New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 246—NO. 58
THURSDAY, SEPTEMBER 22, 2011

ANTITRUST

Expert Analysis

Cellular Merger Under Fire; City Loses Challenge on Combining Health Insurers

The Department of Justice brought a lawsuit seeking to block AT&T's proposed acquisition of T-Mobile, asserting that it would combine two of the four providers of mobile wireless telecommunications services and eliminate a "maverick." The U.S. Court of Appeals for the Second Circuit affirmed the rejection of New York City's challenge to a merger of health insurers for failure to define a plausible relevant market.

Other recent antitrust developments of note included a thorough opinion by the U.S. Court of Appeals for the Third Circuit concluding that statutory limitations on the extraterritorial application of federal antitrust laws are substantive rather than jurisdictional and a ruling about ice cream distribution in Puerto Rico by the U.S. Court of Appeals for the First Circuit.

Wireless Merger

The Department of Justice brought an action in federal court in Washington, D.C., challenging AT&T's proposed acquisition of rival wireless telephony provider T-Mobile. The department's complaint alleges that the combination would likely substantially reduce competition in national and local markets for mobile wireless telecommunications generally and in particular for business and government customers of mobile wireless services.

The complaint sets out a structural case, asserting that in most metropolitan areas the combined firm would have over 40 percent market share and that the concentration levels resulting from the merger would exceed the thresholds set out in the 2010 horizontal merger guidelines. And, according to the government's complaint, the number of national firms would be reduced from four to three, leaving Verizon and the smaller Sprint as AT&T's remaining competitors.

The proposed merger would eliminate head-to-head competition between AT&T and T-Mobile and will enhance the risk of coordination among the remaining firms, according to the complaint. The complaint adds that local or regional providers are limited in their ability to constrain the national carriers because, among other things, they must obtain wholesale "roaming" services

By **Elai Katz**

from a national carrier to provide service throughout the United States. The department also asserts that the acquisition would remove from the market the disciplining impact of T-Mobile, a "maverick" firm that introduced aggressive pricing and innovative technologies. Seven states, including New York, have joined the department's lawsuit.

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Sprint, the third largest mobile wireless provider also filed a complaint in the same court seeking to enjoin the transaction and asserting that an AT&T-Verizon "duopoly" would reduce Sprint's ability to obtain cutting-edge devices and foreclose its access to crucial content and applications. In addition, Sprint alleges that the merger will lead to higher prices for "backhaul" services, which connect wireless networks to traditional wireline networks.

United States v. AT&T Inc., No. 11-cv-01560 (D.D.C. Aug. 31, 2011), available at www.usdoj.gov/atr, and *Sprint Nextel Corp. v. AT&T Inc.*, No. 11-cv-01600 (D.D.C. Sept. 6, 2011)

Comment: The AT&T-T-Mobile merger is also subject to approval by the Federal Communications Commission (FCC), which gives great weight to competition concerns when exercising its duty under the Communications Act to determine if the proposed transfer of licenses and authorizations will serve the public interest. FCC Chairman Julius Genachowski stated that while the FCC's review is not complete, there are "serious concerns about the impact of the proposed transaction on competition." (See Statement of Chairman Julius Genachowski, Aug. 31, 2011, available at www.fcc.gov)

Health Insurance Merger

The City of New York challenged the proposed merger of Group Health Incorporated (GHI) and Health Insurance Plan (HIP), health insurers that provided coverage for the vast majority of city employees, as a violation of state and federal antitrust law. The district court granted summary judgment to the defendant insurers, and the Second Circuit affirmed.

The appellate court observed that a plaintiff must allege a plausible relevant market in which competition will be impaired to state a claim under §7 of the Clayton Act (anti-competitive mergers and acquisitions), §2 of the Sherman Act (monopolization) and the Donnelly Act (New York's antitrust law). The court went on to state that the city's proposed market—the low-cost municipal health benefits market—is legally insufficient because it is defined by the city's preferences, rather than the range of reasonable substitute insurance providers for the city's employees.

