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ANTITRUST

Expert Analysis

Drug Purchasers May Bring Patent-Fraud Antitrust Claims

By **Elai Katz**

The U.S. Court of Appeals for the Second Circuit ruled that purchasers of a patented drug had antitrust standing to bring monopolization claims based on fraudulent patent procurement even though they would not have been able to directly challenge the patent's validity. In another case, a district court decided that a race-tire manufacturer lacked the requisite antitrust injury to bring unlawful exclusive dealing claims against a competitor.

Other recent antitrust developments of note included provisional acceptance by the European Commission of a settlement proposal to remedy allegations that Microsoft tied its Internet browser to its dominant operating system in violation of European competition law.

Standing

Following a generic drug-maker's successful challenge of the enforceability of a patent for a brand name antidiuretic medication on the basis of inequitable conduct before the patent office, purchasers of the drug brought an antitrust suit claiming that the branded drug-maker unlawfully inflated the price of the drug by suppressing generic competition. The purchasers alleged that the defendants, among other things, fraudulently procured the patent, a genre of unlawful monopolization first recognized by the U.S. Supreme Court in *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

The district court dismissed the complaint, stating that the purchasers lacked standing to bring a *Walker Process* claim because the challenged patent had not been enforced against them, and the Second Circuit reversed. The appellate court first noted that the purchasers would be "efficient enforcers" as excluding competition was a means for the defendants to charge consumers higher prices, according to the theory of the complaint, even though the generic competitors were injured more directly.

Next, the Second Circuit observed that *Walker Process* claims are typically brought as counterclaims in patent infringement suits and that purchasers of the drug cannot directly challenge the patent's validity. The court also acknowledged the concern that expanding the universe of patent challengers may disturb the incentives to innovate essential to patent policies. Nevertheless, the appellate court was wary of the potential of leaving antitrust violations "undetected or unremedied" if recognized patent challengers do not bring suits. Without deciding whether purchasers have standing to raise *Walker Process* claims in all cases, the Second Circuit stated that where a patent is already unenforceable due to inequitable conduct, purchasers have standing to assert fraudulent procurement claims.

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In re DDAVP Direct Purchaser Antitrust Litigation, No. 06-5525-CV, 2009 U.S. App. LEXIS 22719 (Oct. 16, 2009)

Exclusive Dealing

A manufacturer of tires for race cars claimed that a rival race tire maker entered into anticompetitive exclusive dealing arrangements with sanctioning bodies that set the rules for dirt-oval-track auto racing events in violation of the Sherman Act. The plaintiff alleged that the defendant made payments to sanctioning bodies to have one of its tires selected as the only tire that could be used for a series of races or racing seasons, thereby foreclosing the plaintiff from a substantial portion of the market.

The district court granted summary judgment to the defendant because the plaintiff did not show it suffered antitrust injury—harm of the type the antitrust laws were intended to prevent and that flows from that which makes the acts unlawful. The court stated that exclusive dealing arrangements can be procompetitive and that competition to become the exclusive supplier is a powerful form of rivalry. The court added that the only injury suffered by the plaintiff is exclusion—the inevitable result of competition for exclusive contracts—and that losing the competitive battle to become the exclusive supplier does not give rise to antitrust injury.

The court observed that sanctioning bodies often choose to use a "single-tire rule" in their races—as well as rules specifying other particular components—to provide a level playing field. The court also noted that the plaintiff itself had provided promotional money in exchange for exclusivity.

Race Tires America Inc. v. Hoosier Racing Tire Corp., 2009-2 CCH Trade Cases ¶76,748 (W.D. Penn.)

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Comment: Thorough analysis of the precise nature and causes of an antitrust plaintiff's asserted injuries often puts into sharper focus the legality of the allegedly anticompetitive practice under the antitrust laws.

Tying

The European Commission (EC) welcomed a proposal by U.S.-based Microsoft to resolve concerns that it may have violated Article 82 of the European Treaty by abusing its dominant position in personal computer operating systems. The EC had asserted that the software company distorted competition on the merits between Web browsers by tying its Web browser to its dominant operating system, making its browser available on more than 90 percent of personal computers worldwide and providing it with an artificial distribution advantage that other browsers were unable to match. The commission stated that the tying arrangement slowed the pace of innovation and created artificial incentives for content providers and software developers to design their products primarily for Microsoft's browser.

