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ANTITRUST

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Hot Air Balloon Maker Defeats Monopolization Claims

The U.S. Court of Appeals for the Third Circuit ruled that a hot air balloon maker did not monopolize the aftermarket for replacement balloon fabric. The U.S. Court of Appeals for the Sixth Circuit affirmed denial of certification of a class of air travelers alleging monopolization of three airport hubs through "predation by reputation." The Federal Trade Commission (FTC) required divestiture of tooth-whitening and other personal-care products to approve the combination of two global consumer products companies.

Other recent antitrust decisions of interest included a determination by a district court that claims of an unlawful tie between the purchase of digital music from an online music store and a digital music player stated a cause of action.

Monopolization

An owner and operator of hot air balloons used for recreational day trips over the New Jersey countryside brought suit against a hot air balloon manufacturer alleging unlawful monopolization and tying in the aftermarket for replacement balloon fabric. The balloon operator claimed that Federal Aviation Administration regulations and the defendant's conduct effectively created a requirement to buy replacement fabric only from the defendant. The Third Circuit affirmed summary judgment for the manufacturer, finding that the balloon operator did not meet its burden of demonstrating that the manufacturer possessed monopoly power in the aftermarket for replacement balloon fabric. The appellate court noted that the fact that the balloon maker's fabric is more expensive than others does not support an

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inference of monopoly power, as the price difference was likely the result of significant differences in fabric quality. The Third Circuit also stated that the operator knew about the aftermarket policy when it chose to buy the original balloon from the defendant balloon maker rather than one of at least four other competitors, undermining the operator's contention that the balloon maker possessed monopoly power because aftermarket behavior generally is disciplined by competition in the primary market.

***Harrison Aire Inc. v. Aerostar Int'l Inc.*, 2005-2 CCH Trade Cases ¶74,930**

Class Actions

The Sixth Circuit affirmed the denial of certification of a proposed class of airline passengers claiming that an airline monopolized air travel for 74 routes into and out of three "hub" airports in Memphis, Detroit and Minneapolis/St. Paul. The complaint alleged that the defendant airline's "predation by reputation"—a reputation of aggressive competition at its hubs—deterred entry into all of the routes and harmed the purported class by enabling supra-competitive fares. The appellate court stated that individual questions predominate on the issue of market definition, where a separate analysis of available alternatives will be required for each of the 74 routes, resulting in a series of mini-trials. The Sixth Circuit also ruled that the plaintiff's proposed market definition of all nonstop scheduled flights into and out of the three hubs failed as a matter of law and noted that the district court could properly consider the plaintiff's failure to define the market in its class certification analysis.

***Rodney v. Northwest Airlines Inc.*, 2005-2 CCH Trade Cases ¶74,940**

Acquisitions

The FTC announced a proposed settlement of its challenge to the planned acquisition by The Procter & Gamble Co. (P&G) of The Gillette Co., a rival supplier of consumer products. The FTC stated that it analyzed the acquisition's likely effect on a number of relevant product markets as well as broader product categories, including whether the combination of the parties' broad array of consumer products might lead to increased involvement in retailers' shelf-allocation decisions as "category managers." The FTC concluded that competition was unlikely to be harmed because most retailers do not look at broad product categories, such as oral care, when making decisions about the allotment of shelf space but rather specific products within these broad categories. The European Commission (EC) also investigated whether the merger would give rise to "conglomerate effects" due to the increased ability to offer bundled rebates or category management services and, like the FTC, concluded that such effects are unlikely.

As to specific relevant product markets, the FTC found that P&G and Gillette are the two largest suppliers of at-home teeth-whitening products, accounting for a combined share of over 80 percent of the market. The settlement accordingly requires the divestiture of Gillette's Rembrandt teeth-whitening products business. Corrective divestiture was also required as to adult battery-powered toothbrushes and men's antiperspirant/deodorants. The consent decree also requires

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P&G to amend a joint venture agreement with a third party to develop and market a toothbrush that self-dispenses toothpaste.

***The Procter & Gamble Co. and The Gillette Co.*, CCH Trade Reg. Rep. ¶15,804 (Sept. 30, 2005) and *Mergers: Commission Approves Acquisition of Gillette by Procter & Gamble Subject to Conditions*, IP/05/955 (July 15, 2005), available at europa.eu.int**

Tying

A consumer of digital music brought unlawful tying claims against Apple Computer, alleging that the digital music files purchased through its iTunes online music store can be played only on Apple's iPod portable hard drive digital music player and that the iPod player can only play music downloaded from iTunes. The complaint alleged that Apple possesses monopoly power in the market for the legal online sale of digital music, where its iTunes store allegedly has 80 percent of the market, and that Apple also possesses monopoly power in the portable hard drive digital music player market, where iPod has allegedly captured over 90 percent of the market. Although the district court noted that it seemed inconsistent to allege that the iTunes store and the iPod player are both the "tying" and "tied" products, it ruled that the complaint sufficiently alleged the elements of a tying claim to survive Apple's motion to dismiss.

