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ANTITRUST

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Department Store Combination Scrutinized by States

The Federal Trade Commission (FTC) decided not to challenge the combination of the first- and second-largest department store chains in the nation while the attorneys general of several states required divestitures of about two dozen stores to satisfy their concerns about the merger.

The Department of Justice brought an action challenging a realtors' association policy that enables real estate brokers to block rivals' access to listings on multi-listing services.

Other recent antitrust matters of interest included a determination by a district court that cellular telephone service carriers' practice of requiring the purchase of an approved handset did not constitute unlawful tying.

Acquisitions

The FTC announced that it closed its investigation into the merger of two large chains of conventional or traditional department stores, permitting the parties to complete the transaction without enforcement action. At the same time, the attorneys general of five states, including New York, announced a settlement of their investigations into the merger, requiring the divestiture of 26 stores.

The FTC stated that the combination would bring about the largest chain of conventional department stores in the nation and create high levels of concentration among conventional department stores in many regions. The acquiring chain, Federated Department Stores, operates the Macy's and Bloomingdale's stores, among others, and is the nation's largest conventional department store chain. The acquired chain, May Stores, operates Lord & Taylor, Filene's and Marshall

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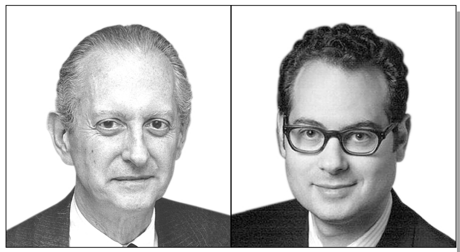

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Fields, among others, and is the second-largest conventional department store chain in the United States. The FTC concluded, however, that it would be improper to define the relevant market narrowly to include only conventional department stores because they face competition from many other kinds of retailers, and, as a result, the investigation did not uncover any evidence of likely anticompetitive effects on consumers.

The FTC describes the evolution of the department store in American retailing from freestanding one-stop stores in cities to "anchors" in suburban shopping malls. The FTC noted that suburban malls themselves may have replaced the freestanding department store of the past, providing a new kind of one-stop shopping. In addition, the FTC observed a significant increase in the number of discount department store chains, vertically integrated clothing retailers, consumer electronic chains and, most recently, Internet outlets.

On the basis of these rapid changes in the marketplace, the commission distinguished the 1994 *Bon Ton* case, in which a district court found that department stores constitute a separate relevant market. The FTC's statement also distinguished its own prior retail merger enforcement action in which it challenged the proposed combination of Staples and Office Depot in 1997. In that case, the FTC concluded that the relevant market was "office supply superstores," having found that prices were lower in communities where two office supply superstores competed with one another. The FTC's investigation found that conventional department stores do not vary local prices based on the number of conventional department stores in the local area. That is, instead of looking only at other local conventional department stores, the department stores consider prices and other competitive factors at specialty retailers as well as a wide range of other retailers. The FTC also stated that an individual mall is too narrow to constitute a relevant geographic market in this case and that a town or metropolitan area would be more appropriate.

In contrast, the attorneys general of five states—New York, Massachusetts, Pennsylvania, Maryland and California—apparently disagreed with the FTC's conclusion, asserting that "department stores offer consumers a distinctive combination …not matched by smaller, more specialized retailers or by large discount stores" and requiring over two dozen divestitures in malls where there are department stores owned by both of the merging parties. The agreement with the states provides that, in its sale of the stores selected for divestiture, Federated must give priority to its traditional competitors. Even if Federated receives higher offers from other parties, it must accept a commercially reasonable offer from a rival department store.

***Federated Department Stores Inc.*, CCH Trade Reg. Rep. ¶¶15,790, 50,204 (Aug. 30, 2005)**

Comment: The state enforcement action described above may seem inconsistent with the general rule that state antitrust enforcement should follow federal precedents. It also indicates a difference in application between European and domestic law. The European Commission has a formal practice of ceding jurisdiction and referring to member states merger investigations that have a particularly local impact. In the United States, state attorneys general (as well as private parties) have the right to bring actions challenging mergers under §7 of the Clayton Act regardless of the federal antitrust authorities' conclusion about the combination's likely effect on competition. Even though the states do not have the statutory power the federal agencies have under the Hart-Scott-Rodino Act to delay the closing of a merger or acquisition, they are entitled to seek divestitures, as the U.S. Supreme Court held in its 1990 *California v. American Stores* decision. In the matter reported immediately above, the FTC stated that participation by state agencies familiar with local conditions may be particularly helpful, yet the FTC and the state authorities did not seem to agree on the appropriate analysis. The FTC concluded that it should not take any enforcement action based on its rejection of narrowly defined product and geographic markets while several states required divestitures apparently based upon such narrow relevant market definitions. Parties to proposed combinations in the United States that attract the attention of state authorities may find it necessary to satisfy the concerns of whichever authorities have reached the conclusion most adverse to the proposed merger even if they were able to persuade other regulators to allow the merger to proceed.

