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ANTITRUST

BY ELAI KATZ

Drug Makers' Settlement Pact Not Illegal

The U.S. Court of Appeals for the Federal Circuit ruled that an agreement settling a patent dispute did not violate antitrust law because it did not restrain competition beyond the scope of the patent. The Federal Trade Commission (FTC) challenged an agreement to divide markets along the U.S.-Canada border that was extended beyond the term of a legitimate collaboration between golf store chains.

Other recent antitrust developments of note included a decision by the British Court of Appeal that a plaintiff seeking civil damages could not recover the supracompetitive overcharges obtained by participants in a vitamins cartel.

Patent Litigation Settlements

Direct and indirect purchasers of an antibacterial drug brought antitrust class actions alleging that agreements to settle patent disputes between the manufacturer of the brand-name drug and its generic rivals violated §1 of the Sherman Act because the branded drug maker (the patent holder) paid the generics (the alleged infringers) in exchange for delaying the introduction of generic alternatives.

The district court granted the defendants' summary judgment motion and the Federal Circuit affirmed. The appellate court agreed with the lower court's determination that the plaintiffs failed to demonstrate that the challenged agreements had an anticompetitive effect on the market beyond that permitted by the patent. The Federal Circuit stated that, as long as the underlying patent

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litigation is not baseless, the proper test was whether the settlement agreement restrained competition outside the patent's "exclusionary zone," or, put differently, outside the scope of the right to exclude others from making or selling the invention. The appellate panel also ruled that, in the absence of fraud on the patent office or sham litigation, the court need not examine the validity of the patent. The appellate court observed that the judiciary has a long-standing policy favoring private settlement of disputes, including patent litigation.

The court attempted to distinguish the U.S. Court of Appeals for the Sixth Circuit's 2003 *Cardizem* opinion, where a patent settlement was found unlawful per se, by noting that the agreement in that case had anticompetitive effects outside the patent's exclusionary zone, such as a covenant by the generic drug company not to market noninfringing versions of the drug. The Federal Circuit stated that its ruling was consistent with opinions handed down by the Second and Eleventh Circuits.

In re Ciprofloxacin Hydrochloride (Cipro) Antitrust Litigation, **No. 2008-1097 (Oct. 15, 2008)**

Comment: Although the Department of Justice had argued successfully a couple of years ago that the U.S. Supreme Court should not review a somewhat similar ruling by the Eleventh Circuit—yet another point of contention between the department and the FTC—it remains to be seen whether the Justice Department under a new administration will support such review for the decision reported immediately above.

Remedies

The U.K. Court of Appeal ruled that plaintiffs seeking to recover damages under British law from participants in a vitamins price-fixing conspiracy could only recover compensatory damages, limited to the plaintiffs' provable losses suffered as a result of the cartel. The court rejected the argument that the recovery should be based on "restitution" or the defendants' excess profits, to be calculated based on the difference between the artificially inflated prices charged and the competitive prices that would have been charged but for the conspiracy. The court stated that the lead plaintiff, a supplier of pig and poultry feed and a direct purchaser of vitamins, appeared likely to have passed along the claimed conspiracy overcharges to its own customers and therefore may not be able to prove that it suffered any damages due to the conspiracy.

Devenish Nutrition Ltd v. Sanofi-Aventis SA (France), **[2008] EWCA Civ. 1086 (Oct. 14, 2008)**

Comment: As the national courts in Europe begin to address the complexities of civil-damage claims for price fixing violations, they may benefit from observing and analyzing the successes and failures of U.S. approaches to some of these problems over the last 40 years, which include the 1968 *Hanover Shoe* decision,

where the Supreme Court ruled, unlike the British decision reported immediately above, that price-fixing defendants cannot avoid paying damages because the plaintiffs passed on illegal overcharges to indirect purchasers, and the 1977 *Illinois Brick* case, where the Supreme Court decided that indirect purchasers cannot sue for damages under federal antitrust law.

Market Allocation

The FTC announced the settlement of its charges that a U.S.-based chain of golf stores offering clubs, clothing and lessons illegally agreed with a potential competitor based in Canada to allocate markets in violation of the FTC Act. The commission stated that the noncompete clause in the U.S. and Canadian golf stores' first agreement, entered into in 1998, was legitimate and reasonably related to the two firms' consulting and training collaboration. However, when the firms terminated their collaboration in 2004, they extended their agreement not to enter one another's territory. The consent decree bars the U.S. golf store chain from dividing or allocating the market for the retail sale of golf merchandise and prevents enforcement of the noncompete provisions in the challenged agreement.

