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ANTITRUST

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No Tying Claims for Gas Stations

Two U.S. Courts of Appeal ruled that allegations that gas station franchisees were forced to use their franchisors' credit-card processing services did not state unlawful tying claims. The European Court of Justice decided that the European Commission's approval of a combination of two recorded music firms should not have been overturned by the Court of First Instance.

Other recent antitrust developments of note included a district court's refusal to dismiss as time-barred antitrust claims involving a merger that was completed more than seven years prior to the filing of the complaint.

Tying

In two separate cases, federal appellate courts upheld dismissals of gasoline station franchisees' unlawful tying claims. The plaintiffs—one a gas station owner in Indiana, the other in California—alleged that their respective franchisors unlawfully conditioned granting a gas-station franchise on an agreement to use the franchisors' processing services for the stations' credit- and debit-card transactions. Both complaints also alleged that the franchisors conspired with financial institutions to fix the prices of the processing services.

The U.S. Court of Appeals for the Seventh Circuit stated that the Indiana franchisee's complaint did not sufficiently allege that the franchisor possessed market power in the market for gasoline franchises—the allegedly tying product—as is required to assert an unlawful tying claim. The court rejected assertions that the franchisor—a seller of a single brand of gasoline—constituted its own relevant product market.

The Seventh Circuit added that the complaint did not explain what role a gasoline supplier and franchisor might play in a conspiracy among financial institutions to raise the prices of processing fees and therefore does not allege a plausible antitrust theory as required by the Supreme Court's 2007 *Twombly* decision.

The Ninth Circuit followed a similar analysis and stated that the California plaintiff's market power allegations regarding its franchisor's substantial sales related to the retail gasoline market, and therefore did not support an inference that the franchisor had the requisite market power.

The court rejected the argument that allegations of a contractual franchise relationship sufficiently pleaded market power and observed that antitrust law is concerned with economic power derived from the market, not from voluntary contractual relationships. The court added that a complaint about contractual obligations that were known in advance was not an antitrust matter.

***Sheridan v. Marathon Petroleum Co.*, 2008-1 CCH Trade Cases ¶76,192 (7th Cir.) and *Rick-Mik v. Equilon Enterprises*, 2008 U.S. App. LEXIS 14761, No. 06-55937 (9th Cir. July 11, 2008)**

Acquisitions

The Department of Justice brought suit alleging that the owner of a daily newspaper in Charleston, W.Va., acquired the only other local newspaper with the intent to close it down in violation of antitrust laws. The acquiring newspaper moved to dismiss the complaint, contending that the transaction was not anticompetitive because the two newspapers had operated under a lawful joint venture, or joint operating agreement, since 1958, and that this venture, which combined the papers' advertising functions, had already eliminated all but editorial competition between the newspapers.

The district court denied the motion, stating that the proper characterization of the joint venture and the appropriate standard applicable to it required factual development regarding the degree of integration of the two newspapers' editorial functions, which differed from a joint venture involving fungible goods.

The court rejected the newspapers' argument that all competition that is relevant for antitrust purposes—competition to sell advertising space—was already eliminated by the pre-existing joint operating agreement. The court observed that the exemption granted to newspaper joint ventures by the Newspaper Preservation Act requires preservation of the independent editorial voices.

The court stated that editorial competition for readers' attention and interest impacts circulation and that the complaint sufficiently alleged impact on commercial competition to state a claim.

***United States v. Daily Gazette Co.*, 2008-1 CCH Trade Cases ¶76,191 (S.D. W.Va.)**

The European Court of Justice (ECJ) set aside the July 2006 judgment of the Court of First Instance annulling the European Commission's (EC) approval of the

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combination of two leading recorded music firms. The EC's decision had been challenged by a group of independent music firms.

The high court stated that the Court of First Instance incorrectly required the EC to provide a detailed description of each of the factors underpinning the contested decision and took note of the time constraints under which the commission made the decision.

The ECJ added that the lower court did not properly analyze the degree of pricing transparency needed to evaluate the likelihood of collective dominance in the recorded music market and failed to give adequate attention to the relevance of price variations, such as discounts, when evaluating the possibility of tacit coordination. The court noted, however, that the Court of First Instance properly applied the same standard of proof to an EC decision approving a merger as it would to a decision prohibiting a merger.

***Bertelsmann AG v. Independent Music Publishers and Labels Association (IMPALA),* C-413/06 (July 10)**

Comment: The decision reported immediately above addresses the standard of review for a kind of judicial proceeding that does not arise under U.S. merger law, the appeal by a third party of a government agency's decision not to challenge a merger.

