New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 249—NO. 36
MONDAY, FEBRUARY 25, 2013

ANTITRUST

Expert Analysis

Supreme Court: Hospital Merger Not Immune Under State Action

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The U.S. Supreme Court ruled that the state action doctrine did not shield the combination of two Georgia hospitals from FTC scrutiny because the state did not clearly articulate a policy empowering the local hospital authority to undertake mergers that will substantially lessen competition. The U.S. Court of Appeals for the Tenth Circuit declined to review a lower court decision not to dismiss on state action grounds antitrust claims against a private apartment complex that had an exclusive contract with a state university.

Other antitrust developments of note included the U.S. Court of Appeals for the Third Circuit's decision that a French pharmaceutical company that distributed its product in the United States through a licensee could not bring antitrust claims against the seller of a competing product because the French company was neither a consumer nor a competitor in the U.S. market and the Department of Justice's comments to the Federal Energy Regulatory Commission (FERC) urging the commission to carefully consider the possibility that proposed transparency rules would increase the likelihood of coordination in natural gas markets.

State Action Immunity

The public hospital authority in Albany, Ga., owner-lessor of one of two local hospitals, agreed to purchase and lease the other hospital, leading to a combined share of 86 percent of the regional market for acute-care hospital services. The Federal Trade Commission (FTC) commenced a suit in federal court seeking to enjoin the transaction pending administrative proceedings, alleging that it would create a virtual monopoly and would substantially reduce competition in violation of §7 of the Clayton Act. The district court dismissed the complaint, finding that the merger was immune from federal antitrust scrutiny under the state-action doctrine, and the U.S. Court of Appeals for the Eleventh Circuit affirmed.

A unanimous Supreme Court reversed. The court's opinion, authored by Justice Sonia Sotomayor, observed that state-action immunity, particularly when asserted by municipalities or other "substate" entities, should not be applied unless the antitrust defendants acted pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition. The court rejected the argument that the allegedly unlawful merger was a "foreseeable" result of the Georgia Hospital Authorities Law's provisions permitting hospital authorities to acquire and lease hospitals and facilities. Sotomayor stated that the grant of acquisition and leasing powers mirrored other general powers routinely conferred upon private corporations and typically used in ways that raise no antitrust concerns. She noted that the Eleventh Circuit applied the foreseeability concept too loosely and added that while the law permits the acquisition of hospitals, it does not clearly authorize hospital authorities to make acquisitions that will substantially lessen competition.

The court cautioned that loose application of the clear-articulation test would effectively require state legislatures, which frequently delegate corporate authority to local bodies, to affirmatively "disclaim any intent to displace competition to avoid inadvertently authorizing anticompetitive conduct."

FTC v. Phoebe Putney Health System, No. 11-1160 (Feb. 19, 2013)

Comment: Courts often prefer to interpret antitrust immunities and exemptions narrowly, as reflected in the decision reported immediately above where the court observed twice that "state-action immunity is disfavored."

State Action Appeals

In another development involving state action immunity, the operator of the Regency apartment complex near the University of Colorado's Denver campus brought an antitrust suit alleging that the operator of another local apartment complex—Campus Village—violated antitrust laws by entering into an agreement with the university requiring students to reside in the Campus Village apartments during their first two semesters. Campus Village moved to dismiss the complaint on the pleadings pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the residency restriction was not subject to the Sherman Act by operation of the state action immunity doctrine, asserting that the restriction was authorized by a clearly articulated and affirmatively expressed state policy to displace competition with regulation.

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The district court denied the motion to dismiss, and Campus Village appealed under the collateral order doctrine, which permits some non-final orders—such as the denial of a motion to dismiss, which typically cannot be appealed—to be reviewed immediately by an appellate court. The Tenth Circuit dismissed the appeal and stated that a lower court's rejection of state action immunity asserted by a private party is not immediately appealable. The appellate court noted that some other circuit courts decided that the denial of a state action immunity motion to dismiss made by a government entity is subject to immediate or interlocutory review because the immunity is meant—in addition to barring the recovery of money damages—to allow public officials to perform their duties without the concern of the disruption and indignity of trial and pretrial discovery. The Tenth Circuit stated that those concerns were not present when a private party raises state action immunity as a defense to an antitrust suit. The appellate panel also observed that the Supreme Court cautioned against expansion of the collateral order doctrine.

