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Three Tenors Agreement Condemned Under Truncated Analysis

The U.S. Court of Appeals for the District of Columbia Circuit affirmed the Federal Trade Commission's (FTC) ruling that participants in a joint venture to release a musical recording acted unlawfully by agreeing not to discount or promote similar previously-released recordings. The U.S. Court of Appeals for the Fifth Circuit affirmed dismissal of claims that an incumbent local telecommunications provider violated the Sherman Act when it increased the cost of telephone calls to a rival's paging services. Other recent antitrust decisions of interest included a determination by a New Jersey state appellate court that indirect purchasers cannot recover money damages under that state's antitrust laws.

Restraint of Trade

Three renowned opera singers, José Carreras, Placido Domingo and Luciano Pavarotti, performed as the "Three Tenors" in a concert coinciding with the World Cup soccer finals in 1990. One record company distributed the recording of the 1990 Three Tenors concert, which became one of the best-selling classical albums of all time. The Three Tenors performed again during the 1994 World Cup soccer finals. The 1994 recording was distributed, also with great success, by a second record company. The two record companies agreed to distribute the recording of the planned 1998 Three Tenors concert jointly.

According to the FTC, subsequent to the execution of the joint venture agreement, the parties discussed the possible effect of marketing the two prior Three Tenors' albums on the upcoming 1998 concert album. Around the same time, the companies learned that the repertoire of the 1998 concert would substantially

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overlap those of the two prior concerts. The commission found that the record companies agreed to suspend advertising and discounting the prior releases for two and a half months following the expected release of the 1998 Three Tenors recording.

The commission determined that the moratorium was "inherently suspect"—because agreements to prohibit discounts and advertising by their nature tend to raise prices and reduce output—and therefore should be presumed unreasonable. One record company had settled with the commission soon after the issuance of an administrative complaint and the other, having contested the administrative proceeding, appealed to the D.C. Circuit. The federal court of appeals affirmed the commission's conclusion as well as its analytic framework, under which the agreement was neither examined under the rule of reason nor condemned as a per se violation.

The appellate court observed that, over the last 25 years, the U.S. Supreme Court's approach to evaluating claims under §1 of the Sherman Act has evolved from a dichotomous categorical approach, which subjected agreements to either per se condemnation or detailed rule-of-reason analysis, to an approach in which the scope of the examination is tailored to each specific case along a continuum from per se treatment to full-blown rule-of-reason analysis.

The D.C. Circuit rejected the record company's contention that, if the restraint is not per se unlawful, the commission was required to prove that it actually harmed competition in a relevant market. Instead, the appellate court approved the commission's analytical approach, introduced in the FTC's 1988 *Massachusetts Board of Optometry* decision, whereby if a restraint is deemed "inherently suspect"—because economic learning and market experience suggest that this kind of restraint likely impairs competition—it is summarily condemned unless the defendant comes forward with some plausible competitive justification for the restraint. The court agreed with the commission's conclusion that even though the agreement was not a per se violation, it was presumptively unlawful, stating that an agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price-fixing agreement between competitors.

The appellate court noted that the presumption of illegality arises not necessarily from anything "inherent" in the restraint but from the "close family resemblance" between the restraint and other practices already condemned consistently in the past. The court added that the categories of restraints subject to such summary condemnation must evolve as economic learning and market experience develop.

The court also rejected the record company's competitive justification that the moratorium prevented "free riding" by the venturers' prior Three Tenors releases, finding that such "free riding" was in fact the competition between products that were not part of the joint venture.

***PolyGram Holding, Inc. v. Federal Trade Commission*, 2005-2 CCH Trade Cases ¶74,870**

Comment: The somewhat unusual facts recited above make this case an odd choice for disposition by a rule based upon "close family resemblance," economic learning and market experience with certain classes of restraints. Outlawing classes of restraints without rule-of-reason analysis risks limiting procompetitive conduct as well as our understanding of the likely and actual effects of particular practices.

In addition, it is not clear whether the "inherently suspect" analytical approach utilized by the FTC in this case will be limited to administrative cases arising under the FTC Act or will be applied in Sherman Act cases as well. Nor is it clear whether this approach will be limited to agreements that could be condemned as per se unlawful if not for their connection to a legitimate joint venture. Finally, taken together with the U.S. Court of Appeals for the Ninth Circuit's 2004 *Dagher* decision, which will be reviewed by the Supreme Court next term, practitioners involved in structuring and evaluating joint ventures must counsel with caution, particularly where the parties to the venture remain competitors in certain markets or product lines.

