New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

Web address: http://www.nylj.com

VOLUME 239—NO. 59 THURSDAY, MARCH 27, 2008 ALM

ANTITRUST

BY ELAI KATZ

House of Lords Will Not Extradite British Executive

The House of Lords decided that a British citizen indicted for criminal antitrust violations in the United States should not be extradited because price fixing was not a crime in the United Kingdom at the time of the alleged violation. The U.S. Court of Appeals for the Ninth Circuit affirmed a district court's dismissal of price-fixing claims against banks and a credit-card network, following the U.S. Supreme Court's recent teachings on pleading standards.

Other recent antitrust developments of note included a decision by the Seventh Circuit that evidence of a formal agreement or specific assent to collude was not required in order to sustain a jury verdict finding an individual guilty of conspiring to fix concrete prices.

Extradition

The House of Lords of the United Kingdom ruled that a British national may not be extradited to the United States to face criminal price-fixing charges. The individual, a former executive of a firm that supplies carbon products, was indicted by a grand jury in the U.S. District Court for the Eastern District of Pennsylvania for conspiring to fix the prices of several carbon products, including carbon brushes and carbon current collectors, which are used to transfer electrical current in automotive and railroad applications. American subsidiaries of the firm paid substantial fines and many of the firm's employees were granted immunity from prosecution as part of a plea bargain. The House of Lords' report stated that price fixing (without aggravating features such as deceit or fraud) was not a criminal offense in the United Kingdom during the time of the alleged violations. The report rejected the United States' contention that the individual's alleged conduct was akin to a conspiracy to defraud, which was a criminal violation under English law.

The House remanded the case for further consideration of whether the individual should be extradited for charges of obstructing the price-fixing investigation.

Norris v. Government of the United States, **[2008] UKHL 16 (March 12, 2008), available at www.publications.parliament.uk**

Price Fixing

Merchants brought suit alleging that credit card networks and credit card issuing banks conspired to fix fees charged to merchants for payment of credit card sales in violation of §1 of the Sherman Act. Relying on the Supreme Court's 2007 *Twombly* decision, the Ninth Circuit affirmed the district court's dismissal of the complaint on the pleadings. The appellate court stated that the allegations of a conspiracy involving the bank defendants amounted to "nothing more than a conclusory statement" without any supporting facts. The court also stated that claims against the credit card networks were properly dismissed as indirect-purchaser claims under the Supreme Court's 1977 *Illinois Brick* case because the merchants paid fees to the banks not the networks.

Kendall v. Visa U.S.A. Inc.**, No. 05-16549, 2008 WL 613924 (March 7, 2008)**

An employee of an Indianapolis-area supplier of ready-made concrete was indicted and tried for conspiring to fix prices. At trial, the defendant's competitors testified that they met with the defendant in a horse barn and on another occasion at an inn and agreed to limit discounts to reverse the downward spiral of concrete prices. The defendant was found guilty and he appealed.

The Seventh Circuit affirmed the jury verdict, rejecting the defendant's contention that the prosecution failed to prove the existence of a cartel or his participation in it because "no person voiced their assent." The appellate court stated that evidence of a formal agreement is not required and that testimony of meetings where participants did not object as well as testimony of subsequent confrontations with co-conspirators who were cheating on the cartel sufficed to sustain the jury verdict. The court added that occasional cheating did not mean that the conspiracy did not exist.

United States v. Beaver, **2008-1 CCH Trade Cases ¶76,037**

Antitrust Injury

A contractor involved in the construction and dismantling of exhibit booths at trade shows alleged that a convention center and a union entered into an unlawful agreement requiring trade show contractors to hire that union's members exclusively throughout southern New Jersey in violation of §1 of the Sherman Act. The district court granted summary judgment to the defendant and the Third Circuit affirmed.

The appellate court stated that the contractor's injury, lost profits due to higher labor costs, was not an injury of the type the antitrust laws were intended to prevent. The court explained that establishing antitrust injury requires that the plaintiff show a negative effect on prices or quality in a properly defined relevant market and that the relevant geographic market could not be limited to the convention center because it competed for trade shows with other regional and possibly national convention centers.

Atlantic Exposition Services Inc. v. SMG, **2008-1 CCH Trade Cases ¶76,052 (not precedential).**

Comment: The decision reported immediately above grapples with the appropriate approach to defining relevant markets in monopsony cases, that is, when buyers rather than sellers allegedly engaged in anticompetitive conduct, a topic touched upon by the Supreme Court in its 2007 *Weyerhaeuser* decision.

Acquisitions

The Department of Justice (DOJ) announced the settlement of charges that the proposed

Elai Katz *is a partner at Cahill Gordon & Reindel.* **Gabriel Posner,** *an associate at the firm, assisted in the preparation of this column.*

acquisition of the largest U.S. radio station operator by several private equity funds would lessen competition in violation of §7 of the Clayton Act. The settlement requires the buyers to divest four radio stations to restore competition in the radio advertising markets in Cincinnati, Houston, Las Vegas and San Francisco.

The department stated that two of the acquiring funds' prior investments in competing radio station operators created incentives to reduce competition. The DOJ alleged that the funds would likely influence or cause rival radio stations in highly concentrated markets to forbear from competing against each other because, if one radio station increased its advertising rates, a significant portion of lost sales would likely be recaptured by another station in which the funds had a substantial investment.

