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ANTITRUST

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'Quick Look' Disfavored for Joint Venture Restraints

An administrative court ruled that a real estate multiple listing service did not unlawfully restrain trade by limiting the dissemination of listings posted by discount brokers. A district court decided that a professional sports league's requirement that member teams participate in joint Internet marketing was not anticompetitive.

Other recent antitrust developments of note included a decision by the U.S. Court of Appeals for the Second Circuit that a terminated distributor did not have standing to bring monopolization claims against a supplier that merged with its main competitor and two Department of Justice enforcement actions challenging acquisitions of minority interest in a rival.

Multiple Listing Services

The Federal Trade Commission (FTC) brought an administrative proceeding alleging that a multiple listing service (MLS) operated by several associations of southeastern Michigan realtors violated antitrust laws by restricting electronic distribution of real estate listings posted by discount brokers.

Traditional brokers provide a variety of services, including showing the property and participating in negotiations, and typically charge the seller a 6 percent commission, which may be shared with a "cooperating" broker that finds a buyer for the property. Discount or limited service brokers typically charge a flat fee and may not provide any services other than placing the property listing on the MLS. The challenged policy provided that discount broker listings, which were be entered into the MLS database and made available to MLS member brokers, would not be transmitted to public real estate Web sites that home buyers could access without the assistance of a broker.

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An administrative law judge (ALJ) dismissed the complaint and rejected the FTC complaint counsel's argument that the policy should be reviewed using an abbreviated "quick look" analysis. The administrative court stated that the traditional rule-of-reason standard should be applied because it was not immediately obvious that the restraint impaired competition and the MLS proffered plausible procompetitive justifications. The ALJ observed that, apart from the U.S. Court of Appeals for the Disctrict of Columbia Circuit's 2005 *Three Tenors* decision, most circuits have tread cautiously when invited to utilize the truncated "quick look."

The ALJ stated that the evidence did not demonstrate that the challenged policy unduly hindered competition. Despite the limitations imposed by the MLS, discount brokers uniformly testified that their businesses were growing even during difficult real estate market conditions. The administrative judge added that there was no evidence that discount brokers' listings stayed on the market for a longer time or sold at lower prices than full-service broker listings. The decision emphasized that discount brokers were not excluded from the MLS database, the most effective real estate marketing tool, which exposed properties to about 80 percent of potential buyers in southeastern Michigan.

The ALJ was also persuaded by the MLS's justifications for the restriction: (1) that the policy sought to prevent free-riding by nonmember sellers who use discount brokers to place a listing on the MLS and then compete with member brokers for home buyers searching for properties on public Web sites, and (2) that the policy increased efficiency by reducing the "bidding disadvantage" for buyers working with cooperating brokers that expect to receive a typical commission of about 3 percent from the seller.

The ALJ observed that the policy was narrowly tailored to address the free rider and efficiency justifications by permitting inclusion of discount listings in the MLS, which is available only to member brokers, while limiting dissemination of listings to public Web sites, which can be accessed by buyers not working with any broker.

Realcomp II, Ltd. **(FTC Docket No. 9320, Dec. 10, 2007), available at www.ftc.gov**

Sports Leagues

A professional hockey team refused to migrate its Web site to the NHL computer server, as required by the league's Internet marketing strategy. The team brought suit seeking to enjoin the league from enforcing the new policy, claiming that it restrained competition between member teams in violation of §1 of the Sherman Act.

A district court rejected the complaining team's contention that the rule was a "naked" restraint that should be subject to a "quick look" standard of review rather than a full-blown rule of reason analysis. The court noted that it failed to "perceive the nudity," as the NHL's new media strategy was designed to improve professional hockey's ability to attract national advertisers and compete against other sports, a legitimate procompetitive justification.

The court denied the preliminary injunction motion and stated that the plaintiff did not meet its burden under the rule of reason to show market power or an adverse effect on competition in a properly defined relevant market.

Madison Square Garden, L.P. v. NHL, **2007-2 CCH Trade Cases ¶75,929 (S.D.N.Y.)**

Comment: Although the FTC has advocated the use of an abbreviated "quick look" analysis, which dispenses with the requirement to demonstrate anticompetitive effects in a properly defined relevant market, the two decisions reported immediately above exhibit reluctance to broaden the application of the truncated standard of review.

Antitrust Injury

A distributor claimed that a manufacturer of crushed stone or "aggregate" unlawfully monopolized the market by acquiring its main rival, refusing to supply the complaining distributor and then raising its prices.

