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ANTITRUST

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Anticompetitive Acts in Standard-Setting Organizations

The Federal Trade Commission (FTC) ruled that deceiving a technology standard-setting organization could constitute unlawful exclusionary conduct while a district court decided that allegations of failure to honor a promise made to such an organization did not state an antitrust claim.

Other recent antitrust developments of interest included a decision by the U.S. Court of Appeals for the Federal Circuit that prohibiting farmers from replanting second-generation seeds containing patented technology was not patent misuse.

Standard-Setting Organizations

The FTC ruled that Rambus Inc., a developer of semiconductor technology, violated the FTC Act by concealing from a standard-setting organization that it had applied for patents covering the computer memory chip standards under consideration by the organization and amending its patent applications so that its patents would cover the adopted standards. The FTC noted that the organization's rules required disclosure of intellectual property rights that might be relevant to standards under consideration. The FTC stated that by deciding not to make its patent claims known to the computer memory industry until chip makers were locked into standards incorporating the proprietary technology, Rambus stood to obtain the ability to collect substantial royalties. Setting aside the findings and conclusions of an administrative law judge —who ruled that the antitrust laws did not impose a duty on Rambus to disclose its patent applications to the standard-setting organizations—the commission concluded that Rambus distorted the standard-setting process and engaged in an anticompetitive "holdup" of the computer memory industry.

***Rambus Inc.*, 2006-2 CCH Trade Cases ¶75,364**

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A supplier of semiconductors for wireless communications claimed that a wireless communications technology had violated the Sherman Act by firm refusing to license its technology, which had been adopted by an industry standards development organization, on fair, reasonable and non-discriminatory terms. The district court granted the defendant's motion to dismiss the complaint, stating that the defendant's conduct, although allegedly exclusionary, did not fall within the narrow exception to the right to refuse to deal with others. The court added that the defendant's inducement of the organization to adopt its technology by false promise to license its technology on fair terms may state a cause of action on another legal theory, but does not give rise to an antitrust claim.

The court also observed that the defendant's conduct could not eliminate competition in a relevant technology market because the adoption of a standard had already eliminated competition in the market.

***Broadcom Corp. v. Qualcomm Inc.*, 2006 WL 2528545 (D.N.J. Aug. 31, 2006)**

Comment: The two decisions reported immediately above take different approaches on addressing the contention that misrepresentations and false promises, which generally do not give rise to antitrust liability, may constitute unlawful exclusionary conduct in the standard-setting context as well as being illegal on other grounds.

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Patent Misuse

An agricultural technology firm brought a patent infringement suit against farmers for replanting second-generation soybean and cotton seeds containing patented herbicide-resistant technology and the farmers asserted unlawful tying and patent misuse defenses. The Federal Circuit affirmed the district court's dismissal of these defenses, stating that the technology firm had the right to exclude others from using its technology and did not exceed the scope of its patent by preventing farmers from using the patented technology when it self-replicated in the form of second-generation seeds. The appellate court also stated that the technology fee farmers were required to pay when they bought seeds containing the patented technology from seed sellers was essentially a royalty for use of the patented technology.

***Monsanto Co. v. Scruggs*, 2006-2 CCH Trade Cases ¶75,376**

Restraint of Trade

A cigarette maker brought suit against a discount cigarette retailer alleging that it violated the Lanham Act by reimporting trademarked cigarettes designated for foreign markets. The discounter countersued, claiming that the cigarette maker conspired with other retailers to drive it out of business in violation of §1 of the Sherman Act.

The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment but disagreed with its reasoning, stating that the cigarette maker could have possessed market power even though its market share was only around 25 percent because the market was highly concentrated and price changes did not cause dramatic swings in its sales. Instead, the appellate court found that there was insufficient evidence to support the claim that the cigarette maker organized a horizontal conspiracy among retailers to eliminate the discounter.

***R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 2006-2 CCH Trade Cases ¶75,393**

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A horse show promoter brought suit challenging as an unreasonable restraint of trade an equestrian federation's "mileage rule" prohibiting horse show promoters from simultaneously holding similar events within a set geographic distance. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of the complaint because the complaining promoter did not allege that it sought to obtain a waiver of the rule in accordance with the federation's procedures. The appellate court stated that managers of federation-sanctioned competitions could not be shown to have collectively refused to waive the rule's requirement because the promoter did not properly seek a waiver.

***JES Properties Inc. v. USA Equestrian, Inc.*, 2006-2 CCH Trade Cases ¶75,368**

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A new entrant into the business of distribution of aluminum products claimed that distributors in Oklahoma conspired to injure it by refusing to deal with its suppliers in violation of §1 of the Sherman Act. A district court granted summary judgment to the defendants because there was an insufficient showing of concerted action. The U.S. Court of Appeals for the Tenth Circuit reversed and stated that circumstantial evidence, taken in conjunction with evidence of threats of collective refusal to deal, were sufficient to require a trier of fact to determine whether the defendants entered into an illegal agreement not to patronize a supplier who sold to the new entrant. The appellate court added that such a boycott could be economically plausible even in the absence of price fixing or market allocation agreements among the defendants, who could have been trying to keep an aggressive newcomer from lowering prices or taking away market share.

***Champagne Metals v. Ken-Mac Metals, Inc.*, 2006-2 CCH Trade Cases ¶75,373**

Minimum Advertising Price

A district court upheld an Internet retailer's complaint alleging that a manufacturer of home improvement products unlawfully restrained trade by prohibiting distributors from advertising its products for less than 20 percent. Relying on the U.S. Court of Appeals for the Second Circuit's 2005 *Twombly* opinion, the court stated that the retailer sufficiently alleged the existence of an agreement to survive a motion to dismiss on the pleadings, as it was not necessary to allege details of conspiratorial conversations before discovery, and the complaint's allegations of an agreement were "sparse" but "plausible".

***Worldhomecenter.com Inc. v. Thermasol Ltd.*, 2006-2 CCH Trade Cases ¶75,370 (EDNY)**

Relevant Market

Antitrust claims brought by a physician practice group against a hospital were dismissed for failure to allege sufficiently a proper relevant market. The district court stated that the plaintiffs' proposed geographic market was gerrymandered to exclude the hospital's competitors and observed the alleged market cuts off half of the area surrounding the hospital without any explanation other than to artificially increase the hospital's market share.

***Ferguson Medical Group LP v. Missouri Delta Medical Center*, 2006-2 CCH Trade Cases ¶75,387 (E.D. Missouri)**