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ANTITRUST

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Merger of Storage Tank Firms Ruled Unlawful

The U.S. Court of Appeals for the Fifth Circuit affirmed a decision by the Federal Trade Commission (FTC) that the completed merger of two firms that design and erect specialized storage tanks was unlawful and would have to be split up to recreate a viable competitor.

Other recent antitrust developments of note include a Canadian court decision affirming the rejection of the competition agency's request for an order to prevent the closing of a merger of two brewers and a ruling by the U.S. Court of Appeals for the Ninth Circuit that a relevant market limited to aftermarket services for photocopier leasing customers of a single firm was sufficiently pleaded to survive a motion to dismiss.

Acquisitions

The Fifth Circuit affirmed the FTC's decision that a completed merger of two firms that design and build field-erected storage tanks violated the antitrust laws and that the merged firm must divide the combined storage tank business into two entities and then divest one in order to restore competition that had been eliminated by the transaction.

The appellate court stated that the two firms had been the dominant suppliers in four relevant U.S. product markets: industrial storage tanks for three types of liquid or liquified gas and thermal vacuum chambers used for testing aerospace satellites.

This merger challenge arises in a somewhat unusual procedural posture. Although the transaction had been reported to the FTC and the Department of Justice under the Hart-Scott-Rodino premerger notification law, the FTC did not commence its investigation until after the 30-day waiting period expired and the parties were no longer statutorily prohibited from closing the transaction. The merger was closed during the pendency of the investigation. Following an administrative trial, the commission ruled that the transaction would substantially

lessen competition in violation of §7 of the Clayton Act.

The appellate court rejected the merged firm's argument that the FTC improperly applied the burden-shifting framework for deciding §7 cases. In the typical case, the government must first establish a prima facie case, often by showing significantly increased concentration in a relevant market. Then, if the defendant rebuts the government's case by producing evidence casting doubt on the prediction of future anticompetitive effects, the burden of production shifts back to the government.

The Fifth Circuit observed that it is not improper for the evidence to be considered all at once and the burdens analyzed together and stated that the commission reasonably found that the evidence produced by the merged firm failed to rebut the government's prima facie case, which anticipated and addressed the rebuttal evidence regarding the ability of new entrants to constrain the merged firm from raising prices.

The Fifth Circuit stated that evidence of bids submitted by minor competitors after the acquisition and the existence of potential entrants did not overcome the government's contention that any entry would not be of sufficient scale to compete on the same playing field as the merged firm. The appellate court agreed with the FTC that market share concentration statistics were not irrelevant even though the markets at issue were sporadic. The court also stated that the FTC was not obligated to credit potential entrants with the same market share as the merged firm because those firms did not have "an equal likelihood of securing sales" in a bidding model analysis.

The Fifth Circuit stated that post-acquisition evidence, which the merged firm presented in support of its argument that new entrants would discipline any anticompetitive effects of the acquisition, was deemed of limited probative value not only when actually subject to manipulation but also "whenever such evidence could arguably be subject to manipulation." The appellate court reasoned that the merged firm could refuse to bid for new contracts to allow entrants to win a few bids so as to create the impression of a competitive market.

Chicago Bridge & Iron Co. v. FTC, **2008-1 CCH Trade Cases ¶ 76,019**

Comment: The case reported immediately above serves as a reminder that expiration or termination of the premerger notification waiting period does not preclude the U.S. antitrust agencies from challenging a merger. In addition, the decision examines evidentiary issues that arise only in challenges of consummated acquisitions. Although courts have cautioned against undue reliance upon manipulable evidence developed after the completion of a merger, a near automatic disregard for post-acquisition evidence may in some cases deprive courts of the benefit of additional useful data in determining the probability that an acquisition will lessen competition, particularly where such evidence depends on the business decisions of third parties and actions contrary to the economic self-interest of the merged firm.

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The Canadian Federal Court of Appeal affirmed the denial of the Commissioner of Competition's request for an order delaying the closing of a combination of two beer brewers. The commissioner had sought additional time to investigate the merger just before the end of the statutory waiting period, but the court stated that the commissioner did not establish that the ability to remedy any anticompetitive effects post-closing would be substantially impaired.

Commissioner of Competition v. Labatt Brewing Company Limited**, 2008 FCA 22 (Jan. 22, 2008),**

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available at decisions.fca-caf.gc.ca.

Relevant Market Definition

A firm that leases name-brand copiers and provides maintenance services brought suit against a rival alleging a scheme to defraud customers by amending lease and service contracts without disclosing that the terms of the agreements were being lengthened. The plaintiff claimed that the contract extensions foreclosed competition for the defendant's customers in violation of the Sherman Act.

The district court dismissed the complaint on the pleadings for failure to allege a cognizable relevant market and stated that the markets were impermissibly limited to the defendant's copier leasing and services customers, a contractually-created group of customers.

The Ninth Circuit reversed and stated that the allegation of a submarket limited to one firm's customers was sufficient to survive a 12(b)(6) motion because the defendant leveraged the special contractual relationship with its customers to restrain trade in the derivative aftermarket for continued service contracts and replacement equipment. The appellate court cited to the 1992 *Kodak* decision, where the Supreme Court stated that a relevant market could be limited to the servicing and provision of replacement parts for a single manufacturer's copiers.

