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ANTITRUST

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# Court Rejects FTC's Narrow Market Definition

The Federal Trade Commission's (FTC) efforts to block the merger of two natural and organic supermarket chains failed when a district court ruled that the merging stores faced competition from conventional supermarkets. The FTC affirmed an administrative decision that a hospital merger was unlawful but ordered that the hospitals form two separate and competing contracting teams instead of requiring a divestiture.

Other recent antitrust developments of note included a decision by the European Court of First Instance that a software firm abused its dominant market position by incorporating a media-playing application into its operating system and refusing to provide rivals with technical data as well as a ruling by the U.S. Court of Appeals for the Ninth Circuit that bundled discounts were not unlawful unless they resulted in below-cost pricing.

## Acquisitions

A district court rejected the FTC's challenge to a combination of two natural and organic supermarket chains, denying the commission's request for an order enjoining consummation of the transaction.

The court stated that the FTC failed to meet its burden to prove that the relevant market was limited to premium natural and organic supermarkets—a market which would consist almost entirely of the two merging firms—and that if the proper relevant market included all supermarkets then the merger was not likely to lessen competition.

The court was not persuaded by the FTC's argument that, at least for "core" customers,

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conventional supermarkets are not reasonable substitutes for premium natural and organic supermarkets. Instead, the court agreed with the defendants' contention that the proper focus is on "marginal" customers, those who would switch to other stores if the merged firm raised prices, and whether enough such customers would switch to make a price increase unprofitable. The court stated that as conventional supermarkets continue to reposition themselves and increase their offerings of natural and organic products, they will be able to discipline any price increase by the merged firm.

The court observed that differentiation—including customer service, ethnic appeal, low prices, freshness, and unique store experience—constituted a method of competition between supermarkets rather than proof of the existence of more narrow relevant markets or submarkets.

The court reviewed the economic evidence presented and observed that the acquiring firm's prices did not vary depending upon whether the acquired firm had a store nearby and that when it entered a new market where the acquired firm already operated, the acquiring firm took most of its business from traditional grocery stores rather than the acquired firm.

The U.S. Court of Appeals for the District of Columbia Circuit denied the FTC's motion for an injunction pending appeal and stated that the commission did not show that the district court abused its discretion by making clearly erroneous factual findings or errors of law.

***FTC v. Whole Foods Market Inc.*, 2007-2 CCH Trade Cases ¶75,831 (D.D.C.), 2007 U.S. App. LEXIS 20539 (D.C. Cir. Aug. 23, 2007)**

***Comment:*** The question of whether the relevant market inquiry should focus on those marginal customers who might switch to another provider if prices increase or core customers who are unwilling or unable to switch may depend upon the seller's ability to identify and charge different prices to these distinct groups of customers.

Affirming a decision by an administrative law judge (ALJ), the FTC ruled that a merger of two operators of hospitals located in the North Shore suburbs of Chicago enabled the hospitals to exercise market power in violation of §7 of the Clayton Act.

The commission noted that premerger statements by the hospitals' executives and advisers anticipated that the combination would provide an opportunity for price increases and that the hospitals did in fact raise their prices soon after the acquisition was consummated in 2000. The FTC rejected the hospitals' argument that the post-merger price increases merely reflected efforts to raise below-competitive prices to market rates and stated that the combined hospital was able to increase significantly its prices because managed care organizations and other third-party payors considered it commercially necessary to include at least one of the merged firm's hospitals in their networks. The commission added that the merged hospitals' practice of offering only a single multihospital contract undermined third-party payors' ability to negotiate for lower prices in exchange for including a given hospital in their networks.

The commission disagreed with the divestiture ordered by the ALJ to remedy the anticompetitive effects of the merger and stated that a conduct remedy—requiring the

establishment of two separate negotiating teams—would recreate competition between the hospitals without the likely high costs of separating hospitals that have functioned as a single firm for seven years.

***Evanston Northwestern Healthcare Corp.*, 2007-2 CCH Trade Cases ¶75,814**

***Comment:*** Challenges of completed acquisitions provide an unusual opportunity to examine the actual effects of a merger rather than engage in the customary predictive analysis, but firms that have integrated their operations may not always be the best candidates for curative divestiture if actual anticompetitive effects are identified, as the decision reported immediately above demonstrates.

The FTC announced the settlement of charges that a dialysis clinic operator agreed to pay a rival to close three clinics in Rhode Island and Massachusetts in violation of §5 of the FTC Act. The commission also alleged that the agreement to buy additional clinics from the rival clinic operator would have lessened competition in outpatient dialysis services in Warwick and Cranston, R.I., in violation of §7 of the Clayton Act. The FTC cautioned that agreements to pay a competitor to exit a market are per se unlawful.

