New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 246—NO. 20
FRIDAY, JULY 29, 2011

ANTITRUST

Expert Analysis

TV Channel Bundling, Advertising Inserts and Drugs

The U.S. Court of Appeals for the Ninth Circuit ruled that consumers challenging the sale of cable and satellite television channels in bundled, multi-channel packages rather than individually did not state an antitrust claim. A district court issued an order setting forth parameters for prospective bundling and tying practices by publishers of Sunday newspaper advertising inserts.

Other recent antitrust developments of note included a decision by the U.S. Court of Appeals for the Third Circuit that a hospital could not bring tying claims against a drug-maker because the hospital bought the pharmaceuticals from an independent wholesaler rather than directly from the defending manufacturer and a ruling by a divided U.S. Court of Appeals for the Eighth Circuit that a district court was not authorized to enjoin the NFL's lockout.

Bundling TV Channels

Subscribers to cable and satellite television brought an antitrust suit alleging that the programmers and distributors of television services violated antitrust laws by selling multi-channel packages rather than selling each channel separately. The plaintiffs sought monetary damages and an injunction to require that channels be made available on an individual, non-bundled basis. The district court dismissed the complaint, and the Ninth Circuit affirmed.

The appellate court analyzed the claims as alleged bundling or tying violations and observed that the typical competitive harm from these violations is the exclusion of rivals rather than supra-competitive prices, which is the classic injury caused by a horizontal price-fixing conspiracy. The court stated that the complaint did not sufficiently plead any injury to competition, as distinguished from injury to consumers, because there were no allegations that sellers of less popular channels were excluded or that any other competitors were foreclosed from the market. The court noted that antitrust law permits businesses to choose to sell their products in bundles or packages as long as competition is not injured.

Brantley v. NBC Universal, 2011-1 CCH Trade Case ¶77,497.

By **Elai Katz**

Bundling Inserts

Rival firms engaged in publishing free-standing advertising booklets or inserts, typically containing coupons and inserted in a Sunday newspaper, agreed to resolve their antitrust dispute by having a special masters panel provide parameters for future conduct that would be embodied in a court order.

The district court adopted the report and recommendation of the panel of special masters, composed of distinguished antitrust practitioners, and issued an order governing the parties' future business practices with respect to bundling and tying. The panel's report recommended that bundling—offers of substantial discounts conditioned upon the customer buying a bundle of products, often including products not sold by other competitors—would not violate the court order unless the bundle was priced below cost, as evaluated under an "attribution test," and was likely to substantially lessen competition.

> A hospital could not bring tying claims against a drug-maker because the hospital bought the pharmaceuticals from an independent wholesaler.

The panel's attribution test, based in large part on the standard adopted by the Ninth Circuit in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), provides that a bundle can be illegal only if, after allocating all bundle discounts and rebates to the competitive product (the product also sold by the complaining firm), it was sold by the bundling firm at a price below an appropriate measure of incremental cost. The attribution test functions as a "safe harbor" in the sense that pricing above cost (after attributing all bundle-related discounts to the competitive product) is presumed to be lawful.

The panel observed that the recommended bundling standard is intended to apply to short-term arrangements that can be viewed as a type of price competition, as opposed to practices that function as long-term exclusive dealing arrangements and that should be subject to traditional rule of reason analysis without an above-cost safe harbor. The panel stated that the attribution test "protects efficient rivals from exclusion while ensuring that competition based on superior efficiency is not frustrated."

With respect to tying, whereby a seller agrees to sell one product only on the condition that the buyer also purchases a different product, the panel recommended adopting the well-established judicial standard and pointed out that the coercion element can be satisfied when the buyer has "no economically practical option" to buy the allegedly tied product.

Valassis Communications Inc. v. News America Inc., No. 06-cv-10240 (E.D. Mich. June 15, 2011).

Comment: The standard recommended by the panel of special masters follows the Ninth Circuit's guidance but differs sharply from the Third Circuit's much criticized en banc decision in *LePage's Inc. v. 3M Co.*, 324 F.3d 141 (3d Cir. 2003), which condemned bundled rebates as a violation of §2 of the Sherman Act without articulating an unambiguous standard.

Indirect Purchasers

The Third Circuit ruled that a hospital lacked standing to assert tying claims against a drug manufacturer because the hospital bought the products from an independent wholesaler. The Supreme Court had held, in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that only direct purchasers have standing to bring claims to recover damages from antitrust violators under §4 of the Clayton Act.

The appellate court rejected the hospital's argument that it was a direct purchaser because it negotiated with the drug-maker and the drug-maker paid rebates directly to the hospital. The court stated that those facts did not transform the hospital into a direct purchaser because the drug wholesaler took a profit in the transactions and had physical possession of the products before delivering them to the hospital.

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

The Third Circuit also disagreed with the contention that the hospital had standing because it was the first injured party. The court emphasized that the *Illinois Brick* test depends on who was the first, immediate buyer and was expressly designed to avoid asking courts to allocate the harm along the distribution chain. In any event, the court determined that the drug wholesaler could have been injured as well by the alleged tie.

Warren General Hospital v. Amgen Inc., 2011-1 CCH Trade Case ¶77,484 (June 14, 2011).