Limitations of Actions

Direct purchasers of health care services from Chicago-area hospitals that had merged on Jan. 1, 2000, filed complaints in 2007 alleging that the merger violated §2 of the Sherman Act and §7 of the Clayton Act and asserting that the hospitals raised prices significantly almost immediately after the merger. The merged hospital moved the court to dismiss the suits as time barred because the complaints were filed more than four years after the merger was completed.

The district court denied the motion and stated that the statute of limitations arguments were not appropriately addressed on a motion to dismiss on the pleadings. In this case, the plaintiffs' contention that they could not have known about their injury at the time of the publicly announced merger required factual development.

The court added that, under §5(i) of the Clayton Act, the running of the limitations period was tolled during the Federal Trade Commission's (FTC) administrative proceedings challenging the merger and that discovery on the date of the accrual of plaintiffs' claim was required to resolve the limitations issues.

***In re Evanston Northwestern Healthcare,* 2008-1 CCH Trade Cases ¶76,182 (N.D. Ill.)**

Comment: Consummated mergers are susceptible to challenge by antitrust enforcers as well as private parties, even many years after the closing of the transaction, as the decision reported immediately above demonstrates.

Sports Leagues

A former college football coach alleged that the National Collegiate Athletics Association (NCAA) conspired with a university and a regional sports association to prevent him from coaching at any NCAA school, constituting an illegal group boycott. The Sixth Circuit affirmed dismissal of the antitrust claims and stated that the NCAA's enforcement of its rules regarding improper recruiting and academic assistance to players, which led to the former coach's inability to find work at an NCAA member school, did not constitute a commercial activity but rather was intended to ensure fair competition in intercollegiate athletics.

The appellate court also affirmed the district court's determination that the former coach did not suffer antitrust injury because he alleged injury only to himself and not to the market.

***Bassett v. National Collegiate Athletic Ass'n,* 2008-1 CCH Trade Cases ¶76,180**

Immunity

A group of taxpayers and tax-preparers alleged that providers of electronic tax preparation and filing services agreed among themselves and the Internal Revenue Service (IRS) to limit the availability of free, online tax preparation and filing services to no more than 70 percent of taxpayers, thereby restricting output and raising prices in violation of §1 of the Sherman Act. The district court dismissed the complaint and stated that the implied immunity doctrine shielded the providers from antitrust liability because they were acting under the direction of a federal agency in accordance with governmental policy. The court noted that there was no evidence that the providers coerced the IRS into accepting the agreement or that the agreement contravened governmental policy, and thus the exception to conduct-based implied immunity set forth in the Supreme Court's 1973 *Otter Tail* decision did not apply.

***Byers v. Intuit Inc.,* 2008-1 CCH Trade Cases ¶76,193 (E.D. Pa.)**

Jurisdiction

Indirect purchasers of liquid crystal display panels that had brought suit alleging a price-fixing conspiracy sought to enjoin a proposed joint venture between two Japanese manufacturers of such panels. The court denied the motion and stated that it lacked jurisdiction to enjoin two Japanese firms from negotiating with one another under the Foreign Trade Antitrust Improvements Act because plaintiffs did not make a sufficient showing that the proposed venture had a direct, substantial and reasonably foreseeable effect on U.S. commerce. The court added that plaintiffs did not present any evidence supporting their claim that the venture would cause them irreparable harm.

***In re TFT-LCD (Flat Panel) Antitrust Litigation,* 2008-1 CCH Trade Cases ¶76,176 (N.D. Cal.)**

Discovery

A district court ruled that the FTC was entitled to videotape depositions of executives of a pharmaceutical firm alleged to have agreed to delay the entry of generic competition. The court stated that the commission's regulations requiring stenographic reports of investigational hearings was mandatory but should not be read to limit the commission's ability to use additional means of recording testimony.

***FTC v. Tarriff,* 2008-1 CCH Trade Cases ¶76,177 (D. D.C.)**

Criminal Prosecution

The U.K. Office of Fair Trading (OFT) announced the sentencing of three individuals who pleaded guilty to allocating markets, fixing prices and rigging bids in the market for marine hose, used for transporting oil between tankers and storage facilities. These were the first convictions for a cartel violation since passage of the 2002 Enterprise Act, which gave the OFT criminal prosecution power.

***Three imprisoned on first OFT criminal prosecution for bid rigging,* 72/08 (June 11), available at www.oft.gov.uk**