The Second Circuit added that the district court did not err in deciding that the city's proposed amendment to its pleadings came too late, three years into the litigation and only after a summary judgment motion challenged the relevant market definition. The appellate panel also let stand the district court's rejection of the city's request to add the upward pricing pressure (UPP) test to the complaint because the city did not explain how the UPP test (used to assess the impact of a merger on pricing) can substitute for properly pleading a relevant market definition.

City of New York v. Group Health Inc., 2011-2 CCH Trade Cases ¶77,569 (Aug. 18, 2011)

Foreign Conduct

Domestic buyers of magnesite, a mineral used to melt steel and make cement, among other things, brought antitrust claims alleging a price-fixing conspiracy among Chinese producers and exporters of magnesite. The district court decided, sua sponte, that it lacked subject matter jurisdiction to hear the case under the Foreign Trade Antitrust Improvements Act (FTAIA), which provides that the Sherman Act does not apply to conduct involving non-import trade or commerce with foreign nations, subject to important exceptions.

On appeal, the Third Circuit vacated and remanded the lower court decision. The appellate panel stated that the district court erred in analyzing the FTAIA issue as one of jurisdic-

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tion rather than a substantive merits limitation. Relying on *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006)—where the Supreme Court cautioned that unless Congress "clearly states" that a limitation is jurisdictional, the courts should not treat it as such—the Third Circuit panel overturned prior decisions that characterized the FTAIA's limitations as jurisdictional.

The Third Circuit agreed with Judge Diane Wood's dissent in *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003), where she wrote that there was no "hint that Congress was attempting to strip federal courts of their" jurisdiction in the FTAIA.

The distinction between a jurisdictional and a substantive limitation has a significant impact on the litigants' relative burdens. Whereas a jurisdictional analysis arising under Federal Rule of Civil Procedure 12(b)(1) places the burden on the plaintiff to establish that there is subject matter jurisdiction, a substantive pleading analysis under Rule 12(b)(6) puts the burden on the defendant.

The Third Circuit panel then provided interpretive guidance, assuming the district court addresses the FTAIA on remand, stating that the exception permitting the assertion of federal antitrust claims if the conduct involves "import trade or import commerce" does not require that the defendants function as importers as long as their conduct targets import goods or services and that the "effects" exception does not require subjective intent to impact U.S. commerce but rather objectively foreseeable direct and substantial effects on domestic commerce.

Animal Science Products Inc. v. China Minmetals Corp., No. 10-2288, 2011-2 CCH Trade Cases ¶77,566 (Aug. 17, 2011)

Teeth Whitening

The North Carolina Board of Dental Examiners, a state agency created to regulate the practice of dentistry in the state, engaged in a campaign to try to stop non-dentists from providing teeth-whitening services by, among other things, sending cease-and-desist letters to non-dentists and writing to mall operators to dissuade them from leasing to non-dentist teeth-whitening businesses.

In an Initial Decision, an FTC administrative law judge ruled that the dentist board's concerted action to exclude competing providers of teeth-whitening services constituted an unreasonable restraint of trade in violation of §5 of the FTC Act. The judge added that the evidence showed anti-competitive effects, including non-dentists leaving the North Carolina market.

The judge rejected the board's contention that it acted to enforce state law and protect the public from dangerous or unsafe teeth-whitening services because such social welfare concerns are not valid pro-competitive justifications under antitrust law. Competing dentists were not justified in colluding to prevent non-dentist teeth-whitening, the administrative judge added, even if that practice were unlawful in North Carolina, as the board contended.

Earlier this year, the commission had determined that the dental board's conduct was not shielded by state-action immunity because the board was controlled by dentists and the state did not actively supervise the board.

North Carolina Board of Dental Examiners, FTC Docket 9343, CCH Trade Reg. Rep. ¶16,623 (July 19, 2011)

Film Producers

The Producers Guild of America sought the Department of Justice's review of a proposal to use a certification mark—"p.g.a."—in film credits to identify film producers whose work meets the guild's criteria. The certification is meant to distinguish those who perform a full-time producer's traditional duties from financiers, actors and lawyers who obtain producer credits for other services. The department determined that the certification program is not likely to harm competition because it would not exclude producers without a p.g.a. certification or producers who are not members of the guild. The department stated that the proposal would not reduce the supply of producers available to movie studios and would not prevent studios from hiring producers without a p.g.a. certification.

