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ANTITRUST

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Spurned Bidder May Bring Antitrust Challenge

The U.S. Court of Appeals for the Eleventh Circuit ruled that a losing bidder for steel producing assets had standing to bring antitrust claims against the successful purchaser. The U.S. Court of Appeals for the Sixth Circuit decided that the former owner of a car dealership lacked standing to bring claims of an unlawful conspiracy to harm the dealership.

Other recent antitrust developments of interest included the Department of Justice's announcement that it did not intend to challenge a standard-setting organization's proposed policy requiring disclosure of asserted patent rights and the most restrictive terms on which licenses may be granted.

Antitrust Injury

The dominant producer of hot rolled steel coil in the Southeast United States with an 85 percent share of the market brought the hot rolled coil producing assets of a bankrupt steel mill and then sold the assets to Asian buyers for a substantial profit. A group of investors that also sought to acquire the assets brought suit claiming that the steel producer eliminated competition by acquiring and selling to foreign buyers assets necessary for new entry in the domestic market in violation of §1 and §2 of the Sherman Act.

A district court granted summary judgment in favor of the steel producer on the ground that the group failed to demonstrate that it suffered antitrust injury and the Eleventh Circuit reversed. The appellate court stated that the group's asserted injury—its exclusion from the domestic market—was inseparable from the alleged harm to competition and consumers, who were denied the benefits of lower prices that would likely follow from the entry of a new competitor.

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The court rejected the steel producer's contention that the group caused its own injury by failing to submit a higher bid even though it was capable of doing so.

***Gulf States Reorganization Group, Inc. v. Nucor Corp.*, 2006-2 CCH Trade Cases ¶75,442**

An individual, the former owner and operator of a car dealership, claimed that he was forced to sell his interest in the dealership because of an automaker's participation in a resale price maintenance scheme and a conspiracy to retaliate against his discounting practices. A district court denied the automaker's motion to dismiss for lack of standing but certified the issue for interlocutory appeal. The Sixth Circuit reversed, stating that the individual did not suffer antitrust injury as he was neither a competitor nor a consumer in the relevant market and his losses were derivative of the effects of the alleged conspiracy on the dealership.

***Caruana v. General Motors Corp.*, 2006-2 CCH Trade Cases ¶75,441**

Standard-Setting Organizations

The Department of Justice announced that it had no present intention to challenge the adoption by a computer architecture standard-development organization of a policy requiring participants to disclose patent rights needed to implement the eventual standard and declare in advance the most restrictive terms upon which they will license their patents.

The department stated that the disclosure of each patent holder's most restrictive licensing terms would prevent participants from imposing onerous licensing terms after it is too late to modify the developing standard. At the same time, it would enable participants to compare substitute technologies on both technical value and licensing terms and encourage competition between alternative technologies during the standard development process. The department noted that joint negotiation of license terms is prohibited by the policy and that each licensee will negotiate separately with the patent holder.

***VMEbus International Trade Association (VITA)*, Business Review Letter (Oct. 30, 2006), available at www.usdoj.gov/atr**

Immunities

Members of electric cooperatives in Tennessee brought suit claiming that agreements with the Tennessee Valley Authority (TVA) restricting the cooperatives' ability to distribute refunds or

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reduce rates constituted unreasonable restraints of trade in violation of the Sherman Act. The Sixth Circuit ruled that although the TVA is not immune from antitrust suits based on its status as a federal corporation, the federal statute authorizing it to enter into contracts impliedly repealed the antitrust laws. Citing the Supreme Court's 1975 ruling in *Gordon v. New York Stock Exchange*, the appellate court stated that applying the antitrust laws' purpose of protecting competition in this context would conflict with the TVA's statutory mandate to provide services and promote use of electric power by small or local industries.

***McCarthy v. Middle Tennessee Electric Membership Corp.*, 2006-2 CCH Trade Cases ¶75,449**

Acquisitions

The Federal Trade Commission (FTC) announced a proposed settlement of its challenge to a combination of two generic drug companies. The commission alleged that the acquisition would cause competitive harm to consumers in three generic drug markets and the market for organ preservation solutions.