Under the software company's improved proposal, which appears to have addressed the EC's concerns, computer users will be presented with a choice screen explaining what Web browsers are, presenting a list of browsers and providing more information about the Web browser they may wish to install in addition to or instead of Microsoft's browser. Likewise, personal computer manufacturers would be able to install competing Web browsers, set them as the default browser and disable Microsoft's browser. The EC has invited consumers, software companies, computer makers and others to comment on the proposal as part of a "market test" before it becomes final and legally binding.

Antitrust: Commission Market Tests Microsoft's Proposal to Ensure Consumer Choice of Web Browsers; Welcomes Further Improvements in Field of Interoperability, MEMO/09/439 (Oct. 7, 2009), available at ec.europa.eu/competition

Multidistrict Litigation

The U.S. Court of Appeals for the Third Circuit ruled that a decision by a district court judge to compel arbitration of an antitrust dispute between pharmacies and a prescription benefits manager should not have been vacated by the judge to whom the case was transferred by the Judicial Panel on Multidistrict Litigation for coordinated proceedings. The appellate court stated that under the "law of the case" doctrine, courts should avoid revisiting prior decisions in the absence of extraordinary circumstances.

The Third Circuit added that nothing in the multidistrict statute or rules authorizes a transferee to vacate or modify an order of a transferor judge. The appellate panel acknowledged its disagreement with the Manual for Complex Litigation and expressed a concern that failure to adhere to the law of the case doctrine could bring havoc and potential delay and confusion to parties involved in multidistrict litigation.

In re Pharmacy Benefit Managers Antitrust Litigation, 2009-2 CCH Trade Cases ¶76,747

Acquisitions

The Federal Trade Commission (FTC) announced the settlement of charges that the combination of two pharmaceutical companies—forming the world's largest drugmaker based on revenue—would substantially lessen competition in violation of §7 of the Clayton Act. The proposed settlement would permit the merger to proceed subject to divestitures of animal vaccines and other animal medicines to a pre-approved German drug company. The commission alleged that without the divestitures, the transaction would have reduced the number of suppliers of certain vaccines for cattle, dogs and cats and other drugs used to treat cattle, dogs, cats and horses.

The court in 'Race Tires America Inc. v. Hoosier Racing Tire Corp.' stated that exclusive dealing arrangements can be procompetitive and that competition to become the exclusive supplier is a powerful form of rivalry.

The commission stated that it had conducted a lengthy investigation of potential overlaps in various human pharmaceutical markets, including Alzheimer's disease, as well as the merger's broader impact on incentives to innovate. The FTC determined that the evidence demonstrated that the transaction would not likely harm consumers in human drug markets.

The Canadian Competition Bureau also announced an agreement allowing the merger to proceed subject to the animal vaccine and pharmaceutical divestiture as well as modification of the terms of an arrangement for the distribution and marketing of human hormone replacement therapy drugs in Canada.

Earlier this year, the EC approved the proposed acquisition conditioned upon the buyer's commitment to divest certain animal health products, expressing similar concerns to those asserted by U.S. and Canadian antitrust authorities.

Pfizer Inc. and Wyeth, Docket No. C-4267, FTC File No. 091 0053 (Oct. 14, 2009), available at www.ftc.gov; *Competition Bureau Requires Significant Divestitures in Merger of Pfizer and Wyeth* (Oct. 14, 2009), available at www.competitionbureau.gc.ca; *Mergers: Commission Clears Pfizer's Proposed Acquisition of Wyeth, Subject to Conditions*, M.5476, IP/09/1161 (July 17, 2009), available at ec.europa.eu/competition

Interlocking Directorates

FTC Chairman Jon Leibowitz issued a statement regarding two overlapping directors who served on the boards of two firms—one principally a computer maker and the other principally a leading search engine provider.

Section 8 of the Clayton Act prohibits a person from serving as a director of two corporations that are competitors even if only relatively small—but not de minimus—part of their business operations compete with one another. Courts have described the law as designed to "nip in the bud incipient antitrust violations by removing opportunity or temptation" for improper coordination or information sharing.

The statement commended the firms for resolving the FTC's concerns without the need for litigation by having one director resign from each of the boards.

Statement of FTC Chairman Jon Leibowitz Regarding the Announcement that Arthur D. Levinson Has Resigned from Google's Board (Oct. 12, 2009), available at www.ftc.gov

Comment: The interlocking director statute contemplates the possibility that corporations that previously were not competitors might become rivals as a result of acquisitions or natural growth into new geographic or product markets and provides a one-year grace period in such cases.