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ANTITRUST

Expert Analysis

Private Challenges to Credit-Card Network Acquisitions Rejected

By **Elai Katz**

Two district courts rejected separate claims brought by private plaintiffs alleging that two transactions—a beer merger and a credit-card network public offering—would likely lessen competition in violation of §7 of the Clayton Act.

The Department of Justice brought an action seeking to unwind a merger of semiconductor suppliers that was not subject to premerger reporting regulations and the Federal Trade Commission (FTC) charged investment funds with failing to comply with premerger rules for making minority stock acquisitions.

Other recent antitrust developments of note included the Department of Justice's decision not to challenge an insurers' consortium formed to provide large commercial insurance policies.

Private Challenges

Merchants who accept payment by credit cards and who had previously asserted antitrust claims against credit-card networks and credit-card issuing banks alleged that MasterCard's initial public offering (IPO) of stock to the public amounted to an anticompetitive acquisition in violation of §7 of the Clayton Act. The merchants claimed that the redemption and reclassification of the member banks' shares constituted an acquisition within the meaning of §7 and that the credit-card network's transformation from a joint venture to a single entity was a pretext meant to shield the network from antitrust liability under §1 of the Sherman Act, which requires an agreement between at least two independent firms or persons.

The district court rejected the defendants' contention that the IPO transaction is not covered by §7 because the banks gave up control and merely redeemed their MasterCard shares but did not "acquire" the stock or assets of another company. The court stated that the purchase of classes of stock that did not previously exist rendered the transaction an "acquisition" and observed that §7 can and should cover transactions not expressly contemplated by the drafters of the 1914 statute.

The district court nevertheless dismissed the IPO-related claims, without prejudice, because plaintiffs failed to allege plausibly that the IPO might lessen competition or lead to a monopoly. The court stated that, after the IPO, the banks would not retain sufficient control to allow them to continue to impose uniform interchange fees, among other alleged anticompetitive practices, without the risk of §1 liability.

***In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2008 2 CCH Trade Cases ¶76,401 (E.D.N.Y.)**

Beer consumers and drinkers brought a civil action seeking to enjoin the acquisition of Anheuser-Busch Inc., the leading U.S. brewer, by Belgium-based brewer InBev SA/NV. The complaint alleged that the transaction would lead to an increase in prices and a decrease in the variety and quality of beer in violation of §7 of the Clayton Act. The district court refused to enjoin the combination and rejected plaintiffs' argument that InBev, with less than one percent of the U.S. market, exerted beneficial disciplining impact on the U.S. market as a perceived potential or actual potential entrant. The court stated that, but for this transaction, InBev was not a potential major competitor as it had taken steps to get out of the U.S. market and there was no evidence that current rival brewers would not be able to restrain pricing in the market.

***Ginsberg v. InBev SA/NV*, 2008-2 CCH Trade Cases ¶76,400 (E.D. Mo.)**

Acquisitions

The Department of Justice filed suit seeking to undo the completed acquisition of a rival by a manufacturer of semiconductor devices used in military and space programs and deemed critical for national security. The Department of Justice asserted that post-acquisition prices for these products increased and the quality of service decreased and alleged that the transaction created a monopoly in the market for small signal transistors and reduced the number of firms likely to compete in the market for ultrafast recovery rectified diodes from three to two. The critical importance of the small signal transistors and the ultrafast recovery rectifier diodes for military and aerospace systems and the views of the Department of Defense contributed to the Department of Justice's determination that the acquisition would result in higher costs, lower quality of service, and increased supply vulnerability. The July 2008 acquisition was not a reportable transaction under the Hart-Scott-Rodino (HSR) Act's premerger notification scheme.

***United States v. Microsemi Corp.*, No. 1:08-cv-1311 (E.D. Va. Dec. 18, 2008), available at www.usdoj.gov/atr**

Two investment funds agreed to pay penalties totaling $800,000 to settle the FTC's charges that they failed to comply with filing requirements under the HSR Act prior to acquiring voting securities of a corporation. The complaint alleged that several 2004 acquisitions should not have been

ELAI KATZ *is a partner at Cahill Gordon & Reindel.* LAUREN RACKOW, *an associate at the firm, assisted in the preparation of this article.*

consummated without providing federal antitrust authorities with notification and observing the HSR waiting period, which is designed to give antitrust enforcers the opportunity to review transactions meeting certain statutory thresholds before they close. The commission stated that the funds did not qualify for the HSR Act's investment-only exemption because one fund had indirect representation on the corporation's board and the other fund held over 10 percent of the corporation's voting securities.

