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Expert Analysis

NFL Lockout and Flurry Of Justice Department Merger Reviews

By **Elai Katz**

The National Football League's labor and antitrust dispute made its way to the U.S. Court of Appeals for the Eighth Circuit where a divided appellate panel indicated that the league's lockout would likely be shielded from the players' antitrust challenge by a labor exemption even though the players disbanded their union before filing their suit.

Other recent antitrust developments of note included a flurry of merger reviews at the Department of Justice. The department commenced three lawsuits challenging (1) a merger of tax preparation software providers, (2) a combination of electronic payment terminal makers and (3) an acquisition of a chicken processing plant. The Justice Department also threatened to sue to block a hostile bid to combine NASDAQ and the New York Stock Exchange, required the divestiture of shampoo and conditioner brands and approved the merger of low-cost airlines, among several other merger enforcement actions.

NFL Lockout

Nine professional football players (and a young player expected to become a professional player) claimed that the National Football League (NFL) and its member teams violated federal antitrust laws by "locking out" the players from playing, practicing and receiving compensation or benefits, among other things. The players asserted that the lockout amounted to a "group boycott" and sought an injunction prohibiting the league from imposing the lockout. The NFL argued that the lockout was exempt from antitrust law because, like a strike, it is a common tool used in labor negotiations.

A district court granted a preliminary injunction against the lockout, accepting the players' contention that the exemption did not apply because they decertified their union as their collective bargaining representative immediately prior to filing their complaint. In a 2-1 decision, the Eighth Circuit disagreed with the district court's reasoning and stayed the district court's injunction pending an expedited appeal.

> The Department of Justice required Unilever to divest two hair care brands in order to proceed with the acquisition of Alberto-Culver Co., another global consumer products company.

The appellate majority stated that it had "serious doubts that the district court had jurisdiction to enjoin" the NFL's lockout under the Norris-LaGuardia Act, which limits the jurisdiction of a district court to issue an injunction "in a case involving or growing out of a labor dispute." 29 U.S.C. §101. The Eighth Circuit majority disagreed with the lower court's conclusions that the case did not involve or grow out of a labor dispute because the players were no longer represented by a union and noted that the statute did not expressly require that the employees be members of a union.

One appellate judge dissented and argued that although the Norris-LaGuardia Act has been interpreted expansively, it remained focused on safeguarding the collective bargaining process. The dissent explained that unions are by definition a group of individuals acting collectively in restraint of free competition in labor markets and that the act and various labor exemptions were designed to strike a balance between collective bargaining and free competition and protect union members from antitrust claims when their collective action is related to labor negotiations. However, according to the dissent, "unless the values of collective bargaining are implicated, federal labor laws yield to the regular antitrust framework" and when employees forgo collective action the rationale for suspending the application of antitrust law falls away.

The dissent observed that the majority's decision holds the players in "limbo" for an indefinite period "during which they can neither take advantage of their collective bargaining rights nor avail themselves of the protections of antitrust law." The dissent suggested that the balance between labor and antitrust law should be demarcated by a clear-cut line upon dissolution of the union.

Brady v. NFL, No. 11-1898, 2011-1 CCH Trade Cases ¶77,456 (May 16, 2011)

Comment: According to press reports, at oral argument one of the judges urged the parties to

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reach a settlement and the parties have since confirmed that discussions are ongoing.

Stock Exchange Merger

The Department of Justice announced that NASDAQ OMX Group Inc. and Intercontinental Exchange Inc. abandoned their joint, unsolicited bid to acquire NYSE Euronext after the department said it would bring suit to block the deal in court. The department stated that NYSE (owner of the New York Stock Exchange) and NASDAQ, operators of the major stock exchanges in the United States, were effectively the only domestic providers of stock listing services and competed aggressively for companies that want to list shares of their stock.

The department added that NYSE and NASDAQ were the only sellers of stock auction services designed to handle large order flows at the open and close of each trading day. In addition, the two companies competed head-to-head on stock price data collection and reporting. The department asserted that the proposed acquisition would amount to a merger to monopoly in several markets.

