between private label and branded soft drinks has widened considerably in recent years, such that brand name soft drinks sell for as much as twice the price of private label soft drinks and neither consumers nor retailers would switch from private label to brand name soft drinks as a result of a small but significant price increase. In addition, the commission considered supply-side substitution and determined that although brand name manufacturers could produce private label soft drinks, it was highly unlikely that they would do so. Nevertheless, the commission concluded that the merged firm's ability to raise prices is constrained by the countervailing bargaining power of retailers (who own the private label brands) and its rivals' excess capacity.

***Cott Beverages Ltd and Macaw (Holdings) Ltd* (April 28, 2006), available at www.competition-commission.org.uk**

Class Actions

College football players challenged a National Collegiate Athletic Association (NCAA) rule limiting the number of scholarships each member school may award to players as an unlawful restraint of trade in violation of §1 of the Sherman Act. The players claimed that they were injured by the alleged restraint because they did not receive scholarships and sought to represent a class of similarly situated players. A district court denied the players' motion for class certification because the nature of the claim—injury from a failure to award scholarships—precludes class treatment. The court stated that there is an inherent conflict among members of the class as each player has an incentive to prove that he would have received a scholarship instead of other members of the class. The court also stated that individual issues predominate over common issues. Even if the players can prove in a generalized way the number of scholarships that would have been awarded but for the challenged rule, antitrust injury as to each member of the class cannot be proved without determining which players would have been awarded additional scholarships and which schools those players would have attended in the absence of the challenged rule.

***In re NCAA I-A Walk-On Football Players Litigation*, 2006 WL 1207915 (W.D. Wash. May 3, 2006)**