***Slattery v. Apple Computer Inc.*, 2005 WL 2204981, No. C 05-00037 JW (N.D. Cal. Sept. 9, 2005)**

A real estate broker wanted to continue his subscription to a local multiple listing service (MLS) but did not wish to continue his membership in the local realtors association that controlled the MLS. The broker brought suit claiming that membership in the association was unlawfully tied to the MLS subscription, in violation of §1 of the Sherman Act. The district court granted summary judgment to the defendant association because the broker did not bring forth sufficient evidence to show that competition has been foreclosed in the market for real estate services provided by the association. The court explained that merely establishing that customers purchased an unwanted product does not demonstrate foreclosure if there are no rival sellers of that product.

***Reifert v. South Central Wisconsin MLS Corp.*, 2005-2 CCH Trade Cases ¶74,919 (W.D. Wis.)**

Premerger Notification

The FTC and the Department of Justice announced a settlement of charges that a hedge fund manager failed to comply with the premerger reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The HSR Act requires parties to acquisitions of voting securities or assets exceeding certain thresholds to notify the antitrust agencies of the proposed transaction and observe a waiting period before completing the transaction.

The hedge fund manager, an individual, did not submit HSR filings to report acquisitions of a significant amount of stock of two companies by an investment fund deemed to be controlled by him personally, according to a complaint filed by the Department of Justice at the request of the FTC. He agreed to pay a $350,000 civil penalty to settle the charges. Although the acquisitions had been reported, albeit belatedly, by a related entity, the complaint alleged that the hedge fund manager was required to submit a second filing for each of the same transactions on his own behalf as an individual. The complaint alleged that the investment fund that made the acquisition had two "ultimate parent entities" under the HSR rules, requiring two separate filings, one by each of the ultimate parents. In this case, there were two ultimate parents because over half the voting securities of the investment fund were held by one entity while the contractual power to designate more than half of its directors was held by another entity, which in turn was controlled personally by the defendant.

***United States v. Sacane*, CCH Trade Reg. Rep. ¶¶15,801, 45,105 (Case 4800) (D.D.C. Sept. 26, 2005), 2005-2 CCH Trade Cases ¶74,946 (D.D.C. Sept. 29, 2005)**

Comment: Unless each ultimate parent of an entity involved in an acquisition submits an HSR form, the agencies might not learn that a person who controls the acquiring firm also has a significant stake in an entity that competes with the firm being acquired, information that may at times be relevant to the agencies' investigation. This case also serves as a reminder to practitioners that acquisitions of securities or assets by financial institutions and investors may require reporting under the HSR Act and that the agencies have not limited their enforcement to situations that raise substantive antitrust issues.

Sector-Specific Regulation

The European Commission (EC) announced that "location clauses" in agreements between car makers and dealers will no longer benefit from automatic exemption from liability under Article 81 of the EC's treaty, which prohibits restrictive business practices. Location clauses, which impose geographic restrictions on dealers, had been subject to a block exemption covering motor vehicle distribution. The expiration of the exemption is the result of the EC's revised and generally stricter regulation for the motor vehicle sector, which was adopted in 2002. The EC stated that once location clauses are removed, car dealers will be able to operate outside their home territories where they can benefit commercially and increase competition.

The EC also announced that it decided to impose a fine of almost $60 million on a French automaker for obstructing exports of new cars from the Netherlands, where prices are substantially lower then in other member states.

***Competition: New Rules for Car Distribution Bring Dealers Greater Freedom to Compete Across the EU*, IP/05/1208 (Sept. 30, 2005) and *Competition: Commission Imposes a Euro49.5 Million on Peugeot for Obstructing New Car Exports for the Netherlands*, IP/05/1227 (Oct. 5, 2005), both available at europa.eu.int**

Comment: Over the years the EC has adopted sector-specific regulations that exempt certain types of agreements from Article 81 and identify other types of agreements that are "hard core" or severely anticompetitive restrictions. For example, the EC has block exemption regulations for licensing agreements for the transfer of technology. From time to time the EC has revisited its regulations after acquiring experience and analyzing the nature of competition in certain sectors. The EC found that its earlier competition regulations for motor vehicle distribution did not succeed in eliminating significant price differentials between member states.