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ANTITRUST

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Merger Approved of Rival Satellite Radio Providers

The U.S. Department of Justice stated that it will not seek to block the combination of the two U.S. satellite radio providers because the evidence showed only limited consumer switching between the providers and likely future competition from alternative technologies.

The European Court of First Instance ruled that it could not enjoin a firm from voting its minority holdings of a competitor's stock. Other recent antitrust developments of note included a decision by the Supreme Court of Connecticut that the state had standing to seek recovery for injury to the state's general economy caused by antitrust violations.

Acquisitions

The Department of Justice announced that it closed its investigation into the merger of two satellite radio providers. The department stated that the transaction was not likely to substantially lessen competition because even though the merging parties were the only providers of satellite radio in the United States there was only limited head-to-head competition between the two. First, satellite radio subscribers rarely switch providers because one firm's equipment (often pre-installed in new cars but also available for direct retail purchase) does not function with the other firm's service. Second, in the automotive distribution channel, each of the firms has entered into long-term sole-source contracts with the major car makers and by the time these distribution agreements expire, it is anticipated that new alternatives, such as mobile broadband Internet technology, will be available to consumers.

The department noted that the evidence developed in the investigation did not support a relevant retail market limited to satellite radio as many customers subscribe to satellite radio to access exclusive programming, such as Major League Baseball broadcasts, and do not view the other radio satellite service as a

substitute. The department added that the number of inframarginal customers —subscribers that consider the two firms as each other's closest alternatives—was not large enough to make a price increase by the merged firm profitable, particularly because it is difficult to identify and price discriminate against those inframarginal customers.

The department also stated that the parties were likely to realize significant efficiencies by, for example, consolidating the development and production of equipment.

***Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger With Sirius Satellite Radio Inc.*, CCH Trade Reg. Rep. ¶50,227 (March 24, 2008), also available at www.usdoj.gov/atr**

Minority Acquisitions

An Irish-based low-cost airline sought to take over the formerly state-owned Irish airline through a public tender offer. The European Commission (EC) blocked the proposed merger in June 2007 on the grounds that it would eliminate vigorous head-to-head competition and lead to the creation of a dominant airline in Ireland. The low-cost airline appealed the commission's decision and retained the nearly 30 percent stake it had already acquired in its rival.

The target airline asked the EC to order the acquiring airline to divest its minority holdings. The EC rejected the request and stated that it lacked the power under the European Merger Regulation to order the divestiture of less than controlling interests.

In a decision rejecting the target's request for interim relief enjoining the acquiring airline from exercising its minority voting rights, the European Court of First Instance indicated its agreement with the commission's view that it is not authorized to require the disposition of minority interests and observed that the acquiring airline's 30 percent share did not confer it with the ability to exercise control over the target.

***Aer Lingus Group plc v. Commission of the European Communities*, Case No. T-411/07 R (March 18, 2008) available at www.curia.europa.eu**

Comment: In contrast to European regulation of acquisitions of less than controlling stakes described in the decision reported immediately above, in the U.S. minority acquisitions must in many cases be reported under the Hart-Scott-Rodino Act's premerger notification scheme and are from time to time challenged under §7 of the Clayton Act.

State Antitrust Law

The Supreme Court of Connecticut ruled that the state had standing to bring parens patriae claims to recover damages to the state's general economy caused by violations of Connecticut's antitrust law. The state alleged that an insurance broker orchestrated a bid-rigging and price-fixing scheme that inflated the price of insurance premiums for Connecticut businesses and the state government.

The trial court had decided that the state lacked standing to assert claims for damages to the general economy because such actions may not be brought under federal law after the Supreme Court's 1972 *Hawaii v. Standard Oil* decision and interpretation of Connecticut antitrust law is guided by federal precedent.

The Connecticut Supreme Court stated that "blind adherence to all things federal" is not required under the state's antitrust law and that federal decisions are merely persuasive authority, especially where state and federal statutory language is not identical. The court

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noted that Connecticut legislation authorizes the attorney general to seek recovery of damages to the state's general economy.

The court observed that the potential for duplicative recovery (one of the principal rationales for the federal rule) and other difficulties in calculating damages to the general economy implicate problems of proof rather than pleading.

***Connecticut v. Marsh and McLennan Cos.*, 286 Conn. 454, 2008 WL 961109 (April 15, 2008)**

Tying

A terminated food products distributor asserted that a deli restaurant chain franchisor conditioned its franchisees' use of franchise trademarks on the purchase of potato chips, bread and other products from one of two favored distributors, constituting an illegal tying arrangement in violation of §1 of the Sherman Act. A district court granted the defendant franchisor judgment as a matter of law on the antitrust claims and the U.S. Court of Appeals for the Fifth Circuit affirmed.

