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ANTITRUST

Expert Analysis

Circuit Court Applies Rigorous Class-Certification Standards

By **Elai Katz**

The U.S. Court of Appeals for the Third Circuit ruled that a district court applied too lenient a standard in certifying a class in a chemical price-fixing case, joining other circuit courts in setting forth demanding class certification requirements. The Ninth Circuit ruled that a health care provider should have been permitted to try its claims that a brand-name drug maker monopolized the market by defrauding the patent office.

In the same decision, the Ninth Circuit also affirmed a jury verdict finding that a settlement agreement providing for delayed entry of a generic alternative to the brand-name drug did not cause injury to the health care provider.

Other recent antitrust developments of note included an administrative complaint brought by the Federal Trade Commission (FTC) challenging the now-abandoned combination of rival suppliers of landscape construction materials.

Class Actions

Direct purchasers of hydrogen peroxide sought certification of a class to pursue claims that manufacturers of the chemicals fixed prices in violation of antitrust law. The district court certified a class and defendant chemical manufacturers appealed, arguing that the district court used too-lenient a standard and erroneously applied a presumption of antitrust impact.

The Third Circuit reversed and clarified the standards district courts must use in determining whether common issues predominate over individual issues such that the claims can proceed as a class action: The appellate court stated that the district court must make factual determinations based on a preponderance of the evidence standard, rather than merely accepting a threshold showing of classworthiness by plaintiffs. The Third Circuit panel added that the court must resolve factual or legal disputes relevant to class certification even if those disputes overlap with the merits of the case.

The appellate court stated that the district court should not have disregarded the opinion of defendants' economic expert that it would be impossible to establish through common proof that all or virtually all members of the proposed class suffered economic injury caused by the alleged conspiracy because prices were not uniform and were often individually negotiated. The court emphasized that trial courts must weigh conflicting expert testimony at the certification stage.

In re Hydrogen Peroxide Antitrust Litigation, **No. 07-1689, 2008 WL 5411562 (Dec. 30, 2008)**

Comment: The decision reported immediately above follows a recent trend among federal appellate courts, including the First, Second and Seventh circuits, towards the imposition of more rigorous standards for certifying complex antitrust and securities actions for class treatment.

Patents

A health care provider brought suit alleging that the manufacturer of a brand name hypertension drug monopolized the market by fraudulently obtaining invalid patents to delay the entry of generic competition and entered into an anticompetitive patent-dispute settlement agreement by paying generic firms to delay the introduction of a generic version of the successful hypertension drug.

A district court granted the defendants summary judgment on the monopolization claim and ruled that the patent application constituted protected petitioning and was immune from antitrust claims under the Supreme Court's *Noerr-Pennington* doctrine. The Ninth Circuit reversed, stating that the health care provider showed that there was a genuine issue of material fact sufficient to avoid summary judgment by introducing evidence that the branded drug-maker failed to provide an English translation of a significant Japanese document and did not mention an important court decision to the patent examiner.

The restraint of trade claims proceeded to trial in another district court and the jury found that the health care provider did not suffer injury caused by the delayed-entry provisions of the settlement. The defense had introduced evidence that the generic firm would not have entered the market in any event out of concern for the risk of bringing a generic version of the drug to market without an appellate decision invalidating the relevant patent. The Ninth Circuit affirmed and stated that the trial court did not err by not requiring disclosure of the generic firm's privileged materials, as the generic firm did not rely on an advice-of-counsel defense at trial and argued instead that the firm's board did not want to undertake the risk without regard to counsel's advice.

Kaiser Foundation Health Plan Inc. v. Abbott Laboratories Inc., **Nos. 06-55687, 06-55748, 2009 WL 69269 (Jan. 13, 2009)**

Acquisitions

A supplier of drycast concrete hardscape products used in landscape construction projects announced it would not proceed with an acquisition of a rival firm one day after the FTC filed an administrative complaint to

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challenge the proposed transaction. Because drycast concrete hardscapes are exceptionally heavy and difficult to transport, an effective competitor in the relevant market—defined as the sale of drycast concrete hardscape to national home centers, such as Home Depot—must have plants within 200 miles of national home center locations. The commission alleged that the proposed acquisition would result in a company that would be the only drycast concrete hardscape manufacturing firm capable of supplying these products from plants throughout the country and could control 90 percent or more of the relevant market. The FTC asserted that the proposed acquisition would enable the acquiring company to unilaterally increase prices to national home centers and would ultimately harm "do-it-yourself" consumers by raising their home improvement costs.