A district court dismissed the complaint for failure to allege antitrust injury and the U.S. Court of Appeals for the Second Circuit affirmed. The court noted that terminated distributors often lack standing to challenge their suppliers' mergers because their particular injury, termination, could have been accomplished by the supplier even if it had not acquired market power. The appellate court stated that the distributor was not injured by higher prices because it was terminated prior to the alleged price hike.

The court rejected the distributor's claim that it should have antitrust standing because it was both a customer and a competitor of the supplier, explaining that the plaintiff's general role in the market is not enough to warrant standing and the anticompetitive effect of the challenged conduct, monopoly prices, must be compared to the actual injury alleged, termination. The court observed that an upstream monopolist has the ability to charge monopoly prices without the help of a distributor, and therefore detriment to competition cannot be asserted by alleging expansion of monopoly power through downstream vertical integration.

***Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 2007-2 CCH Trade Cases ¶75,913**

Minority Acquisitions.

The Department of Justice announced the closing of its investigation into a newspaper publisher's proposed minority investment in its main rival in the San Francisco Bay Area. The department stated that the acquisition would provide the buyer with around 30 percent of the equity of its competitor and that the two firms accounted for most of the daily newspaper readership and advertising in the Bay Area.

The department noted that its investigation examined the possibility that the investment would create an incentive for less vigorous competition between the publishers. The department observed that the publishers will remain subject to antitrust scrutiny under §1 of the Sherman Act because the proposed transaction will not bring them under common ownership or control.

***Statement of the Department of Justice's Antitrust Division Regarding Its Investigation of Hearst Corporation's Proposed Acquisition of Tracking Stock in MediaNews Group Inc.* CCH Trade Reg. Rep. ¶50,225 (Oct. 25, 2007), available at www.usdoj.gov/atr**

In another enforcement action involving noncontrolling investments, the Department of Justice announced the proposed settlement of charges that a cable manufacturer's acquisition of an indirect minority stake in a rival would have lessened competition in the market for drop cable, a type of coaxial cable used by cable television providers. The department alleged that the rival firms were two of only four drop cable producers in the United States and that the acquisition would either enable coordination of the firms' activities or undermine the acquired firm's ability to compete against the buyer. The settlement requires the buyer to divest its stake in its competitor.

Though the FTC has advocated the use of an abbreviated "quick look" analysis, which dispenses with demonstrating anticompetitive effects in a defined relevant market, two recent decisions show reluctance to broaden application of the truncated standard of review.

The DOJ also stated that the proposed transaction would have given the buyer the right to participate on the board of directors of its rival resulting in interlocking directorates in violation of §8 of the Clayton Act.

***United States v. CommScope, Inc.*, No. 1:07-cv-02200 (D.D.C. Dec. 6, 2007), available at www.usdoj.gov/atr**

Gun Jumping

An institutional pharmacy claimed that two prescription drug providers refrained from competing for the pharmacy's business after drug providers had signed an agreement to merge but before the merger was consummated. A district court ruled that the allegations, that the drug providers consulted with one another about renewing the complaining pharmacy's contract and that one of the firms refused to negotiate reasonable terms with the pharmacy, were sufficient to state a per se claim. According to the court, it was possible for the two firms to conspire between signing and closing a merger agreement and the Supreme Court's 1984 *Copperweld* decision, holding that a parent was incapable of conspiring with its subsidiary, did not shield them from liability under § 1 of the Sherman Act.

***Omnicare, Inc. v. UnitedHealth Group, Inc.*, 2007-2 CCH Trade Cases ¶ 75,950 (N.D. Ill.)**

Comment: Although the antitrust enforcement agencies have brought a number of actions challenging pre-closing coordination between merging parties, more significant judicial experience addressing these issues may better enable courts to determine whether gun-jumping violations should be per se unlawful.

Amnesty

A district court ruled that the Department of Justice had no reasonable basis to revoke its grant of immunity to a shipping firm that cooperated with the department's investigation of a parcel tanker shipping cartel. The court dismissed an indictment charging the shipping firm with violations of §1 of the Sherman Act.

The court stated that the firm provided the department with incriminating evidence of the existence of a customer allocation conspiracy under the government's corporate leniency program. Subsequently, the department withdrew its grant of conditional immunity on the ground that the firm did not sufficiently terminate its participation in the cartel.

The court noted that nonprosecution agreements are binding contracts and that the shipping firm did not materially breach the agreement. The court observed that the government got its benefit of the bargain by dismantling a cartel and obtaining substantial fines and prison terms due to the shipping firm's cooperation.

***United States v. Stolt-Nielsen SA*, 2007-2 CCH Trade Cases ¶75,962 (E.D. Pa.)**