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ANTITRUST

BY WILLIAM T. LIFLAND AND ELAI KATZ

Acquisition of Nonvoting Interest May Be Anticompetitive

The U.S. Court of Appeals for the Sixth Circuit ruled that an acquisition of a nonvoting interest in a milk-processing plant by a dairy farmer cooperative may violate the Clayton Act. A Federal Trade Commission (FTC) initial decision would require the divestiture of a Chicago-area hospital acquired by a rival in 2000. The Sixth Circuit reversed a summary judgment granted to an airline accused of predatory conduct. Other recent antitrust decisions of interest included a ruling by the U.S. Court of Appeals for the Federal Circuit that a practice of licensing compact disc manufacturing patents as a package did not constitute patent misuse.

Acquisitions

Reversing a district court's summary judgment for defendants, the Sixth Circuit ruled that an acquisition that resulted in a dairy farmer cooperative having an interest in two milk-processing plants could have violated §7 of the Clayton Act. The appellate court noted that the two milk plants were the only bidders in over 40 school districts in Kentucky and Tennessee and that postacquisition prices in those districts were higher than in other districts. The court stated that even though the cooperative did not have control over one of the plants or the ability to influence its business decisions, the cooperative's interest in both plants might still lessen competition in violation of the Clayton Act.

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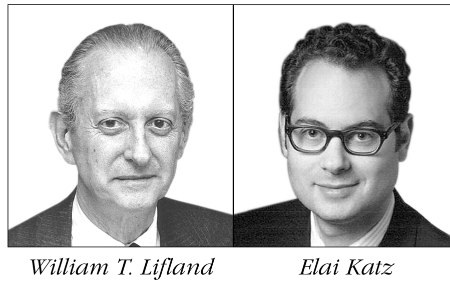
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***United States v. Dairy Farmers of America*, 2005-2 CCH Trade Cases ¶74,975**

The FTC announced an initial decision by an administrative law judge (ALJ) finding that the combination of two hospitals in the North Shore area of Chicago substantially lessened competition in violation of §7 of the Clayton Act and ordering the divestiture of one of the hospitals. The ALJ noted that the FTC's challenge to the combination was made after the transaction was completed in January 2000 and, thus, presented an opportunity to examine the actual effects of the transaction. The ALJ found that, in addition to a significant increase in concentration in the relevant market, the merged hospitals' prices increased substantially more than those of comparable hospitals after the merger, resulting in higher costs to insurers as well as consumers.

The ALJ stated that in some prior hospital merger cases, courts assumed that managed care organizations would steer their members to more distant hospitals in response to price increases by the merged hospitals and therefore defined the relevant geographic market to include the more distant hospitals. In this case, however, the ALJ found that post-merger evidence showed that managed care organizations did not send their members to the more distant hospitals in response to price increases of more than 5 percent. The ALJ noted that managed care organizations are constrained in their ability to steer members to more distant hospitals because employers demand that conveniently located hospitals be included in health care networks. The hospitals have sought review of the initial decision by the full commission.

***Evanston Northwestern Healthcare Corp. and Highland Park Hospital*, CCH Trade Reg. Rep. ¶15,731 (Oct. 20, 2005)**

Comment: The merger challenge reported immediately above serves as a reminder that some mergers may be challenged years after consummation and evaluated in the light of market conditions at the time of the challenge.

Predation

Spirit Airlines, a low-fare airline targeting price-sensitive leisure passengers, brought a monopolization suit against Northwest Airlines, alleging that Northwest engaged in predatory behavior on the Detroit-Boston and Detroit-Philadelphia routes in order to force Spirit

out of those markets. A district court granted summary judgment for Northwest and the U.S. Court of Appeals for the Sixth Circuit reversed, observing that: Prior to Spirit's entry, Northwest had a 72 percent share of traffic on the Detroit-Philadelphia route and 89 percent of the Detroit-Boston route. Following Spirit's entry into these routes in early 1996, Northwest allegedly reduced its fares dramatically and increased the number of daily flights. By fall 1995, Spirit abandoned these markets and Northwest raised its prices and reduced the number of flights to the previous levels.

Spirit argued that Northwest's low fares were predatory, that is, below its average variable cost, when the relevant market was defined to include only the customers served by Spirit on each of the two routes—point-to-point price-sensitive leisure travelers—and excluded price-insensitive business travelers and connecting travelers who fly through Detroit. On the other hand, Northwest's experts examined overall route profitability—comparing revenue from all passengers to the average cost—and argued that Northwest's prices were above its average variable costs. The district court held that the relevant market could not be restricted to a certain class of passengers but rather must include all passengers on a given route.

The Sixth Circuit ruled, however, that a reasonable jury could find that the proper relevant market is limited to leisure travelers, noting that Northwest's internal documents recognize the price-sensitive or leisure traveler as a distinct market. Spirit's predatory pricing analysis was thus deemed economically plausible and should not have been rejected by the district court. The appellate court also found that a trier-of-fact could reasonably find that Northwest recouped any losses from its predatory pricing within a short period following Spirit's exit from the two routes.

***Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 2005-2 CCH Trade cases ¶75,003**

Comment: The definition of the relevant market often determines the outcome of antitrust cases. In suits alleging a violation of §2 of the Sherman Act, successful characterization of the defendant as a monopolist may turn upon the definition of the relevant market. In the case reported immediately above, the definition of the proper relevant market also impacted whether Northwest's prices could be found to be predatory.

The Federal Circuit held that offering to license patents covering compact disk manufacturing only as a package rather than individually did not constitute patent misuse.

Patent Misuse

The U.S. Court of Appeals for the Federal Circuit held that offering to license patents covering compact disk manufacturing only as a package rather than individually did not constitute patent misuse. Defendants in an infringement action asserted that the patents were unenforceable under the patent misuse doctrine because the patent holder did not give the option of licensing individual patents. The appellate court found that even though some of the patents included in the package were nonessential, the arrangement did not constitute an unlawful tie or patent misuse because the licensees are not required to use technology covered by the nonessential patents and there was no evidence that the license fee would have been lower if the nonessential patents were not included in the package.

***U.S. Philips Corporation v. International Trade Commission*, 424 F3d 1179 (2005)**

Comment: The patent misuse doctrine applies antitrust law principles to patent licensing. The Patent Act provides that a party seeking to assert the defense of patent misuse must demonstrate that the patent holder possesses market power. This contrasts with the Federal Circuit's recent ruling that a patent holder is presumed to have market power in antitrust tying claims under the Sherman Act. That decision, *Independent Ink v. Illinois Tool Works*, is being reviewed by the Supreme Court.

Restraint of Trade

The U.S. Court of Appeals for the Second Circuit affirmed dismissal of a complaint alleging that the settlement of patent litigation between the manufacturer of a brand-name drug for the treatment of breast cancer and a generic drug maker constituted a conspiracy to monopolize the market in violation of the Sherman Act. The appellate court ruled that a $21 million "reverse payment" from the patent holder to the generic drug maker to settle a patent dispute was not per se unlawful because the legislation enacted to promote generic entry created an environment that encourages patent holders to pay to protect their monopolies. The Second Circuit also stated that the fact that the patent holder settled after losing in the district court and before the appeal did not establish, without more, that the settlement agreement was unlawful. The court noted that the settlement of disputes, including patent infringement suits, is to be promoted rather than discouraged by risk of antitrust liability.

***In re Tamoxifen Citrate Antitrust Litigation*, 2005-2 CCH Trade Cases ¶74,992**

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