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Litigation News and Analysis • Legislation • Regulation • Expert Commentary

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WHAT'S INSIDE

ACQUISITION

Feds try to stop AT&T's T-Mobile deal

The U.S. Department of Justice has filed suit to stop AT&T's proposed acquisition of T-Mobile, saying the $39 billion deal would substantially reduce competition for mobile wireless services across the country.

United States v. AT&T Inc. et al., No. 1:11-cv-01560, complaint filed (D.D.C. Aug. 31, 2011).

The government has asked the U.S. District Court for the District of Columbia for an injunction blocking the merger.

REUTERS/Danny Moloshok

The Obama administration sued to block AT&T's $39 billion acquisition of wireless rival T-Mobile on concerns it would harm competition, launching its biggest challenge yet to a takeover and dealing the carrier a potentially costly blow.

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COMMENTARY

Pfleiderer AG v. Bundeskartellamt: A step forward in efforts to obtain discovery from European Commission antitrust proceedings

Heidi M. Stilton, Craig S. Davis and Daniel Levisohn of Lockridge Grindal Nauen discuss a recent ruling by the European Union Court of Justice that may provide plaintiffs in the United States a new to tool to obtain evidence of cartel activities and prove their claims in antitrust cases.

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Pfleiderer AG v. Bundeskartellamt: A step forward in efforts to obtain discovery from European Commission antitrust proceedings

By Heidi M. Silton, Esq., Craig S. Davis, Esq., and Daniel Levisohn
Lockridge Grindal Nauen

For years, civil antitrust lawyers have identified the European Commission's antitrust investigations as a source for evidence of cartel activity. As part of Europe's regulatory framework, the EC offers leniency to cartels in exchange for their cooperation with the Directorate General for Competition, the EC agency in charge of enforcing the European Union's competition rules.[1]

Seeking evidence of wrongdoing, antitrust plaintiffs litigating in the United States have sought to use the discovery provisions of the Federal Rules of Civil Procedure to request records from these investigations.[2]

> U.S. courts have been reluctant to help plaintiffs obtain records from EC investigations.

However, these records have often remained undiscoverable — in large part because of the EC itself, which has vigorously advocated against the disclosure of information obtained from leniency deals.[3] The reasoning is that future cartels would be less likely to cooperate in antitrust proceedings if the proceedings made them vulnerable to civil lawsuits.[4] Defendants and the EC argue that disclosure of these records could undermine Europe's antitrust regulatory regime.[5]

U.S. courts have been reluctant to help plaintiffs obtain records from EC investigations. Judges have typically denied motions to compel cartel defendants to produce documents obtained from EC leniency programs.[6] U.S. courts have deferred to the EC's reasoning that the integrity of the European antitrust system outweighs an individual plaintiff's interest in discoverable records.

The principle of international comity has often provided the basis for these decisions. International comity encourages a "spirit of cooperation [when] a domestic tribunal approaches the resolution of cases touching the laws and interest of other sovereign states."[7]

However, a new judgment by the EU Court of Justice may provide an opening for civil antitrust plaintiffs in the United States to obtain records from EC investigations.

In *Pfleiderer AG v. Bundeskartellamt*, the Court of Justice instructed European courts that the EU's competition laws "must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement."[8]

This decision is an important step toward permitting antitrust plaintiffs to obtain appropriate discovery when they have been injured by defendant cartels. *Pfleiderer* shows that European courts do not consider it inevitable that EC records will be shielded from plaintiffs. As such, *Pfleiderer* also suggests that judges in the United States should rebalance their comity analysis when asked to compel discovery of EC leniency records in the course of antitrust litigation.

DISCOVERY IN ANTITRUST CASES

The U.S. Federal Rules of Civil Procedure provide for an expansive discovery process. Parties to a civil case in federal court are entitled to "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."[9] Discoverable information need not be admissible at trial; it is restrained only by what "appears reasonably calculated to lead to the discovery of admissible evidence."[10]

The U.S. Supreme Court has called the pretrial discovery process "one of the most significant innovations of the Federal Rules of Civil Procedure."[11] The federal rules give discovery "a vital role in the preparation for trial."[12] The values that underlie pretrial discovery are central to the functioning of the U.S. court system.

> At best, European countries' jurists may view the American pretrial discovery process as an oddity.

