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ANTITRUST

BY ELAI KATZ

No Antitrust Violation in Standard-Setting Deception

Overturning a decision by the Federal Trade Commission (FTC), the U.S. Court of Appeals for the District of Columbia Circuit ruled that a computer-technology developer did not unlawfully monopolize the market by deceiving a standard-setting organization.

The U.S. Court of Appeals for the First Circuit decided that a consumer suit alleging a conspiracy to block the importation of lower-priced cars from Canada should not have been certified as a class action. Other recent antitrust developments of note included the European Commission's approval of the merger of a leading supplier of portable navigation devices with one of only two providers of digital mapping for such devices.

Monopolization

The D.C. Circuit reversed the FTC's ruling that a developer of semiconductor technology engaged in unlawful monopolization in violation of §2 of the Sherman Act. The commission had concluded that the developer distorted the standard-setting process and engaged in an anticompetitive "hold-up" of the computer memory industry by failing to disclose to a computer technology standard-setting organization patent interests it held in four technologies that were eventually adopted as industry standards.

The court observed that the commission's decision depended on the developer's nondisclosure leading to one of two results: either causing the standard-setting organization not to adopt an open, nonproprietary

standard, or enabling the developer to avoid having to agree in advance to favorable licensing terms. Although the appellate court agreed that deceptively causing the selection of a proprietary standard was anticompetitive, it stated that the commission failed to demonstrate that the developer's conduct resulted in the selection of the standard. The court observed that although evading advance negotiation of terms allowed the developer to restrict output and set supracompetitive prices, a lawful monopolist's deception that raises prices does not constitute a cognizable violation of §2 of the Sherman Act without more. The court relied on the Supreme Court's 1998 *NYNEX v. Discon* decision that fraudulent conduct leading to higher prices by an already-established monopolist did not violate §2. Finding that the commission did not prove the first component of its syllogism and that the second component did not constitute exclusionary conduct, the court stated that the commission failed to sustain its allegation of unlawful monopolization.

***Rambus Inc. v. FTC*, 2008-1 CCH Trade Cases ¶76,121**

Comment: As the lower courts further develop the law in this area, they may explore the kind of evidence necessary to demonstrate unlawful monopolization in the relatively unusual standard-setting context, where cooperation amongst competitors is indispensable, while at the same time competitors must avoid unlawful collusive behavior. Given this potential conflict, courts and regulators may wish to proceed with caution when striking the delicate balance between efficient collaboration and vigorous competition.

Class Actions

Consumers alleged that car manufacturers conspired to unlawfully block the importation of lower-priced cars from Canada in violation of §1 of the Sherman Act. The First Circuit agreed to hear an interlocutory appeal of the district court's certification of two indirect purchaser classes: a nationwide class seeking injunctive relief under federal antitrust law and a class seeking monetary damages under several state antitrust and consumer protection laws.

The appellate court reversed certification of a federal injunctive class for lack of a live controversy because the incentive to sell Canadian cars in the United States arose from an exchange rate anomaly that took place between 1998 and 2003 when the U.S. dollar was very strong relative to the Canadian dollar.

The First Circuit also vacated and remanded for further consideration the certification of a state law damages class. The court observed that the plaintiffs' impact theory was novel and complex: they claimed that if car-makers had not conspired to block the flow of lower-priced Canadian cars into the United States, the influx of those cars would have forced sellers to lower the prices of U.S. cars and therefore the prices actually paid by consumers were artificially inflated. The court stated that the plaintiffs did not provide a sufficiently thorough explanation

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of how they will establish that all class members were impacted by the alleged conspiracy using common proof and without numerous individualized determinations, in light of the fact that car purchases are individually-negotiated.

***In re New Motor Vehicles Canadian Export Antitrust Litigation,* 2008-1 CCH Trade Cases ¶76,100**

Acquisitions

The European Commission approved the acquisition of a provider of navigable digital maps by a manufacturer of portable satellite navigation devices (sometimes referred to as global positioning system or GPS devices). The commission stated that it investigated whether the vertically integrated merged firm, combining one of only two suppliers of digital maps, which are essential inputs for GPS devices, with a leading supplier of these devices, would likely restrict rival device makers' access to digital maps or increase their prices. The commission concluded that a competing provider of digital maps would limit the merged firm's ability to exclude rivals or raise their costs and that the firm would not be able to compensate for lost sales of digital maps by additional sales of devices.