***In re Dick's Sporting Goods Inc.*, FTC File No. 071-0196 (Oct. 9, 2008), available at www.ftc.gov**

Joint Ventures

A district court ruled that an agreement among members of an automated teller machine (ATM) network to set interchange fees—fees banks must pay when their customers use ATMs owned by other banks or companies—was a "core activity" of the joint venture and therefore must be analyzed under the rule of reason. Citing the Supreme Court's 2006 *Dagher* opinion, the court stated that the challenged conduct was part of "the core activity of the joint venture itself," the right to price the goods that the venture produced. The court added that rule-of-reason analysis would apply even if the challenged restraint was deemed "ancillary" to the joint venture's legitimate goals rather than a "core function."

***In re ATM Fee Antitrust Litigation*, 554 F. Supp. 2d 1003 (N.D.Cal. 2008)**

State Aid in Financial Crisis

The European Union's state aid control laws are designed to ensure that all European firms compete on a level playing field and generally preclude member state governments from distorting competition and trade between member states by conferring an advantage to particular (usually local) firms on a selective basis. Recognizing that government interventions are sometimes necessary, European law allows for various exemptions and has created a regulatory scheme whereby proposed state aid measures must be notified to and approved by the European Commission (EC).

As a result of the current global financial crisis, several member states have sought expedited approval from the EC for their plans to shore up their domestic financial markets by providing support to banks and other financial institutions. The EC has responded by issuing guidelines and putting in place an expedited review process. It has approved plans proposed by the United Kingdom and Ireland, stating that the plans qualified as an appropriate means to remedy a serious economic disturbance, as they are of limited duration and provide nondiscriminatory access to any financial institution with substantial business in those states.

***State Aid: Commission approves revised Irish support scheme for financial institutions, IP/08/1497, State Aid: Commission approves UK support scheme for financial institutions, IP/08/1496 and Communication from the Commission: The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis*, IP/08/1495 (Oct. 13, 2008), available at ec.europa.eu/comm./competition/index_en.html**

Comment: The EC's establishment of an expedited process and articulation of its policies are helpful to clients and practitioners facing questions regarding the role of competition or antitrust laws during a severe financial crisis.

Acquisitions

The Department of Justice announced the settlement of its charges that the combination of two firms that manufacture commercial ice-cube machines, used by hotels, restaurants and convenience stores, would lessen competition in violation of §7 of the Clayton Act. The department stated that the merging firms were two of only three significant ice-cube machine makers and required the divestiture of one of the firm's entire ice machine business. The EC cooperated with the Department of Justice and had previously announced a similar remedy to allow the merger to proceed.

***United States v. Manitowoc Co.*, No. 1:08-cv-0107 (D.D.C. Oct. 6, 2008), available at www.usdoj.gov/atr and *Mergers: Commission approves proposed acquisition of Enodis by Manitowoc subject to conditions*, IP/08/1380 (Sept. 19, 2008), available at ec.europa.eu/comm/competition/index_en.html**

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The FTC issued an administrative complaint challenging a consummated acquisition by a manufacturer of high performance battery separator membranes of a rival firm, alleging that the merger resulted in decreased competition and higher prices in several North American markets for battery separators. The FTC asserted that the February 2008 transaction helped the acquiring manufacturer maintain its monopoly power in the deep-cycle and motive-separator markets. The FTC also challenged an unrelated 2001 joint marketing agreement between the manufacturer and a firm that makes absorbed-glass-mat battery separators, alleging that the purpose of this agreement was to prevent the latter from entering the polyethylene separator market.

***In re Polypore Int'l Inc.*, Dkt. No. 9327, CCH Trade Reg. Rep. ¶16,184 (Sept. 10, 2008), available at www.ftc.gov**

Interlocking Directorates

A women's clothing retailer sought to enjoin some of its shareholders from nominating to the company's board a director who also served on the board of a maternity clothing retailer, claiming that his election would result in a violation of §8 of the Clayton Act, which proscribes interlocking directorates between competitors. A district court denied the motion and stated that the plaintiff did not demonstrate that the possible disclosure of trade secrets, the injury it alleged it would suffer if one of its directors sat on the board of another apparel retailer, constituted antitrust injury. The court added that §8 of the Clayton Act was not intended to serve as a vehicle for the involvement of courts in corporate proxy contests.

***Charming Shoppes Inc. v. Crescendo Partners II, L.P.*, 2008-2 CCH Trade Cases ¶76,287 (E.D. Pa.)**

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