Producers Guild of America, Business Review Letter, No. 11-1, CCH Trade Reg. Rep. ¶44,111 (Aug. 26, 2011), available at www.usdoj.gov/atr

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Ice Cream Distribution

Sterling Merchandising, a distributor of ice cream in Puerto Rico, claimed that Nestlé, its rival and the largest local distributor, violated the Sherman Act by acquiring another distributor and entering into exclusive contracts with retailers. The First Circuit affirmed the grant of summary judgment to Nestlé on the grounds that Sterling, the second largest ice cream distributor on the island, did not suffer the requisite antitrust injury to have standing to bring federal antitrust claims.

The court noted that, since the allegedly anti-competitive acquisition, Sterling had increased its sales and share of the market while Nestlé's share had declined from 85 to 70 percent. The appellate panel added that the evidence did not show increased prices or reduced output, the archetypal indicators of harm to competition.

Sterling Merchandising Inc. v. Nestlé, S.A., No. 10-1925, 2011-2 CCH Trade Cases ¶77,586 (Sept. 1, 2011)

Comment: In the decision reported immediately above, the court noted that the allegedly anti-competitive acquisition had been approved, with conditions, by the Puerto Rico Office of Monopolistic Affairs.

Supermarket Acquisition

As is the case in the United States, foreign enforcement agencies that typically make decisions on an administrative basis have struggled from time to time in their efforts to persuade courts to accept their articulation of the relevant market.

The Australian Competition and Consumer Commission (ACCC) sought to block the proposed acquisition of Franklins, a supermarket chain, by Metcash, a supplier of packaged groceries to independent supermarkets. The ACCC asserted that the combination would violate Section 50 of the Competition and Consumer Act 2010 as it would likely have the effect of substantially lessening competition in the market for the wholesale supply of packaged groceries to independent supermarket retailers in the state of New South Wales (which includes Sydney) and the Australian Capital Territory.

The commission asserted that following the merger, Metcash will be the only major distributor for independent markets, emphasizing Franklins' role as a wholesale supplier to its franchise stores and a potential supplier to others.

The Federal Court of Australia dismissed the ACCC's case on the grounds that Metcash faced substantial indirect competitive pressure from Australia's national, vertically integrated (or self-supplying) supermarket chains, including Woolworths and Coles. The court observed that if Metcash significantly increased wholesale prices charged to independent stores, they would likely pass those increased costs along to retail consumers who can switch to the self-supplying national supermarket chains, and Metcash would ultimately lose sales. In addition, the court noted, the national chains exert competitive pressure on Metcash through their efforts to buy independent grocery stores that Metcash supplies. Accordingly, the court stated, those self-supplying supermarket chains, with around 80 percent of the retail grocery market, should not be excluded from the analysis.

The court observed that the Australian supermarket industry is characterized by a high degree of vertical integration in the distribution supply chain; while the major chains own their wholesaling operations, many independent supermarkets operate under the banner of a major wholesaler, such as Metcash's IGA brand, or as franchises. As such, the court rejected the commission's efforts to restrict the definition of the relevant market to the wholesale supply of packaged groceries to independent supermarkets as opposed to all supermarkets.

The court also noted that in the absence of the proposed acquisition—the "counterfactual" scenario—it is likely that the competitive status quo would not be maintained because Franklins would probably sell its assets store-by-store to different buyers. The court added that the combination of Franklins and Metcash could strengthen independent grocery stores' ability to compete against the national chains.

The ACCC announced that it intends to appeal the decision.

ACCC v. Metcash Trading Limited, [2011] FCA 967 (Aug. 25, 2011) and "ACCC Appeals Metcash Judgment" (Sept. 9, 2011), available at www.acc.gov.au