Auraria Student Housing at the Regency v. Campus Village Apartments, No. 11-1569, 2013-1 CCH Trade Cases ¶78,204 (10th Cir. Jan. 4, 2013)

Antitrust Injury

The Third Circuit ruled that Ethypharm S.A., a French pharmaceutical company, lacked antitrust standing to assert Sherman Act claims against Abbott Laboratories for, among other things, bringing a patent infringement suit against the exclusive U.S. distributor of Ethypharm's cholesterol-reducing drug and entering into a restrictive settlement agreement with the distributor. Ethypharm sought to recover for lost profits from the drug's lackluster performance, allegedly due to Abbott's patent suit and settlement. The district court granted summary judgment to Abbott, agreeing with Abbott's assertion that Ethypharm could not have been harmed by any anticompetitive conduct in the United States and did not suffer the requisite antitrust injury.

The appellate panel affirmed and began by observing that antitrust injury is generally limited to consumers and competitors in the restrained market. Ethypharm did not claim to be a consumer, and the court concluded that Ethypharm could not be considered Abbott's competitor in the United States because it lacked the legal right to sell its drug in the United States and elected to participate in the market exclusively through a U.S. distributor. The court limited its ruling to the unique case where pharmaceutical regulations present legal barriers to participating in the U.S. market and clarified that the ruling does not extend to all situations where manufacturers use distributors to sell their products.

The court added that Ethypharm did not qualify for the "inextricably intertwined" exception to the requirement that an antitrust plaintiff must be either a consumer or a competitor because the Third Circuit has interpreted that exception narrowly to include only cases where the plaintiff competes in the market generally but does not compete directly against the defendant.

Ethypharm S.A. France v. Abbott Laboratories, No. 11-3602, 2013-1 CCH Trade Cases ¶78,232 (3d Cir. Jan. 23, 2013)

Courts often prefer to interpret antitrust immunities and exemptions narrowly.

Price Dissemination

The Department of Justice provided comments on FERC's proposal to require reporting and public dissemination of specific natural gas transactions under the natural gas market transparency provisions of the Natural Gas Act. The department observed that transparency can have both pro-competitive and anti-competitive effects. On the one hand, transparency can increase efficiency in production, consumption and investment. And, in this particular case, transparency can also enable market monitoring by the commission and the public. On the other hand, transparency can also facilitate coordination among suppliers, particularly when detailed, transaction-specific information is made available.

The Department of Justice urged FERC to carefully consider the conditions and existing degree of transparency in natural gas markets "to avoid unnecessarily increasing the likelihood of coordination among gas suppliers." The department recommended that the commission consider keeping firm- or transaction-specific information confidential or otherwise withhold such details from public dissemination. The department also suggested aggregating, masking and/or lagging the release of detailed transaction data so that market participants would not be able to reach terms of coordination or detect deviation from any coordinated plan.

Comment of the U.S. Department of Justice, Federal Energy Regulation Commission, Enhanced Natural Gas Market Transparency, Docket No. RM13-1-000 (Feb. 1, 2013)

Grocery Markets

When grocery wholesaler Flemings Inc. went bankrupt in 2003, the two largest full-line grocery wholesalers—Minnesota-based SuperValu Inc. and New Hampshire-based C&S Wholesale Grocers Inc.—each acquired Flemings facilities in the other's primary geographical region (the Midwest and New England, respectively). Pursuant to an asset exchange agreement, SuperValu and C&S then exchanged their Flemings facilities. The exchange agreement also included a non-compete provision prohibiting each wholesaler from selling to customers served by the Flemings distribution facility sold to the other.

Grocery retailers supplied by defendants brought suit alleging that the non-compete clause violated the Sherman Act. The district court ruled in 2010 that the non-compete provision was not per se unlawful, reasoning, in part, that it did not entirely prohibit competition and there were procompetitive benefits including more efficient service to customers. Changing their theory, the retailers then claimed that the entire agreement was unlawful per se as an allocation of markets and territories.

Following a similar line of reasoning, the court declined in its most recent ruling to subject the agreement to either per se condemnation or a "quick look" abbreviated rule of reason analysis and granted defendants' summary judgment motion following a full rule of reason review.

The court stated that it must evaluate the agreement's effect on competition generally in the wholesale grocery market and not solely on competition between SuperValu and C&S. The court noted that the evidence showed customers switched their business to other wholesalers in the Midwest and New England markets, and at least one store fielded offers from other distributors. Furthermore, the retailers were unable to show detrimental effects on competition despite the substantial increase in concentration, according to the court.

In a separate decision in a related case, a split panel of the U.S. Court of Appeals for the

Eighth Circuit revived similar claims brought by five retail grocers whose complaints were dismissed from the action by the district court on the grounds that they were covered by arbitration provisions between the retailers and one or another of the defendant wholesalers. The appellate majority reversed and stated that the arbitration clauses did not contemplate an antitrust conspiracy and did not bar the retailers from bringing an antitrust lawsuit against the wholesaler with which they did not sign an arbitration agreement.