The commission stated that the number of suppliers of generic versions of an antidepressant drug and a combination high blood-pressure drug will be reduced from five to four as a result of the acquisition, that the remaining generic suppliers are of limited competitive significance and that the price of the branded versions of these drugs is so much greater than the generics that they do not have a significant effect on the pricing of their generic equivalents. The commission noted that the merging parties are two of only three suppliers that can supply all three formulations of the antidepressant product (50 mg, 100 mg and 150 mg) in a market where customers prefer to buy all formulations from one supplier.

The FTC also stated that the merging parties were the only two firms in the process of developing a generic version of a drug used to treat symptoms resulting from a ruptured blood vessel in the brain and that the two firms' combined share of the market for solutions used for flushing and preservation during the harvesting of donor organs would be about 90 percent.

The proposed consent agreement requires divestitures of the overlapping products and assets shortly after consummation of the acquisition.

***Barr Pharmaceuticals Inc. and Pliva d.d.*, CCH Trade Reg. Rep. ¶ 15,941 (File No. 061-0217, Oct. 20, 2006), available at www.ftc.gov**

Comment: The settlement reported immediately above demonstrates the compound-specific nature of the FTC's market definition analysis in the pharmaceutical industry. Evidence of substitution of one drug for another should nonetheless be relevant to merger review.

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The Department of Justice announced the settlement of its challenge to a merger that will create the largest bank in Alabama and Mississippi and the second-largest bank in Tennessee. The department alleged that the combination would adversely affect competition in local markets for small business lending. The settlement requires divestitures of 52 branch offices and provides that if certain branch offices are closed within three years of the merger, the combined firm will sell or lease them to a commercial bank at a price that meets or exceeds the best offer from a non-bank buyer.

***Regions Financial Corp. and AmSouth Bancorporation* (Oct. 19, 2006), available at www.usdoj.gov/atr**

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The European Commission (EC) announced its preliminary determination that Italy violated Article 21 of the European Union's Merger Regulation by refusing, without legitimate justification, to authorize completion of the merger of a Spanish firm with an Italian firm. The proposed merger of the two companies, both involved in the management of toll motorways, had been reviewed and approved by the EC, which had exclusive jurisdiction to assess the competitive impact of the combination. Under Article 21, member states cannot apply national competition law to mergers that are subject to EC review and cannot prohibit such mergers other than for the protection of legitimate interests other than competition.

In a separate enforcement action, the EC announced its conclusion that Spain violated Article 21 by imposing asset divestiture conditions on a German energy company's bid to acquire a Spanish energy company after the EC had approved the combination unconditionally.

***Mergers: Commission Sends Preliminary Assessment to Italy on Measures to Block Abertis-Autostrade Merger* (IP/06/1418, Oct. 18, 2006) and *Mergers: Commission Opens Infringement Procedure Against Spain for Not Lifting Unlawful Conditions Imposed by CNE on E.ON's Bid for Endesa* (IP/06/1426, Oct. 18, 2006), both available at ec.europa.eu/comm/competition**

Jurisdiction

Advanced Micro Devices Inc. (AMD) brought suit alleging that rival computer-chip maker Intel Corp. monopolized the market in violation of §2 of the Sherman Act by entering into exclusive deals and encouraging customers to limit their purchases of AMD chips. Intel moved to dismiss AMD's antitrust claims for lack of subject matter jurisdiction, to the extent that the injuries asserted are based upon the foreign effects of Intel's allegedly exclusionary conduct.

A district court ruled that the claims of domestic injury from lost foreign sales were nothing more than "ripple effects" and did not satisfy the statutory jurisdictional requirement of substantial, direct and foreseeable effects on the U.S. market.

***In re Intel Corp. Microprocessor Antitrust Litigation*, 2006-2 CCH Trade Cases ¶75,435 (D. Del.)**