"NASDAQ OMX Group Inc. and Intercontinental Exchange Inc. Abandon Their Proposed Acquisition of NYSE Euronext After Justice Department Threatens Lawsuit" and "Remarks as Prepared for Delivery by Assistant Attorney General Christine Varney Regarding NASDAQ OMX Group Inc. and Intercontinental Exchange Inc. Abandoning Their Bid for NYSE Euronext" (May 16, 2011), available at www.usdoj.gov/atr

Tax Software Merger

The Department of Justice filed a complaint in Washington, D.C. federal court seeking an order enjoining H&R Block Inc.'s proposed acquisition of TaxACT, a rival provider of do-it-yourself tax preparation software. The complaint alleged that the merging firms were the second and third largest providers of do-it-yourself tax preparation software and that the top three firms account for 90 percent of the market.

The department noted that TaxACT has been a maverick—disrupting the market with lower prices and product innovation—that has thwarted coordination between the two leading firms. In addition, the department alleged that competitive pressure from TaxACT caused H&R Block to offer a free online product.

The complaint also referenced internal H&R Block documents stating that "elimination" of a competitor was one of the benefits of the acquisition.

United States v. H&R Block Inc., No. 11-cv-00948, CCH Trade Reg. Rep. ¶45,111 No. 5178 (D.D.C. May 23, 2011), also available at www.usdoj.gov/atr

Bank Merger

Berkshire Hill Bancorp and Legacy Bancorp, two Massachusetts-based banks, agreed to divest four branch offices in Berkshire County, Mass., to resolve the Department of Justice's objection to the banks' proposed merger. The department indicated that, without the divestitures, the combination would lessen competition in local markets for retail banking and small business banking services. The transaction is also subject to Office of Thrift Supervision approval.

The Department of Justice announced that NASDAQ OMX Group Inc. and Intercontinental Exchange Inc. abandoned their joint, unsolicited bid to acquire NYSE Euronext after the department said it would bring suit to block the deal in court.

"Justice Department Reaches Agreement With Berkshire Hills Bancorp and Legacy Bancorp on Divestitures" (May 18, 2011), available at www.usdoj.gov/atr

Chicken Processors

The Department of Justice commenced a lawsuit challenging the completed acquisition of Tyson Foods' Harrisonburg, Va., chicken processing complex by rival chicken processor George's Inc. Chicken processors, often referred to as integrators, contract with nearby farmers to grow chickens. The department asserted that the transaction combined two of three chicken processors in the Shenandoah Valley and would reduce competition for grower services. The government's complaint focused on the harm to sellers of services to the combined company, not buyers of processed chicken. Assistant Attorney General Christine Varney stated that "America's farmers deserve competitive prices and terms for the sale of their services."

According to the complaint, the companies signed an agreement and immediately closed the acquisition, which was not reportable under the Hart-Scott-Rodino Act's premerger notify-and-wait provisions, despite their knowledge of the department's serious concerns.

The district court set a trial date for late August and ordered George's to maintain the ongoing viability of Tyson's facilities and not to sell or transfer any of the acquired assets without the Department of Justice's approval.

United States v. George's Foods, LLC, No. 11-cv-00043, CCH Trade Reg. Rep. ¶45,111 No. 5175 (W.D. Va. May 10, 2011)

Comment: The enforcement action reported immediately above highlights a conundrum that arises from time to time in non-reportable acquisitions where the parties have the legal right to close the deal but the antitrust authority has expressed concerns. The parties must weigh any economic and legal advantages of closing the deal against the risk of precipitating government action and possibly having to unwind the transaction in the future.

More Chickens

In another transaction involving chicken processors, the department decided not to challenge the combination of Perdue Farms Inc., the third largest processor of conventional chicken in the United States, and Coleman Natural Foods, a processor of natural and organic chicken. As in the *George's Foods* acquisition, the Justice Department considered the competitive impact of increased concentration among buyers in a given market. In this case, the department concluded that the Perdue and Coleman facilities do not overlap in any local region.

"Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Perdue's Acquisition of Coleman Natural Foods" (May 2, 2011), available at www.usdoj.gov/atr

Comment: In the two chicken processing acquisition matters reported immediately above, the department analyzed a potential increase in buyer market power, sometimes

referred to as "monopsony power." As the recently revised merger guidelines acknowledge in a new section discussing mergers of competing buyers, the agencies are not primarily concerned about the effects of monopsony power in the downstream markets in which the merging firms sell, such as any increase in the price of chicken sold to consumers, but rather anticompetitive decreases in prices paid to sellers.