The appellate court rejected the distributor's argument that franchisee product-purchasing agreements should be analyzed as tying arrangements. The Fifth Circuit distinguished the Supreme Court's 1992 *Kodak* decision and indicated that the relevant market could not be restricted to the franchisor's restaurants. The court observed that the power derived from contractual terms in a franchise agreement should not be confused with market power in the tying product, a necessary element in a tying claim. The appellate court added that the exercise of the franchisor's contract power in its small part of the relevant market improved competition by preventing the exit of its financially troubled restaurants from the market.

***Schlotzsky's, Ltd. v. Sterling Purchasing and National Distribution Co.*, 2008-1 CCH Trade Cases ¶76,071**

Sports Leagues

The Second Circuit affirmed the denial of a professional hockey team's motion to enjoin enforcement of the league's Internet policy requiring teams to migrate their Web sites to the league's server. The appellate court stated that the lower court did not abuse its discretion and had correctly decided that the alleged restraint should be subjected to a full-blown rule of reason analysis rather than an abbreviated "quick look" because the ban on independent Web sites had procompetitive justifications.

***Madison Square Garden LP v. National Hockey League*, 2008-1 CCH Trade Cases ¶76,079 (not designated for publication)**

Pleading Standards

Following the U.S. Supreme Court's issuance of its 2007 *Twombly* decision on pleading standards, manufacturers of computer chips alleged to have fixed the prices of Static Random Access Memory chips moved to stay discovery and dismiss the complaints for failure to state a claim. The district court denied the motion and stated that e-mails produced during preliminary discovery and cited in the amended complaint supported the allegation that the defendants had an agreement to exchange price information and that it was plausible to infer a price-fixing conspiracy from these factual allegations. The court noted that allegations of the existence of a grand jury investigation did not support antitrust conspiracy claims because it was not known whether the investigation would lead to any indictments.

***In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2008-1 CCH Trade Cases ¶76,077 (N.D. Cal.)**

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A district court agreed to reconsider its denial of a motion to dismiss claims of an anticompetitive conspiracy involving shippers of liquid chemicals in order to apply the pleading standard set forth in *Twombly*, which was handed down after the district court's first ruling. The court dismissed the complaint and stated that the plaintiff alleged "labels and conclusions" regarding collusive conduct without specific facts tending to support conspiracy claims or plausible grounds to infer an agreement.

***In re Parcel Tanker Shipping Services Antitrust Litigation*, 2008-1 CCH Trade Cases ¶76,080 (D. Conn.)**

Comment: As the two decisions reported immediately above demonstrate, the lower courts' efforts to give meaning to and apply *Twombly's* pleading standard may lead to different results than under prior law in some cases but not in others.

Class Actions

Purchasers of corn seed brought monopolization claims against a developer and seller of genetically modified corn seeds, alleging that the seed seller foreclosed competing developers of seed traits from the market through exclusive deals and bundling. A district court denied the plaintiffs' motion to certify a class and the Third Circuit affirmed. The appellate court stated that the district court did not abuse its discretion in ruling that the plaintiffs failed to show that some injury to each class member can be demonstrated with common proof. The court indicated that without additional evidence of classwide impact using actual data, a presumption of classwide impact based on allegations of artificially elevated pricing would not support certification.

***American Seed Co. v. Monsanto Co.*, 2008 WL 857532 (April 1, 2008) (not selected for publication)**

Resale Price Maintenance

A maker of high-end office chairs settled resale price maintenance charges brought by the attorneys general of New York, Illinois and Michigan. The complaint, filed at the same time as the settlement, alleged that the chair maker artificially raised retail prices and reduced retail price competition for its chairs by requiring retailers to agree not to advertise prices below the suggested retail price in violation of §1 of the Sherman Act and state antitrust laws. The settlement provides for the payment of a civil fine and an injunction against resale price maintenance and related conduct.

***New York v. Herman Miller Inc.*, No. 08-CV-02977 (S.D.N.Y. March 21, 2008)**

Comment: The enforcement action reported immediately above casts doubt on some commentators' predictions that resale price maintenance schemes would not be challenged after *Leegin*, the Supreme Court's 2007 ruling that vertical minimum price fixing is no longer automatically unlawful and instead subject to examination under the rule of reason. In cases that are litigated rather than settled, plaintiffs may find it necessary to plead the contours of the relevant market and the defendant's market power, allegations that were absent in this complaint.