Refusal to Deal

A provider of paging and other telecommunications services brought suit claiming that the incumbent local telephone services provider in San Marcos, Texas, violated §2 of the Sherman Act by increasing the cost of making calls to the plaintiff's paging services. The Fifth Circuit affirmed the lower court's dismissal of the antitrust claims, stating that the alleged facts do not fit within the narrow exception to the general rule that even monopolists may refuse to deal with a rival. The appellate court noted that the incumbent was not alleged to have given up short-term profits in the hopes of driving the paging service provider out of business, as was the case in the Supreme Court's 1985 *Aspen Skiing* decision. Instead, the incumbent most likely profited from converting calls to the plaintiff's services from flat-rate local calls to long-distance toll calls.

***ASAP Paging, Inc. v. CenturyTel of San Marcos*, 2005-2 CCH Trade Cases ¶74,849**

Comment: Having identified *Aspen Skiing* as "at or near the boundary of Section 2 liability," the Supreme Court's 2004 *Trinko* decision has focused the attention of courts and litigants on the unique facts and rationale of the 1985 case when examining refusal to deal claims. As the case reported immediately above demonstrates, plaintiffs seeking to bring antitrust claims based on a refusal to deal by a monopolist may be required to prove a prior voluntary course of dealing with the monopolist and a subsequent refusal to deal that sacrifices the monopolist's short-term profits for the purpose of eliminating a competitor.

Indirect Purchasers

A New Jersey state appellate court ruled that a purchaser of tires lacked standing to bring class-action damages claims against manufacturers alleged to have fixed the prices of carbon black, a primary ingredient in tires, in violation the New Jersey Antitrust Act. The Superior Court, Appellate Division, reversed the trial court's denial of the defendants' motion to dismiss the complaint. The appellate court stated that New Jersey follows federal antitrust law in interpreting its own antitrust statute and, adhering to the U.S. Supreme Court's 1977 *Illinois Brick* decision, limits the private right of action to those who purchased the affected product directly from defendants. The appellate court added that the New Jersey Legislature declined to enact an *Illinois Brick* "repealer" statute, as some other states have done.

***Sickles v. Cabot Corp.*, 2005-2 CCH Trade Cases ¶74,858 (N.J. Superior Court, Appellate Division)**

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Acquisitions

The FTC announced a proposed settlement of its challenge to an acquisition by the owner and operator of nine casinos in the United States and Canada of the owner and operator of six casinos in the Midwest and South. The commission alleged that the parties to the agreement operate the only two establishments offering casino services in Baton Rouge, La. The complaint defines casino services as the combination of slot machine, video poker machine, table gaming, and associated amenities such as parking, food and beverages, and entertainment. The consent order requires that the acquiror divest its Baton Rouge casino to a pre-approved buyer.

***Penn National Gaming, Inc.*, CCH Trade Reg. Rep. ¶15,780 (July 28, 2005)**

Macquarie Airport Group and Ferrovial Aeropuertos jointly agreed to acquire Exeter International Airport, located in the South West of England, from Devon County Council, the municipal authority. Ferrovial and Macquarie jointly control and operate the airport in nearby Bristol. Macquarie has control of or a substantial stake in a number of other airports around the world, including the Rome and Brussels airports. Ferrovial also has significant investments in various airports.

Following the submission of pre-merger notification to the European Commission (EC), the United Kingdom Office of Fair Trading (OFT) requested that the EC refer the proposed transaction to it pursuant to Article 9(2)a of the European Council Merger Regulation, originally issued in 1989 and revised in 2004, which provides that a Member State may request referral of a proposed transaction that threatens to significantly affect competition within a distinct market within that Member State. If the EC agrees to refer the transaction, it cedes its jurisdiction over the transaction to the Member State's competition authority.

In order to obtain such referral, the Member State must demonstrate that, based on preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition. In its request for referral, the OFT stated that the South West of England may be a distinct market for the supply of airport infrastructure facilities to airlines and that, when combined with their control of Bristol Airport, Macquarie and Ferrovial's post-acquisition share of this market could raise competitive concerns. The OFT also disclosed that it had received comments from third parties. In announcing its decision to refer the investigation to United Kingdom competition authorities, the EC stated that it agreed with the OFT's preliminary market analysis and with the contention that local regulators are best placed to carry out the investigation.

***Macquarie Airport Group and Ferrovial Aeropuertos*, European Commission (IP/05/1048, Aug. 9, 2005, available at europa.eu.int)**

Comment: The system for allocation of merger review authority between the European Commission and its member states differs significantly from the American federal system, where the states may pursue an independent or coordinated inquiry during the pendency of a federal investigation or even after its conclusion and where no formal method exists to determine whether a state investigator is better suited to examine a proposed transaction with significant local impact. The European merger control regulations in this respect may be a step in the direction of greater efficiency in the antitrust review of corporate acquisitions.