As a U.S. district court explained, "The general practice of requiring a party to turn over documents in its possession, however damaging those documents may be to the disclosing party, serves the important goals of increasing fairness and accuracy in adjudication."[13]

In antitrust litigation, pretrial discovery is arguably more important than in other types of litigation. The reason is simply that the proof of wrongdoing "is largely in the hands of the alleged conspirators."[14] Britain's High Court of Justice, Chancery Division, recently observed:

> Indeed, it is a commonplace that the victim of a cartel will not have all the information necessary for it to assess whether, and if so to what extent, the prices it has been charged were inflated as a result of the operation of the cartel. Thus in the absence of satisfactory disclosure, prosecution of damages claims by those who suffered from the operation of a cartel becomes difficult and one-sided.[15]

This difficulty in prosecution may be particularly true "when plaintiffs allege an antitrust conspiracy which has taken deliberate and elaborate steps to cloak its activities."[16]

In the modern, transnational business climate, antitrust plaintiffs often confront

legal systems that operate differently from the American system. Obtaining otherwise discoverable evidence that resides in foreign territory can be challenging.

Defendants may resist turning over records, citing the laws and procedures of foreign jurisdictions[17] or international treaties.[18]

> Some countries have gone so far as to pass blocking statutes that criminalize the disclosure of documents in discovery proceedings.

Many foreign jurisdictions, particularly civil-law jurisdictions where judges possess significant investigatory powers, offer no comparable pretrial discovery process.[19] At best, these countries' jurists may view the American pretrial discovery process as an oddity.[20] At worst, they may regard pretrial discovery as hostile to their own democratic traditions and systems of justice.[21]

Some countries have gone so far as to pass blocking statutes that criminalize the disclosure of documents in discovery proceedings.[22]

SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE

Whether to compel the production of evidence in these situations requires courts to answer tough questions about procedure and conflicts of law about discovery.

In *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, the U.S. Supreme Court clarified how courts should respond when domestic rules governing discovery come into conflict with the rules of foreign jurisdictions or international treaties.[23]

Specifically, the high court analyzed whether plaintiffs could compel the production of evidence located in France using the Federal Rules of Civil Procedure or whether the plaintiffs were required to follow the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, an international treaty to which the United States and France were signatories.[24]

The court held that the Hague Convention was not intended to be the exclusive mechanism for compelling the production of evidence in a foreign territory.

However, rather than adopt a firm rule about which procedures to apply, *Société* instructed courts to conduct a comity analysis on a case-by-case basis, balancing the sovereign interests at stake with the interests of the parties.[25]

The court summarized five factors:

- The importance to the litigation of the documents or other information requested.
- The degree of specificity of the request.
- Whether the information originated in the United States.
- The availability of alternative means of securing the information.
- The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[26]

DISCOVERY OF EC DOCUMENTS

When applying the *Société* precedent to cases in which a plaintiff has moved to compel the production of documents obtained from EC antitrust proceedings, courts have generally held that comity favors denying motions to compel production.

> A new judgment by the European Court of Justice may provide an opening for civil antitrust plaintiffs in the United States to obtain records from EC investigations.

A representative case is *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, in which several leading credit card providers allegedly inflated transaction fees paid by merchants.[27] Prior to commencement of the lawsuit, the EC had investigated practices by credit-card companies similar to the practices alleged by the plaintiffs.[28]

The plaintiffs moved to compel records from the EC investigation, but the EC declined to authorize the release of the requested records.[29] The EC explained that disclosure of the documents "may seriously undermine the effectiveness of public antitrust enforcement."[30]

The *Payment Card* court reviewed relevant case law to decide whether to compel production of the documents by the defendants. The plaintiffs' relied upon *In re Air Cargo Shipping Services Antitrust Litigation*, in which the defendant, Air France, tried to withhold from discovery five boxes of documents on the basis that disclosure would violate France's blocking statute.[31]

Despite the blocking statute, the judge in *Air Cargo* granted the plaintiffs' motion to compel, concluding that the French interest was only "a sovereign interest in controlling access to information within its borders."[32]

In addition, the court noted that the French government had already consented to disclosure of the information to the U.S. Department of Justice, which had conducted its own investigation into the same activity.[33]

Ultimately, the District Court in *Payment Card* found that *Air Cargo* was not on point because the "prohibition imposed by the French blocking statute is different in kind from the interest asserted by the European Commission."[34]

The court in *Payment Card* next analyzed *In re Vitamins Antitrust Litigation*, a case in which a court ordered the production of documents over objections from the EC.[35] In that case, the plaintiffs sought production of records that the defendants had submitted to the EC concerning vitamin price-fixing.