In re Wholesale Grocery Products Antitrust Litigation, 09-MD-2090, 2013-1 CCH Trade Cases ¶78,223 (D. Minn. Jan. 11, 2013); *In re Wholesale Grocery Products Antitrust Litigation*, No. 11-3768 (8th Cir. Feb. 13, 2013)

Private Redress in the UK

In a development from across the Atlantic Ocean, the United Kingdom Secretary of State for Business, Innovation and Skills announced proposals that could make it easier for consumers and companies to take action against anticompetitive behavior. Of particular note are two suggested reforms. First, the proposal recommends the establishment of the Competition Appeal Tribunal as a venue for competition actions, including the ability to fast-track simpler cases in an effort to promote redress for smaller businesses.

Second, the proposal introduces limited opt-out collective actions, which would be among the first of its kind in the European Union. The proposal includes certain safeguards that the government hopes will prevent abuse of the new collective action mechanism: There will be no treble damages available, no contingency fees for lawyers and a continuation of enforcement of the "loser-pays" rule. Furthermore, "strict judicial certification" of any collective action is intended to ensure only meritorious claims proceed. These proposals are likely to reinforce the UK as a jurisdiction of choice (when appropriate) for violations of EU competition law.

Department for Business Innovation & Skills, Private Actions in Competition Law: A consultation on options for reform—government response, BIS/13/501 (January 2013).

Comment: Most of the proposals must endure the legislative drafting process and Parliamentary debate. It will likely be a matter of years before any changes requiring legislative approval are enacted. Nonetheless, the proposal could usher in a new age of private antitrust enforcement in the United Kingdom and, even more broadly, the European Union.

Tour Bus Merger

The Department of Justice and the New York State Attorney General alleged in a civil complaint that New York City tourists saw sightseeing tour bus prices increase by approximately 10 percent after the two major bus companies, Gray Line New York and CitySights NY, formed a joint venture in 2009. The suit claimed that the transaction substantially eliminated competition in violation of state and federal law and seeks divestiture of the CitySights brand or dissolution of the joint venture, and a permanent injunction barring a future combination of the businesses.

According to the complaint, Gray Line New York and CitySights accounted for nearly all of the hop-on, hop-off bus tour market in New York City since CitySights introduced "intense" competition in 2005. The complaint further alleged that an executive advised during a board presentation that the joint venture would be able to "assume [a] 10% fare increase," but that without the transaction, no fare increase would ensue "due to competition."

A proposal in the UK introduces limited opt-out collective actions, which would be among the first of its kind in the European Union. The proposal includes certain safeguards: There will be no treble damages available, no contingency fees for lawyers and a continuation of enforcement of the 'loser-pays' rule.

As reported in last February's Antitrust column, the joint venture was not reportable under the Hart-Scott-Rodino Act, and the parties sought approval of the transaction from the federal Surface Transportation Board (STB) because it operated nominally in interstate commerce. The board declined to approve, clearing the way for this antitrust challenge.

United States and New York v. Twin America, No. 12-CV-8989, CCH Trade Reg. Rep. ¶45,112 No. 5318 (Dec. 11, 2012 S.D.N.Y.)

Collective Negotiation

The Department of Justice settled charges that the Oklahoma State Chiropractic Independent Physicians Association violated §1 of the Sherman Act in its collective negotiation of payer contracts. The association—representing about 45 percent of Oklahoma's chiropractors—allegedly denied its members the ability to independently negotiate payment agreements with health insurance providers and other payers since 1997.

On top of this restriction, a 2004 directive required association members to cancel any existing contracts made with payers before the 1997 policy. The department alleged that these policies decreased the availability of chiropractic services, increased prices and kept members from offering patient discounts. The proposed final judgment enjoins the association from contracting with payers on behalf of its members and further enjoins negotiating or facilitating negotiation of joint contracting among chiropractors.

United States v. Oklahoma State Chiropractic Independent Physicians Association, No. 13-CV-21, CCH Trade Reg. Rep. ¶45,113 No. 5322 (N.D. Okla. Jan. 10, 2013)

Price Fixing

Following a two-week trial in federal court in Puerto Rico, a jury convicted a former executive of a coastal water freight transportation company of participating in a conspiracy to fix rates and surcharges for transporting goods between the continental United States and Puerto Rico. According to the Department of Justice, evidence presented at trial showed that the executive and other coconspirators agreed to allocate customers of Puerto Rico freight services, rig bids and fix rates and surcharges. The department noted that to date three companies and six individuals (including the executive) have pleaded guilty or been convicted for participation in the conspiracy.

Former Executive Convicted for Role in Price Fixing Conspiracy Involving Coastal Freight Services Between the Continental United States and Puerto (Press Release, Department of Justice, Antitrust Division, Jan. 29, 2013)