***United States v. ESL Partners LP and ZAM Holdings LP,* No. 1:08-cv-02175 (D.D.C. Dec. 15, 2008), available at www.ftc.gov**

Comment: Under U.S. merger notification and review law, some mergers that seem to raise serious antitrust issues are not subject to file-and-wait requirements while partial acquisitions that are highly unlikely to have any anticompetitive effects must comply with premerger notification rules or risk substantial fines.

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The FTC filed suit to challenge a proposed merger between two firms that provide electronic and software systems used to estimate the costs of collision repairs (estimatics) and to value passenger vehicles that have been "totaled" (total loss valuation, or TLV, systems), and asserted that the combined firm would account for more than half of the estimatics and TLV system markets. Estimatics and TLV systems are used in the process of repairing vehicles damaged in car accidents—estimatics provide the initial estimate to repair a damaged automobile, while TLV systems are used when the cost of repair reaches a certain threshold and the vehicle is declared a total loss.

Emphasizing that the markets for estimatics and TLV systems were highly concentrated, the complaint alleged that the proposed merger would harm insurers, repair shops, and consumers by reducing the number of independent competitors in both markets from three to two and facilitating coordination between the remaining firms.

***In re CCC Holdings Inc. and Aurora Equity Partners III LP,* Dkt. No. 9334 (Dec. 15, 2008), available at www.ftc.gov**

Joint Ventures

The Department of Justice issued a business review letter stating that it would not challenge the formation of a consortium of insurance companies that will offer large commercial insurance policies. Noting that the arrangement would allow commercial insurers that lack the individual capacity to offer large commercial insurance policies (equal to or in excess of $250 million) to combine their insurance capabilities, the department stated that the proposed consortium would likely not decrease competition in the sale of large commercial insurance policies, could offer a new choice for purchasers of these types of policies, and might be more efficient than the insurers' current methods of offering these larger policies, such as reinsuring the risks. The department also observed that the likely participants in the proposed consortium presently account for no more than five percent of the total premiums paid for large commercial insurance policies in the United States.

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***Ivy Capital Group LLC,* Business Review Letter No. 08-5, CCH Trade Reg. Rep. ¶44,108, DOJ Press Release, Department of Justice will not Challenge Formation of Consortium of Commercial Insurers (Nov. 24, 2008), available at www.usdoj.gov/atr**

Comment: In the financial services and insurance industries, joint ventures that combine capital and divide risk among firms that otherwise compete with one another are often deemed to be procompetitive means to finance a project or insure a risk that a single firm is unlikely to undertake on its own.

Immunities

The U.S. Court of Appeals for the Tenth Circuit ruled that the doctrine of tribal sovereign immunity shielded a tobacco company from antitrust liability, affirming the district court's decision. The court stated that the district court did not err in concluding that the tobacco company, which was created by a Native American Tribe as a tribal enterprise, was a division of the tribe and did not waive its immunity from liability under federal law. The appellate court added that although immunity did not extend to the individual defendants, principal managers of the tobacco company, the claims against them failed because as officers of a single enterprise they were not separate actors who could agree to restrain trade in violation of §1 of the Sherman Act.

***Native American Distributing v. Seneca-Cayuga Tobacco Co.,* 2008-2 CCH Trade Cases ¶76,395**

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A federal district court denied a motion to dismiss claims that private equity firms violated antitrust law through their participation in "club deals," where groups of private equity funds jointly sponsored leveraged buyouts (LBOs). The plaintiffs, shareholders of companies that were taken private, alleged that the private equity firms conspired to allocate the LBO market in order to pay less than fair value for the target companies. The court ruled that the plaintiffs alleged sufficient facts to plead an agreement in restraint of trade in violation of §1 of the Sherman Act. The court also rejected defendants' argument that their alleged conduct was immune from antitrust liability because of securities regulation under the Supreme Court's 2007 *Billing* decision, stating that the Securities and Exchange Commission did not sufficiently regulate the defendants or the conduct at issue in this case.

***Dahl v. Bain Capital Partners, LLC,* Civ. No. 07-12388-EFH, 2008 U.S. Dist. LEXIS 101682 (D. Mass. Dec. 15, 2008)**

Antitrust Injury

The Ninth Circuit affirmed the grant of summary judgment to a hospital and medical group defending antitrust charges brought by an excluded doctor. The court stated that the doctor did not produce evidence that the challenged conduct either raised the prices of advanced pediatric radiology services or diminished their quality, as the plaintiff must do to show antitrust injury.

***Hilton v. Children's Hospital San Diego,* 2008 2 CCH Trade Cases ¶76,393 (unpublished decision)**

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