***Newcal Industries, Inc. v. Ikon Office Solution,* 2008-1 CCH Trade Cases ¶ 76,010.**

Comment: In its analysis of the viability of a single-firm relevant market, the Supreme Court in *Kodak* emphasized the manufacturer's control of its proprietary replacement parts whereas the decision reported immediately above focused on the special contractual relationship that provided the lessor with an opportunity to engage in allegedly deceptive conduct.

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Purchasers alleged that a manufacturer of premium foam mattresses entered into unlawful resale price maintenance agreements with retailers. A district court dismissed the complaint for failure to properly define a relevant product market, a required pleading element after the Supreme Court's 2007 *Leegin* ruling that vertical price fixing must be judged under the rule of reason. The court rejected the plaintiffs' proposed market limited to visco-elastic foam mattresses and stated that the appropriate relevant market was all mattresses, including foam and inner-spring mattresses.

***Jacobs v. Tempur-Pedic International Inc.*, 2008-1 CCH Trade Cases ¶ 76,005 (N.D. Ga.)**

Standard Setting

The FTC announced settlement of charges that the holder of patents related to a computer communications standard for local area networks engaged in unfair methods of competition as well as unfair acts or practices in violation of §5 of the FTC Act. The commission alleged that the patentee's predecessor-in-interest had announced that if its technology were chosen, it would license the technology to any person for $1,000. According to the complaint, the patentee reneged on the announced terms after users became locked into the adopted standard, threatening to raise prices for the networking industry and to subvert the standard-setting process.

Two commissioners, including Chairman Deborah Platt Majoras, dissented from the decision to issue a complaint and accept the proposed settlement. The chairman's statement took issue with the use of §5 of the FTC Act in the absence of a violation of the Sherman or Clayton Act and distinguished the facts in the complaint from other FTC standard-setting "hold up" cases, including the 2006 *Rambus* decision and the 1996 *Dell* decision.

The Fifth Circuit stated that post-acquisition evidence, was deemed of limited probative value not only when actually subject to manipulation but also "whenever such evidence could arguably be subject to manipulation."

***In re Negotiated Data Solutions LLC*, CCH Trade Reg. Rep. ¶ 16,097 (FTC File No. 051 0094, Jan. 23, 2008), also available at www.ftc.gov.**

Comment: The enforcement action reported immediately above reaffirms that, in the eyes of many enforcers, standard-setting activities warrant heightened scrutiny because of their potential procompetitive impact as well as their susceptibility to mischief.

State Action

The Ninth Circuit ruled that Washington state's alcoholic beverage regulation requiring that wholesalers "post" their prices and "hold" them for 30 days violated §1 of the Sherman Act. The appellate court explained that the post-and-hold regulation required the state to control the procedure but not the actual posted prices and was therefore a "hybrid" (rather than "unilateral") restraint which is subject to preemption by the Sherman Act.

The Ninth Circuit stated that the post-and-hold rule was a per se violation because it facilitated collusion and price stabilization even though each wholesaler was only required to adhere to its own posted price.

***Costco Wholesale Corp. v. Maleng*, 2008-1 CCH Trade Cases ¶ 76,021**

Price Fixing

A district court dismissed claims by credit card holders that credit card issuing banks fixed late fees and over-limit fees in violation of federal and California state antitrust laws. The court stated that the allegations, including a late-fee chart, did not support an inference of an agreement any more than parallel independent conduct and, citing to the Supreme Court's 2007 *Twombly* decision, added that the pleadings of "plus factors" did not move the conspiracy claims from the realm of the conceivable to the plausible.

***In re Late Fee and Over-Limit Fee Litigation*, 2008-1 CCH Trade Cases ¶ 75,996 (N.D. Cal.)**

Tying

A provider of specialty care transport ambulance services claimed that a network of hospitals unlawfully conditioned the availability of beds and complex medical procedures on the use of the hospitals' ambulances. A district court denied the hospitals' summary judgment motion and noted that the plaintiff showed that, after the hospitals entered the ambulance transportation market, two ambulance firms exited the market and the hospitals increased prices.

***Med Alert Ambulance, Inc. v. Atlantic Health System, Inc.*, 2008-1 CCH Trade Cases ¶ 76,009 (D.N.J.)**

Immunities

A drug wholesaler claimed that the maker of a rheumatoid-arthritis drug filed a citizen-petition with the Federal Drug Administration to delay entry of generic competition in violation of §2 of the Sherman Act. The district court rejected a motion to dismiss the complaint and stated that the drug-maker was not shielded from antitrust liability under the Supreme Court's *Noerr-Pennington* doctrine because the complaint sufficiently alleged that the petition was a sham solely meant to delay approval of rival products. The court observed that the drug-maker filed the petition "on the eve" of final approval and could have had no reasonable belief that its petition was viable.

***Louisiana Wholesale Drug Co. v. Sanofi-Aventis*, 2008 WL 169362 (S.D.N.Y. Jan. 18, 2008)**