***United States v. Bain Capital, LLC,* CCH Trade Reg. Rep. ¶¶45,108 (No. 4925), 50,952 (D.D.C. Feb. 13, 2008) available at www.usdoj.gov/atr**

Comment: The antitrust agencies continue to scrutinize private equity funds' partial ownership interests in firms that compete with their proposed acquisition targets.

Joint Bids

A complaint alleged that two bidders in a contest for corporate control of a technology firm submitted a joint bid in violation of antitrust laws. The plaintiff, a shareholder of the technology firm, claimed that two private equity funds made competing formal bids, then one withdrew from the auction and the other lowered its bid. After the lower bid was accepted, according to the complaint, the bidder that withdrew agreed with the winning bidder to fund half of the acquisition in exchange for 50 percent of the equity.

A federal district court dismissed the complaint and stated that joint bids for corporate control should not be treated as per se unlawful because there are procompetitive reasons, such as sharing of risk and pooling resources, for such coordinated action. The court then stated that under the rule of reason the defendant bidders could not have possessed market power, even if the relevant market was narrowly limited to the market for corporate control of a single firm, because many potential bidders expressed some interest when the target firm was first put up for sale.

***Pennsylvania Avenue Funds v. Borey,* No. C06-1737RAJ (W.D. Wash. Feb. 21, 2008)**

Relevant Market

Manufacturers of computer chips alleged that the developer of semiconductor chip technology unlawfully monopolized the market by failing to disclose its intellectual property rights to a standard-setting organization that later adopted the developer's technology. A district court denied the developer's motion for summary judgment and rejected the argument that the manufacturers did not adequately define the relevant market because they did not introduce any evidence regarding the price or royalty rates of alternative technologies. The court stated that although the price of potential substitutes was highly relevant, the manufacturers could nevertheless show which other technologies were close substitutes and whether consumers would switch from one to the other.

The court also stated that the developer could be said to possess monopoly power even though it granted licenses to less than 30 percent of the chip technology users because the developer could still win patent suits that it brought against another 60 percent of the technology's users. In addition, the court observed that market share statistics may not be meaningful indicators of market power in a standardized technology market.

> *The House of Lords ruled a British national may not be extradited to the United States to face criminal price-fixing charges. It said price fixing (without aggravating features such as deceit or fraud) was not a criminal offense in the United Kingdom during the time of the alleged violations.*

***Hynix Semiconductor Inc. v. Rambus Inc.,* 2008-1 CCH Trade Cases ¶76,047 (N.D. Cal.)**

Patent-Dispute Settlements

The Federal Trade Commission (FTC) filed a complaint in federal district court alleging that the maker of a branded drug used to treat sleepiness paid four generic drug companies to delay entering the market as part of the settlement of a patent infringement suit in violation of §5 of the FTC Act. The FTC stated that the branded drug-maker agreed to share its monopoly profits with potential entrants to prevent competition with its successful product. The commission observed that under the Hatch-Waxman Act no other generic product could be brought to market until the four generic drug companies that agreed to delay entry either entered the market or relinquished their statutory exclusivity rights.

***FTC v. Cephalon Inc.,* Civ. Action No. 1:08-cv-00244, CCH Trade Reg. Rep. ¶16,110 (D.D.C. Feb. 13, 2008)**

Comment: The FTC usually brings nonmerger antitrust enforcement cases as administrative actions, which seems to be consistent with the legislative goals of establishing and maintaining an expert regulatory agency for competition policy, but it appears the commission selected the District of Columbia U.S. district court as the forum to adjudicate this case to prevent the defendant from appealing an adverse administrative decision to one of the circuit courts that has previously ruled in favor of defendants in "reverse-payment" patent settlement cases.

Group Boycott

The FTC announced the settlement of charges that associations of Connecticut chiropractors and an attorney unlawfully orchestrated a boycott to derail the establishment of a cost-savings benefits administration program in violation of § 5 of the FTC Act.

The commission's complaint alleged that the benefits administrator sought to contract with individual chiropractors and then offer to major health management organizations (HMOs) and other health care payors a more-efficient and less-expensive means of providing chiropractic care to their enrollees. The FTC stated that two chiropractors' associations and a lawyer who represented one of the associations engaged in a campaign to encourage member chiropractors to refuse to deal with the benefits administrator and provided model "opt-out" letters to chiropractors who already contracted with the benefits administrator.

The commission stated that the associations did not identify any procompetitive reason for arranging a coordinated refusal to deal among competing chiropractors, such as efficiency-enhancing clinical or financial integration.

***In re Connecticut Chiropractic Association,* FTC File No. 071-0074, CCH Trade Reg. Rep. ¶16,121 (March 5, 2008), available at www.ftc.gov.**

Collective Bargaining

The FTC submitted comments on an Ohio executive order that sought to establish collective bargaining for independent home health care providers. The commission stated that the order could lead to higher prices with no assurance of better quality of care and noted that collective negotiation by competing providers without efficiency-enhancing integration is per se illegal price fixing. The FTC observed that the order was at odds with the federal labor exemption which protects from antitrust scrutiny negotiations between employers and employees but not between independent contractors and businesses. One commissioner dissented from the comments and stated that the order was part of the state's effort to make less costly in-home care as an alternative to nursing homes under the state's Medicaid program.

***FTC Staff Submits Comments on Establishing Collective Bargaining for Independent Home Care Providers in Ohio* (Feb. 15, 2008), available at www.ftc.gov**