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ANTITRUST

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Alleging Merely Parallel Conduct Held Inadequate

The U.S. Supreme Court ruled that a complaint alleging that telecommunications firms refrained from entering one another's territory was insufficient to assert an antitrust violation without facts indicating that a conspiracy was "plausible." The High Court also decided that securities law and regulations implicitly precluded antitrust claims against underwriters of initial public offerings (IPOs) of high-tech stocks.

Other recent antitrust developments of note included a district court's denial of a motion by the Federal Trade Commission (FTC) to preliminarily enjoin the merger of bulk gasoline suppliers in northern New Mexico and a complaint filed by the Department of Justice seeking to undo the combination of the only two newspapers in Charleston, W.Va.

Pleading

Subscribers to local telephone and Internet services asserted that incumbent local telecommunications companies unlawfully agreed to refrain from competing in each others' territories. The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and the U.S. Court of Appeals for the Second Circuit reinstated the complaint.

The Supreme Court reversed the appellate decision and ruled that a bare assertion of an unlawful agreement will not suffice to plead an antitrust conspiracy claim. The Court rejected the plaintiffs' argument that the existence of an agreement can be inferred from allegations of the defendants' failure to pursue attractive business opportunities in nearby geographic areas served by their co-defendants. The Court observed that independent motives naturally explained the defendants' parallel behavior and stated that "a conclusory allegation of agreement at some unidentified point" was insufficient. The Court stated that it was not requiring a heightened pleading standard for antitrust cases, but rather enough facts to state a claim that is "plausible on its face."

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The Court took note of the substantial costs that antitrust discovery can impose and the need for a pleading standard that allows courts to avoid such costs in cases with "no reasonably founded hope" of discovering evidence to support a conspiracy claim.

***Bell Atlantic Corp. v. Twombly*, 2007-1 CCH Trade Cases ¶75,709**

Implied Immunity

In another decision reversing the Second Circuit's reinstatement of an antitrust complaint, the Supreme Court dismissed claims brought by purchasers of IPO securities. The complaint alleged that underwriting firms conspired to sell sought-after IPO shares of high-technology companies only to buyers that committed to provide additional compensation to the underwriters by requiring investors to pay high commissions on subsequent purchases, to buy other less desirable securities ("tying"), and to buy additional shares of the same security at escalating prices ("laddering").

The district court dismissed the complaint on the ground that securities law and regulations impliedly preclude the antitrust claims and the Second Circuit reversed, reinstating the complaint. The Supreme Court in turn reversed the appellate ruling and stated that the securities law and this antitrust complaint were clearly incompatible.

The Court set out four factors to be considered in deciding whether securities law and regulations implicitly preclude application of the antitrust laws and concluded that (1) joint efforts by underwriters to market and sell IPO securities are central to the proper functioning of capital markets; (2) the SEC is authorized to regulate the conduct at issue; (3) the SEC has exercised its legal authority to do so; and (4) the concurrent application of both antitrust and securities law would produce conflicting guidance or standards of conduct.

The Court stated that the antitrust claims in this case are in significant conflict with the securities law even though the Securities and Exchange Commission (SEC) has disapproved of the conduct alleged in the complaint to violate the antitrust laws. The Court expressed a concern that, in light of the fine line between permissible and forbidden conduct under the securities laws, antitrust courts throughout the country are likely to make serious mistakes adjudicating such cases and thus underwriters and other firms are likely to avoid lawful or desirable

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conduct to reduce the risk of treble damage antitrust suits.

The Court also observed that permitting an antitrust suit in this case does not serve a significant enforcement function because the SEC actively regulates the challenged conduct.

***Credit Suisse Securities (USA) LLC v. Billing*, No. 05-1157, 2007 U.S. LEXIS 7724 (June 18, 2007)**

Comment: Both of the Supreme Court decisions reported immediately above involve a ruling dismissing private lawsuits at an early stage in litigation and reflect the concern that the costs and risks of treble damage actions may discourage firms from engaging in permissible or even procompetitive behavior.

Acquisitions

A district court denied the FTC's request for an order preliminarily enjoining the merger of two firms engaged in the bulk supply of gasoline to northern New Mexico because the commission did not demonstrate a substantial likelihood that it will be able to prove that the merger may lessen competition.

The court stated that the merging parties do not compete directly against each other and that the increase in market concentration is not likely to decrease competition because existing suppliers—which deliver gasoline to northern New Mexico from nearby refineries as well as by truck from the Gulf Coast and El Paso—are likely to constrain any price increase or output reduction by the merged firm

The court also observed that even though transportation of oil by truck cannot replace supply by pipeline, it serves as a constraint on any attempt by the merged firm to reduce supply.

***FTC v. Foster*, 2007-1 CCH Trade Cases ¶75,725 (D.N.M.)**

The Department of Justice filed a complaint alleging that the acquisition of a daily newspaper in Charleston, W.Va., in May 2004 by the only other local daily newspaper violated federal antitrust laws. Despite the fact that until the transaction the two newspapers lawfully coordinated certain financial and operational aspects of their business—including sales of subscriptions and advertisements— under a "joint operating agreement" in accordance with the Newspaper Preservation Act, the department viewed the prior arrangement as competitive in some respects because the newspapers had maintained separate ownership and control of the their editorial content and style.

The complaint alleged that the transaction—which was not reviewed prior to its consummation because it was not reportable under the Hart-Scott-Rodino premerger notification statute—was not immune from antitrust scrutiny under the Newspaper Preservation Act because it was part of a plan to eliminate one of the two newspapers, leaving only one daily newspaper in the Charleston area, and would have eliminated competition to attract readers.

The Puerto Rico legislature enacted a law requiring an environmental deposit on imports of motor oil. Trying to force the legislature to repeal the statute, lubricants importers allegedly agreed with one another to stop importing the products into Puerto Rico.

***United States v. Daily Gazette Co.*, (S. D.W.Va. May 22, 2007), CCH Trade Reg. Rep. ¶45,107 No. 4873, also available at www.usdoj.gov/atr**

Comment: The enforcement action reported immediately above serves as a reminder to practitioners that nonreportable transactions are not immune from challenge by the antitrust agencies even after they have been consummated.

The Department of Justice announced the closing of its investigation into the proposed acquisition of a financial futures exchange by a rival. The department stated that even though the two exchanges account for most financial futures, especially interest rate futures, traded on U.S. exchanges, they rarely compete head-to-head because their products provide means to hedge different risks and they are unlikely to introduce new products that compete directly absent the proposed transaction. The department also noted that the merger was not likely to foreclose entry by other exchanges into financial futures trading.

***Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Chicago Mercantile Exchange Holdings Inc.'s Acquisition of CBOT Holdings Inc.* (June 11, 2007), available at www.usdoj.gov/atr**

Group Boycott

The Puerto Rico legislature enacted a law requiring an environmental deposit on imports of motor oil. In an attempt to force the legislature to repeal the statute, importers of lubricants allegedly agreed with one another to stop importing the products into Puerto Rico. The FTC alleged that the importers' boycott was a horizontal output-restricting agreement and a per se violation of federal antitrust law.

In announcing the proposed settlement of the charges, the commission stated that the challenged conduct does not constitute petitioning activity that is immune from antitrust liability under the Supreme Court's *Noerr-Pennington* doctrine because the coordinated action in this case was meant to influence the government by harming consumers directly rather than jointly seeking governmental action that may restrain competition. The FTC also distinguished the importers' conduct from group boycotts that seek a purely political objective and do not result in a pecuniary benefit for the participants.

***American Petroleum Company Inc.*, File No. 061 0229 (June 14, 2007), available at www.ftc.gov.**

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