Hospital Merger

The U.S. Court of Appeals for the Eleventh Circuit granted a preliminary injunction to prohibit the consummation of a proposed hospital acquisition pending appeal of the trial court's dismissal of the Federal Trade Commission's complaint. The district court had ruled that the state action immunity doctrine shielded the proposed acquisition from antitrust scrutiny because a municipal hospital authority was the acquiring party even though the FTC asserted a private firm, Phoebe Putney Health System, effectively motivated and controlled the acquisition of rival Palmyra Park Hospital. The FTC had alleged that the proposed merger would create a monopoly in the Albany, Georgia, area, resulting in higher health care costs for patients.

FTC v. Phoebe Putney Health System Inc., No. 11-12906 (July 6, 2011).

NFL Labor Dispute

A divided panel of the U.S. Court of Appeals for the Eighth Circuit ruled that the district court should not have enjoined the National Football League's lockout, as anticipated by the appellate court's earlier decision, reported in last month's column, to stay the district court's order pending an expedited appeal. The appellate panel explained that the district court did not have the authority to grant an injunction as requested by the player-plaintiffs in their antitrust complaint against the league.

The Eighth Circuit majority stated that the Norris-LaGuardia Act, 29 U.S.C. §101 et seq., which prohibits injunctions for cases "involving or growing out of a labor dispute," applied to this case notwithstanding the players' decision to disclaim the union as their collective bargaining representative immediately prior to filing their suit. The court stated that "the labor dispute did not suddenly disappear just because the players elected to pursue the dispute through antitrust litigation rather than collective bargaining."

The Eighth Circuit's majority rejected the players' argument that the statute prohibits injunctions against strikes—which had been enjoined by courts before the law's passage as unlawful conspiracies in restraint of trade—but not against lockouts because such a "one-way" interpretation would conflict with the law's text and its intent to leave labor disputes to economic forces rather than subject them to the judgment of the courts.

Brady v. NFL, 2011-1 Trade Cases ¶77,518.

Premerger Notification

The FTC and the Department of Justice announced the amendment of the form, related instructions, and rules for parties required to file for antitrust review of proposed mergers and acquisitions under the Hart-Scott-Rodino Act (HSR). These changes increase the burden of premerger notification in some respects while reducing the burden in others.

The amended form includes a new section, item 4(d), designed to require parties to provide categories of documents not fully captured by the current item 4(c). These additional categories include confidential information memoranda (e.g., offering memoranda and similar documents) that describe the acquired business, materials prepared by investment bankers, consultants, or other third-party advisers that contain competition-related content about the transaction, such as bankers' "pitch books" or analyses of strategic options, and documents that evaluate expected synergies.

The amended form broadens the reporting of overlaps and holdings of related entities that are under common management with the acquiring party but not under common "control" (in the HSR sense of that term). This change will likely impact private equity funds and other similarly structured organizations that have not been required under the current form to provide information about holdings by related entities in the same family of funds.

The standard recommended by the panel of special masters in 'Valassis Communications' follows the Ninth Circuit's guidance but differs sharply from the Third Circuit's much criticized en banc decision in 'LePage's Inc. v. 3M Co.,' which condemned bundled rebates as a violation of §2 of the Sherman Act.

The FTC has eliminated the reporting of "baseline" year revenue, which often required costly and time-consuming collection of outdated and irrelevant data.

Premerger Notification; Reporting and Waiting Period Requirements, FTC http://www.ftc.gov/os/fedreg/2011/07/110707hsrfrn.pdf.

Comment: Although the FTC has streamlined parts of the form, the addition of item 4(d) may require submission of additional materials created by consultants and investment bankers, such as pitch books, while reporting requirements for related entities will likely increase the cost and burden for some filers.

Chicken Processing

The Department of Justice agreed to settle a lawsuit, described in last month's column, charging that the acquisition of a chicken processing plant in Virginia by another processor would violate §7 of the Clayton Act by reducing prices paid to local chicken growers. The settlement requires the buyer to make improvements to the acquired plant that would, according to the department, increase production and demand for grower services, and thereby remedy the government's concerns.

United States v. George's Foods, LLC, 11-cv-00043, CCH Trade Reg. Rep. ¶45,111 No. 5157 (June 23, 2011 W.D. Va.), available at www.justice.gov/atr.

Merger Remedies

The Department of Justice released an updated version of its Policy Guide to Merger Remedies. The revised guide recognized that divestitures may not be appropriate to remedy competitive concerns in many vertical mergers, whereas conduct remedies, including information firewalls and non-discrimination provisions designed to prevent future behavior that might harm consumers, could allow for efficiencies while preventing competitive injury. The guide also indicated that the department will continue to prefer structural remedies, that is, divestitures, for horizontal mergers.

The guide addresses the significance of timing in implementing effective remedies, comparing "fix-it-first" remedies with upfront buyers and the more common post-consummation divestiture packages pursuant to a consent decree. The guide also describes the role of the recently created Office of the General Counsel in evaluating and policing compliance with remedy decrees.

Antitrust Division Policy Guide to Merger Remedies, U.S. Department of Justice, Antitrust Division (June 2011) http://www.justice.gov/atr/public/guidelines/272350.pdf.

Comment: The policy guide does not highlight capital improvements, the remedy in the chicken processing merger described above, as a favored form of relief.