***American Renal Associates Inc.*, CCH Trade Reg. Rep. ¶16,045 (Sept. 7, 2007)**

***Comment:*** Although, as in the enforcement action reported immediately above, paying a rival to close a facility or reduce output is summarily condemned by the antitrust authorities, there is no general prohibition on a firm unilaterally deciding to shut a facility.

## Monopolization

The European Court of First Instance upheld the European Commission's 2004 decision that a U.S.-based software company abused its dominant position in the personal computer operating system market in violation of Article 82 of the European Treaty. The court stated that the commission did not commit manifest error in its determinations (1) that by incorporating or bundling its media player software application into its operating system, the software company engaged in unlawful tying and excluded suppliers of other streaming media applications and (2) that the software company refused to share information that rival suppliers of work group servers needed in order to fully interoperate with the software company's operating system.

The Court of First Instance also upheld the relief ordered by the commission requiring the software company to offer a version of its operating system without the media player and to disclose interoperability specifications to developers of work group servers.

The U.S. Department of Justice issued a statement commenting on the European court's decision and expressed its concern that the standard applied may chill innovation and discourage competition. The department asserted that under U.S. law even dominant firms are encouraged to compete vigorously and that consumers may benefit when a dominant firm makes an independent decision to add features to its products or to refuse to license intellectual property to rivals.

***Microsoft Corp. v. Commission of the European Communities*, T-201/04 (Sept. 17, 2007), available at curia.europa.eu, and *Assistant Attorney General for Antitrust, Thomas O. Barnett, Issues Statement on European Microsoft Decision* (Sept. 17, 2007), available at www.usdoj.gov/atr**

## Bundling

A hospital operator brought suit alleging that a rival hospital engaged in attempted monopolization in violation of §2 of the Sherman Act by offering greater discounts to third-party payors who used the defendant hospital exclusively for primary, secondary and tertiary hospital services. The plaintiff hospital competed with the defendant on primary and secondary services—common medical services—but was not able to compete on tertiary, or more complex, services. Following a trial, the jury rendered a verdict in favor of plaintiff and awarded damages of $5.4 million, trebled to $16.2 million.

The U.S. Court of Appeals for the Ninth Circuit vacated the judgment. The court rejected the substantial foreclosure standard applied by the district court, which relied on the U.S. Court of Appeals for the Third Circuit's 2003 *LePage's* decision, and observed that condemnation of price-reducing bundled discounts may discourage legitimate price competition. The appellate court stated that bundled discounts should not form the basis of a §2 claim unless the discounts result in prices that are below an appropriate measure of the seller's average variable costs. The court added that in determining whether the bundled prices were below cost, the full amount of any discounts on all the products in the bundle must be allocated to the product or products as to which there was competition.

***Cascade Health Solutions v. PeaceHealth*, 2007-2 CCH Trade Cases ¶75,846**

## Pleading Standards

The U.S. Court of Appeals for the Second Circuit affirmed dismissal on the pleadings of antitrust claims against elevator manufacturers. Citing to the Supreme Court's *Twombly* decision handed down earlier this year, the appellate court stated that conclusory allegations of an agreement at some unidentified point, allegations of parallel prices and contract terms and assertions of anticompetitive behavior in Europe were insufficient to establish a plausible inference of an agreement.

***In re Elevator Antitrust Litigation*, 2007-2 CCH Trade Cases ¶75,847**

## Joint Licensing

A maker of hats and other headwear bearing professional football teams' logos brought antitrust claims alleging that a football league and its member teams restrained trade in violation of §1 of the Sherman Act by granting an exclusive license to another apparel manufacturer. The court granted the defendants' motion for summary judgment and stated that the 32 football teams did not enter into an agreement in restraint of trade by delegating the exploitation of their intellectual property rights to a common actor, as they have been doing since 1963. The court reasoned that they were acting as a single entity in this context and thus were not capable of conspiring with one another, relying on the Supreme Court's 1984 *Copperweld* decision.

***American Needle, Inc. v. New Orleans Louisiana Saints*, 2007-2 CCH Trade Cases ¶75,813 (N.D. Ill.)**

## Indirect Purchasers

The Minnesota Supreme Court ruled that a purchaser of automobile tires had standing to bring price fixing claims under state antitrust law against producers of rubber chemi-cals used in the manufacture of tires, among other things. The high court panel stated that the lower court should not have relied on the U.S. Supreme Court's 1983 *Associated General Contractors* opinion in deciding that plaintiff's injury was too indirect to confer standing because Minnesota law expressly provided indirect purchasers with a cause of action.

***Lorix v. Crompton Corp.*, 2007-2 CCH Trade Cases ¶75,815**

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