***Statement of the FTC's Bureau of Competition Regarding the Announcement That Oldcastle Architectural Inc. Will Not Proceed With Its Proposed Acquisition of the Pavestone Companies (Jan. 15, 2009); In re CHR PLC,* Dkt. No. 9335 (Jan. 14, 2009), available at www.ftc.gov**

Comment: In the enforcement action reported immediately above, the FTC lodged its challenge in its own administrative court, rather than seeking to enjoin the now-abandoned transaction in federal court as has been its more typical practice. The commission also limited the definition of the relevant product market to a particular retail channel, presumably to the exclusion of the same or similar products sold to customers through other kinds of retailers.

A wireless telecommunications firm agreed to pay over $2 million in fines for failing to comply with the terms of a court ordered consent decree arising out of the Department of Justice's challenge to the telecommunications firm's acquisition of a rival. The consent decree required the divestiture of wireless telecommunications businesses in three rural areas and provided that the businesses would be operated independently pending divestiture. The department alleged that the firm failed to separate confidential customer account information and its employees used this information to take customers from the businesses slated for divestiture.

***United States v. AT&T Inc.*, No. 1:07-cv-1952 (ESH) (D.D.C. Jan. 14, 2009), available at www.usdoj.gov/atr**

The U.K. Office of Fair Trade (OFT) announced publication of a restatement of its approach evaluating whether to clear mergers based on "failing firm" grounds, where the acquired firm would be forced to exit the market without the merger. Emphasizing the rationale underlying "failing firm" defenses—that the harm to competition would result even without the merger—the OFT stated it would clear a merger when the business in question would inevitably have exited the market without any serious prospect of being reorganized and a realistic and substantially less anticompetitive alternative to the merger did not exist. The OFT codified its position on "failing firm" claims, previously established through existing guidance and decisional practice, to allow businesses in financial difficulty to understand their options.

The Ninth Circuit ruled that a health care provider should have been permitted to try its claims that a brand-name drug maker monopolized the market by defrauding the patent office.

***Restatement of OFT's Position Regarding Acquisitions of "Failing Firms," OFT1047* (December 2008), available at www.oft.gov.uk**

Restraint of Trade

The FTC announced the settlement of charges that the operator of a Pittsburgh, Pa., real estate multiple listing service (MLS) restricted access to its database to discourage discount brokerage services in violation of antitrust laws.

The commission stated that the MLS, owned by a membership organization composed of local real estate professionals, is the only such database serving the Pittsburgh area and that access to the database is necessary to provide effective real estate brokerage services.

The FTC alleged that the MLS refused to make nontraditional, discount listings available for viewing on publicly accessible real estate Web sites and noted that the brokers enacting the restrictive rules were in effect agreeing among themselves to limit the way they competed with one another.

The commission added that free-riding concerns did not justify the restrictions because a member of the MLS is always involved in posting the discount listings to the database.

***In re West Penn Multi-List Inc.*, File No. 0810167 (Jan. 9, 2009), available at www.ftc.gov**

Group Boycott

The U.S. Court of Appeals for the Sixth Circuit affirmed a district court's dismissal of a complaint alleging a per se horizontal boycott against an insurance company and its affiliated and independent agents' decision to sever relations with another group of insurance companies. The court found that the complaint did not allege any horizontal agreement between the insurance company and its agents. Addressing the independent agents, the Sixth Circuit concluded that the defendants did not engage in a horizontal "hub-and-spoke" conspiracy because the plaintiffs could not identify the "rim," that is, agreements among competing insurance agents.

***Total Benefits Planning Agency Inc. v. Anthem Blue Cross and Blue Shield*, 2008-2 CCH Trade Cases ¶76,435**

Joint Licensing

The Australian Competition and Consumer Commission (ACCC) announced that it did not object to collective bargaining notifications that would allow members of an association of independent labels to offer joint licenses to broadcast music videos. The association proposed to offer nonexclusive licensing rights to certain users to broadcast copyrighted music videos. Noting that transaction costs prevented some members from offering individual licenses—resulting in a loss of fees when their music videos were broadcast—the ACCC stated that joint licensing could lead to more efficient management of licensing rights, generate cost savings for all parties to the license, and increase the viability of the Australian independent music sector.

***ACCC allows independent record labels to collectively license music video broadcast rights*, NR 002/09 (Jan. 9, 2009), available at www.accc.gov.au**