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ANTITRUST

Expert Analysis

Court Examines Premerger Conduct and Information Exchanges

A district court ruled that information exchanged between insurance companies during merger negotiations and the parties' conduct before they merged did not restrain trade in violation of the Sherman Act. The U.S. Court of Appeals for the Second Circuit decided that an arbitration clause precluding the pursuit of antitrust claims as a class was unenforceable. Other recent antitrust developments of note included a decision by the U.S. Court of Appeals for the Ninth Circuit dismissing claims that a social networking Web site monopolized the market by not allowing links to a rival Web site.

Information Exchanges

A leading institutional pharmacy brought suit claiming that in the months leading up to their merger, two health insurers coordinated their business strategies in violation of §1 of the Sherman Act. The pharmacy alleged that during their merger discussions, the health insurers were both negotiating contracts with the pharmacy and that the insurers conspired to have the acquired insurer obtain the lowest possible price from the pharmacy and then switch the acquiring insurer's plan over to the more favorable contract after the merger was consummated.

A district court had denied the health insurers' motion to dismiss the complaint on the pleadings and, following discovery, ruled for the insurers on their summary judgment motion. In a thorough opinion addressing the subtle and complex antitrust issues arising from discussions about commercially sensitive topics between competitors planning a transaction,

By **Elai Katz**

the court ruled that the plaintiff-pharmacy did not bring forth evidence to prove the existence of an agreement in restraint of trade between the insurers.

The court acknowledged that virtually no case law establishes standards for determining when pre-merger discussions are anticompetitive and observed that it sought to strike a sensitive balance between the interest in permitting legitimate merger discussions and preventing free exchanges of competitively sensitive information between rivals.

'Omnicare' provides useful guidance on the delicate antitrust issues arising from communications between rivals considering a merger.

The court stated that pricing information provided by the seller to the buyer during the due diligence process was appropriately conveyed in averages and ranges rather than specifics and was necessary for evaluating the business to be acquired. The court added that even though some sensitive information may have been provided to business personnel beyond the limits contemplated by the parties' confidentiality agreement, such conduct, by itself, was not inconsistent with independent action.

In its evaluation of the evidence of premerger information exchanges, the court distinguished between pricing information flowing from seller to buyer and vice-versa and stated that the rationale for providing the buyer's pricing information to the seller is weaker but that the seller may reasonably want to know that it is being acquired by a well-run firm with sound strategic plans.

The court also focused on the timing of the exchanges and noted that the fact that very little sensitive information was exchanged after the execution of the merger agreement indicated that those communications were for the purpose of evaluating the value and wisdom of the merger, rather than coordination of competitive strategy.

The court also rejected the pharmacy's argument that the acquired insurer's negotiation strategy—walking away from discussions and taking a chance that it would not have a contract with the pharmacy—was so risky and irrational that it could only be explained by the existence of a conspiracy. The court noted that the strategy was successful and that other insurers also took similar bargaining positions.

The court rejected the pharmacy's contention that the merger agreement itself was unlawful because it required that the acquiring insurer approve major transactions contemplated by the seller. The court observed that such provisions are common and that, in any event, negotiations with the pharmacy were carved out of the approval provision. The court noted that consent decrees in U.S. Department of Justice enforcement actions involving merger agreement approval provisions had no precedential value and were distinguishable on their facts.

***Omnicare Inc. v. UnitedHealth Group Inc.*, No. 06-C-6235 (N.D. Ill. Jan. 16, 2009)**

Comment: The *Omnicare* decision provides useful guidance on the delicate antitrust issues

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arising from communications between rivals considering a merger and serves as a reminder to mergers and acquisitions advisors and counselors that antitrust experts should be consulted to advise on the timing, rationale and limitations upon premerger discussions involving competitively sensitive topics.

Arbitration

Merchants that accepted credit and charge cards brought an antitrust suit asserting that American Express's "Honor All Cards" policy amounted to an illegal tying arrangement. A district court granted a motion to compel arbitration pursuant to the mandatory arbitration clause in the merchants' contract with American Express and the merchant-plaintiffs appealed.

The Second Circuit reversed and remanded, stating that the class action waiver provision, which precludes arbitration of claims on a class basis, was not enforceable under the Federal Arbitration Act given the circumstances of this case. The court first noted that the district court, rather than the arbitrator, must decide whether the challenged provision is enforceable. The appellate court then stated that the plaintiffs' expert demonstrated that for these named plaintiffs (relatively small merchants with limited damages claims) the antitrust claims can only be pursued through the aggregation of individual claims either in litigation or in arbitration because the costs of litigation for an individual plaintiff would exceed any likely recovery at trial.