Point-of-Sale Terminals

The Department of Justice commenced litigation to block VeriFone Systems Inc.'s proposed acquisition of Hypercom Corp. The department alleged that the merger would substantially lessen competition in the market for point-of-sale (POS) terminals used by retailers to accept credit and debit card payments. The complaint also asserted that the parties' proposed remedy to divest Hypercom's U.S. business to Ingenico S.A. would not resolve antitrust concerns as Ingenico is the only other significant competitor in the domestic POS terminal market. The parties subsequently abandoned the planned divestiture to Ingenico and court proceedings have been stayed as the parties seek to find an acceptable alternative buyer.

United States v. VeriFone Systems Inc., CCH Trade Reg. Rep. ¶45,111 No. 5176, No. 11-cv-00887 (D.D.C. May 12, 2011) and "VeriFone, Hypercom and Ingenico Abandon Plans to Divest Point of Sale Business to Ingenico Following Justice Department Lawsuit" (May 20, 2011), available at www.usdoj.gov/atr

Shampoo and Conditioner

The Department of Justice required Unilever, the multinational consumer products company, to divest two hair care brands in order to proceed with the acquisition of Alberto-Culver Co., another global consumer products company. The antitrust agency asserted that the merger would have reduced the number of significant competitors in the markets for "value shampoo and conditioner" sold in retail stores from three to two and would have left Unilever with around 90 percent of those markets.

The department stated that value shampoos are not reasonably interchangeable with more expensive shampoos because of the kinds of ingredients used and the substantial price gap between value shampoos, which are generally priced around $1 per bottle and the next level of shampoos, priced at over $2 a bottle.

The department stated that it cooperated with antitrust authorities in the United Kingdom, Mexico and South Africa in this investigation, aided by the parties' timely provision of waivers facilitating such cooperation.

United States v. Unilever N.V., No. 11-cv-00858, CCH Trade Reg. Rep. ¶45,111 No. 5174 (D.D.C. May 6, 2011), available at www.usdoj.gov/atr

Comment: Despite the revised merger guidelines' downplay of the need for rigorous identification of relevant markets, the merger enforcement action reported immediately above relied on traditional structural analysis, where a relevant market is defined and substantial increases in market concentration lead to a presumption of anticompetitive effects.

Software Patent Acquisition

The Department of Justice announced that a consortium of technology companies seeking to acquire hundreds of patents have modified their original agreement to address the department's concerns that the acquisition would lessen competition and innovation among open source software developers. The consortium—composed of Microsoft Inc., Oracle Corp., Apple Inc. and EMC Corp.—sought to acquire nearly 900 patents and patent applications from Novell Inc. and subsequently allocate them to the four consortium members.

The revised agreement provides that the patents will be acquired subject to a widely adopted open-source license and a significant license for the Linux operating system and that the consortium will not limit or modify the availability of any acquired patents under the Linux license.

The department stated that it cooperated closely with the German Federal Cartel Office and that the parties granted waivers to enable the agencies to share information and coordinate on the proposed relief.

"CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice's Open Source Concerns" (April 20, 2011), available on www.usdoj.gov/atr

Low-Cost Airline Merger

The Department of Justice announced that it closed its investigation into Southwest Airlines Company's proposed acquisition of rival low-cost carrier AirTran Airways. The department stated that although the airlines compete on some nonstop routes, the airports affected by those overlaps do not have restrictions on slots or gate availability and the combined airline will benefit consumers by offering new service on routes that neither airline currently flies. The department added that low-cost carriers have exerted pricing pressure on routes previously served only by incumbent legacy airlines.

"Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Southwest's Acquisition of AirTran" (April 26, 2011), available at www.usdoj.gov/atr

Workforce Technology

The Department of Justice announced that two providers of health care workforce management solutions abandoned their planned merger after the department expressed concerns about the transaction. The companies, API Healthcare Corporation and Kronos Inc. are one another's most significant rivals for health care time and attendance technology and would have controlled approximately 70 percent of the market, according to the department.

"API Healthcare Corp. Abandons Merger Plans With Kronos Inc. After Justice Department Expresses Antitrust Concerns" (April 29, 2011), available at www.usdoj.gov/atr