The commission noted that it did not conclude its investigation of a separate proposed acquisition of the other digital map provider by a mobile telephone manufacturer.

***Mergers: Commission clears Tom Tom's proposed acquisition of digital map provider Tele Atlas,* IP/08/742 (May 14, 2008), available at ec.europa.eu**

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The Department of Justice announced the settlement of charges that the acquisition of a regional movie theater chain by a national rival would lessen head-to-head competition between first-run movie theaters in three North Carolina metropolitan areas, where, the department alleged, ticket prices would increase and viewing quality would decrease if the transaction proceeded as proposed. The department stated that it required the divestiture of four movie theaters to maintain competition in those cities and to permit the acquisition to close.

***United States v. Regal Cinemas,* CCH Trade Reg. Rep. ¶45,108, No. 4938 (April 29, 2008), also available at www.usdoj.gov/atr**

Exclusive Dealing

A distributor sought to join a network of preferred providers supplying medical equipment to enrollees in medical benefits programs offered by several major Michigan employers. After its application was rejected, the distributor brought an action alleging that the network's administrator and other distributors entered into unlawful exclusive dealing arrangements in violation of §1 of the Sherman Act.

A district court granted the network administrator's summary judgment motion and the Sixth Circuit affirmed. The appellate court stated that the competition foreclosed by the challenged exclusive dealing arrangements—less than 13 percent of the relevant market—did not constitute a substantial share of the relevant market.

The Sixth Circuit also affirmed the district court's imposition of sanctions pursuant to Federal Rule of Civil Procedure 11 against the distributor's counsel for pursuing an obviously meritless antitrust suit long after discovery showed that the claims lacked support. The distributor and its counsel were also sanctioned for bringing a frivolous appeal pursuant to Federal Rule of Appellate Procedure 38.

***B&H Medical LLC v. ABP Administration Inc.,* 2008 U.S. App. LEXIS 9721 (May 7, 2008)**

Restraint of Trade

The Department of Justice filed an action against a joint venture that maintains a real estate multiple listing service, challenging its membership rules as unreasonably restraining competition among realtors in Columbia, S.C. The department stated that to obtain access to the critically important realty database, real estate brokers were required to abide by several anticompetitive restrictions, including not reducing their fee if the home sellers perform certain tasks or find a buyer on their own.

***United States v. Consolidated Multiple Listing Service Inc.,* No. 3:08-CV-01786-SD (May 2, 2008), available at www.usdoj.gov/atr**

Antitrust Injury

A terminated distributor of kosher, ethnic and specialty food products claimed that a rival distributor and a supplier attempted to monopolize the kosher food market in New England in violation of §2 of the Sherman Act.

The district court dismissed the complaint for failure to plead antitrust injury. The court stated that the only actual injury the distributor alleged flowed from the termination of his distributorship, and although it may have been unjustified and wrongful, it did not cause injury to competition as a whole and thus cannot result in an antitrust injury. The court observed that the supplier's decision to substitute one exclusive distributor for another is not anticompetitive even if the supplier possesses monopoly power.

***S.W.B. New England Inc. v. R.A.B. Food Group LLC,* 2008-1 CCH Trade Cases ¶76,108 (S.D.N.Y.)**

Below-Cost Pricing

The Tenth Circuit reversed a jury judgment finding that a gasoline and groceries retailer violated the Colorado Unfair Practice Act's prohibition on below-cost sales by offering significant discounts on gasoline to customers who also purchased groceries. The appellate court stated that the defendant retailer's conduct was governed by a specific provision for bundled sales, which permits sellers to sell an item below-cost as long as it is packaged with the sale of other items and the total price is above the combined costs.

***Parish Oil Co. v. Dillon Companies,* 2008-1 CCH Trade Cases ¶76,138**