The court observed that antitrust claims may be subject to mandatory arbitration as long as the prospective litigants are not prevented from vindicating their rights under the Sherman Act through arbitration. The court clarified that it did not hold that class action waivers in arbitration agreements are always unenforceable, but that, in this case, enforcing the provision would grant the defendant "de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery."

***In re American Express Merchants' Litigation*, No. 06-1871-cv, 2009 U.S.App. LEXIS 1646 (Jan. 30, 2009)**

Refusal to Deal

The operator of a social networking Web site alleged that a leading rival unlawfully monopolized and attempted to monopolize the market in violation of §2 of the Sherman Act by disabling a function that allowed its users to link to content on the plaintiff's Web site. The Ninth Circuit affirmed a district court's dismissal of the complaint on the pleadings and stated that the allegations did not qualify for the narrow exception to the general rule that even a monopolist may choose not to deal with a competitor. The court noted that the defendant's prior course of action—permitting linking to plaintiff's Web site—was not an agreement or even an understanding between the plaintiff and the defendant but rather a course of dealing between the defendant and its users.

The court observed that the defendant's actions on its own Web site did not reduce consumer choice in the market for social networking Web sites, as there was no allegation that consumers were prevented from directly accessing the plaintiff's or any other social networking site.

The court also affirmed dismissal of California state law claims and stated that a finding that challenged conduct is not an antitrust claim precludes an unfair competition cause of action based on the same conduct.

***LiveUniverse Inc. v. MySpace Inc.*, 2008-2 CCH Trade Cases ¶76,445 (not designated for publication)**

Abuse of Dominant Position

The European Commission (EC) announced that it sent Microsoft a Statement of Objections outlining preliminary conclusions that Microsoft abused its dominant position in violation of Article 82 of the European Treaty by tying the Internet Explorer Web browser to the Windows operating system. The EC asserted that by bundling Internet Explorer with Windows and thereby making Internet Explorer available on 90 percent of personal computers, Microsoft distorted competition among competing Web browsers, undermined product innovation and reduced consumer choice.

***Antitrust: Commission confirms sending a Statement of Objections to Microsoft on the tying of Internet Explorer to Windows*, MEMO/09/15 (Jan. 17, 2009), available at ec.europa.eu/competition**

Acquisitions

The EC announced the approval of a proposed acquisition by the Spanish flag-carrier airline of two Spanish low-cost airlines, conditioned upon the release of slots for landing and take-off rights at several European airports. The EC stated that the proposed acquisition would likely restrict competition or lead to a monopoly on 19 city-pair routes within Spain and from Spain to other European countries. The EC added that the released slots should create conditions for new entrants or existing competitors to operate more than 150 roundtrips per week, while facilitating entry and maintaining competitive pressure on the merged firm.

***Mergers: Commission clears Iberia's proposed acquisition of Vueling and Clickair, subject to conditions*, IP/09/29 (Jan. 9, 2009), available at ec.europa.eu/competition**

Price Discrimination

The Ninth Circuit found that a franchisee's price discrimination claim against a petroleum refiner did not satisfy the "in commerce" requirement under the Robinson-Patman Act. Affirming the district court's grant of summary judgment for the defendant, the Ninth Circuit stated that the price discrimination claim failed because no evidence demonstrated that the gasoline at issue moved in interstate commerce by crossing a state line.

***Petroleum Sales Inc. v. Valero Refining Co.*, 2008-2 CCH Trade Cases ¶76,449**

Cartels

A district court dismissed an antitrust complaint brought against a Venezuelan-based petroleum company for participation in a cartel orchestrated by the Organization of Petroleum Exporting Countries (OPEC). The court stated that the claims were outside its subject matter jurisdiction under the act of state doctrine as the injury alleged was the result of decisions of foreign sovereign states to curtail their production of crude oil.

***In re Refined Petroleum Products Antitrust Litigation*, 2009-1 CCH Trade Cases ¶76,463 (S.D. Tex.)**

Comment: Rulings similar to the one reported in *Refined Petroleum Products* have frustrated elected officials for many years and on Jan. 12, 2009, the "No Oil Producing & Exporting Cartels (NOPEC) Act" was reintroduced in the Senate (S. 204). If enacted, this proposed law would provide that OPEC activities are not protected by sovereign immunity or the act of state doctrine and would authorize related antitrust suits by the Department of Justice but not by private parties.