• ***Restraint of Trade.*** The Department of Justice filed a complaint in federal district court in Chicago challenging a national realtor association's policy that allegedly permits traditional realtors to limit the availability of real estate listings to innovative, Web-based realtors who often discount their commissions.

According to the complaint, realtors generally share information about houses on the market through a local Multiple Listing Service (MLS), a joint venture among competing real estate brokers which, in most areas, is controlled by affiliates of the defendant realtor association. Traditionally, realtors showed listings from the local MLS to their customers at their offices or by fax. Recently, some realtors have enabled their technologically savvy customers to search the MLS database on their own using their home computers.

The complaint alleges that these Web-based realtors who can provide more-efficient and less-expensive services are a competitive threat to traditional realtors. The department alleges that prior to the adoption of the challenged policy, realtors were generally required to submit all of their listings to the MLS and were not permitted to withhold listings from a rival. In addition, the complaint states that it is in the seller's best interest to disseminate information about the property for sale as widely as possible.

The department claims that the challenged policy enables realtors to prevent listings of their clients' homes from being displayed on Web-based realtors' sites, thereby preventing those realtors from providing the complete MLS results that a traditional realtor can provide to potential buyers.

United States v. National Association of Realtors, **CCH Trade Reg. Rep. ¶45,105 (N.D. Ill. Sept. 8, 2005)**

Comment: The MLS lawsuit is part of a broader effort by both federal antitrust agencies to challenge practices in real estate markets, including state regulations that prohibit discounting, a type of restraint that has generally been perceived by courts and scholars to be anticompetitive. If this proceeding continues, the courts may have an opportunity to examine the more general question of the competitive impact of withholding information from rivals where such information has previously been shared in a cooperative database.

Without market power, a central element of per se tying, it is unlikely that a plaintiff could successfully prosecute a rule-of-reason unlawful tying claim.

• ***Tying.*** Purchasers of wireless or cellular telephone services brought suit alleging that wireless telephone service carriers' practice of requiring the purchase of a carrier-approved handset in order to subscribe to each carrier's services constituted unlawful tying in violation of §1 of the Sherman Act. A district court granted summary judgment for the carriers because plaintiffs did not present sufficient evidence to show that any one of the carriers had the requisite market power to support a tying violation and did not show that the alleged tying arrangements had an actual adverse effect on competition for wireless handhelds.

Wireless service providers sell service subscriptions and approved wireless handsets as a package through their retail outlets or their sales agents and have subsidized the cost of the handsets, which are manufactured by others. The purchasers claim that in an effort to keep customers from switching carriers, the handsets are "locked" to prevent the use of the handset with another carrier.

Having found that, during the relevant period, none of the carriers had a market share of more than 24 percent, the court ruled that the plaintiff could not demonstrate the existence of market power in the tying product market (here, cellular telephone services). Relying on the Supreme Court's 1984 *Jefferson Parish* decision, the court stated that a share of 30 percent of the market is the minimum market share from which market power in the tying product can be inferred. The court also rejected the argument that the carriers' parallel practices supported an inference of market power. The court noted that plaintiffs had backed away from their allegation of concerted conduct among the carriers and observed that it is inappropriate to assess one defendant's market power by measuring the cumulative power of all defendants practicing parallel tying arrangements.

The court noted that, having been unable to show that any of the carriers have market power it is not surprising that the plaintiffs have not been able to show any anticompetitive effects in the handset market. The court's examination of Federal Communications Commission statistics showed that despite the alleged ties, the carriers' efforts to prevent switching have been mostly unsuccessful. The court added that the subsidization of the cost of handsets undercuts the degree to which the locking mechanism prevents customers from switching carriers.

In re Wireless Telephone Services Antitrust Litigation, **2005-2 CCH Trade Cases ¶74,909 (SDNY)**

Comment: Courts have traditionally classified certain tying arrangement as per se unlawful, but the label per se may be a misnomer in this context, as many elements usually associated with rule-of-reason analysis, such as market power and, at least in some courts, anticompetitive effects, must be proved in a per se tying claim. In addition, as the decision reported immediately above suggests, in the absence of market power, one of the central elements of per se tying, it is unlikely that a plaintiff could demonstrate the necessary anticompetitive effects to successfully prosecute a so-called rule-of-reason unlawful tying claim.

This upcoming term, in *Illinois Tool Works v. Independent Ink,* the Supreme Court may have the opportunity to comment on this issue when it rules on whether market power may be presumed in a tying case from the existence of a patent.