The special master's comity analysis explained that the interests of the EC were not more important than the interests of the U.S. in enforcing its own antitrust laws.[36]

But the *Payment Card* court identified another factor unique to the case that may have swayed the outcome in favor of production: The defendants had destroyed records and gone to great lengths to hide their activities.[37]

The opinion most persuasive to the court in *Payment Card* was *In re Rubber Chemicals Antitrust Litigation*. In that case, the defendants had voluntarily admitted to the EC anticompetitive conduct in the rubber chemical industry in exchange for leniency.[38]

The plaintiffs moved to compel disclosure of the defendant's communications with the EC. In refusing to order production, the court observed that the requested records pertained to anticompetitive conduct in Europe, not in the United States.[39]

More importantly, the court's comity analysis granted significant deference to the EC's position that production would create disincentives for future participation. The court observed that "a foreign entity has taken a clear position and articulated reasons why it believed production of the requested document would harm its interests. ... [T]he principles of comity outweigh the policies underlying discovery."[40]

Using reasoning from *In re Rubber Chemicals*, the District Court in *Payment Card* denied the plaintiffs' motion to compel production.[41] The court observed that the EC "established that confidentiality plays a significant role in assisting the effective enforcement of European antitrust law ... [by] encourag[ing] third parties to cooperate with the commission's investigations."[42]

While acknowledging the interests of the United States in enforcing its own antitrust laws, two factors swayed the court that the EC's interests should prevail.

First, the defendants had other avenues for obtaining the information.[43] Second, the EC's investigation was ancillary to the real matter in the case. "[It] is the defendants' European business practices, rather than the commission's investigation itself, that may be directly relevant to this litigation," the court explained. "[The requested documents], though they might be helpful to the plaintiffs, are secondary to any unlawful conduct alleged to give rise to a cause of action."[44]

PFLEIDERER DECISION

The opinion from the EU Court of Justice in *Pfleiderer* was issued against this backdrop in the United States.

Responding to ongoing EC protests about the fallout of subjecting its investigations to American pretrial discovery, U.S. courts were reluctant to compel the production of leniency records. Although obtaining EC documents was not impossible for plaintiffs, U.S. courts generally held that international comity outweighed a plaintiff's right to discoverable material.

However, *Pfleiderer* may offer new support for plaintiffs hoping to obtain evidence originating in EC investigations.

Pfleiderer arose out of anticompetitive conduct by decor-paper manufacturers in Europe. In January 2008, the Bundeskartellamt, the German antitrust regulatory authority, imposed fines amounting to about $90.5 million on three manufacturers of decor paper and five individuals.[45]

Pfleiderer was a purchaser of decor paper.[46] Shortly after Bundeskartellamt issued its penalties, Pfleiderer petitioned the agency for files relating to the decor-paper industry in order to prepare a civil action for damages.[47]

Bundeskartellamt handed over a limited number of records, but withheld access to confidential business information, internal documents and other records relating to the parties' leniency applications.[48]

> The European Court of Justice's decision may already be reverberating through national courts.

In response, Pfleiderer brought an action before the Amstgericht, the local court in Bonn, to obtain the records.[49] The court granted Pfleiderer access to the records in accordance with local procedures.[50]

However, the Bonn court stayed the ruling.[51] Fearing that the decision could run counter to EU law, the court requested a ruling from the Court of Justice[52] Specifically, the Bonn court asked whether parties adversely affected by a cartel "may not, for the purposes of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency [under European Union antitrust law]."[53]

The Court of Justice responded by explaining that no EU law on the disclosure of leniency documents was binding on national courts.[54] Rather, national courts were free to disclose documents relating to leniency applications based upon their own local laws provided they did not make the implementation of EU antitrust law "excessively difficult."[55]

The Court of Justice instructed national courts to conduct a "weighing exercise" on a case-by-case basis between the "respective interests in favour of disclosure of the information and in favor of the protection of that information provided voluntarily by the applicant for leniency."[56]

More importantly for plaintiffs, the Court of Justice recognized that civil-damages cases "make a significant contribution to the maintenance of effective competition in the European Union."[57]

Accordingly, EU law on cartels "must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement."[58]

The decision by the Court of Justice in *Pfleiderer* may already be reverberating through national courts.

On July 4 England's High Court of Justice, Chancery Division, issued an opinion in *National Grid Electricity Transmission Plc v. ABB Limited & Ors,* responding, in part, to a request by plaintiffs for documents that may contain leniency material from an EC investigation into cartel activity by the defendants in the gas-insulated switchgear industry.[59]

The plaintiffs' disclosure application relied upon *Pfleiderer*, observing that "the jurisdiction to order the disclosure of documents that may contain leniency materials rests in this court, which should conduct the weighing exercise referred to by the European Court of Justice in *Pfleiderer*."[60]

The court did not rule on whether to order disclosure. However, it ordered a hearing on the issue to consider the implications of *Pfleiderer* and to give the parties, as well as the EC, the opportunity to make arguments.[61]

The Court of Justice's *Pfleiderer* decision is an improvement over the EC's position.

First, the E.C.'s confidentiality policy focuses on protecting the integrity of its own leniency programs.[62] In *Pfleiderer*, the Court of Justice reasserted the rights of individuals to claim damages caused by anticompetitive conduct.

Second, the Court of Justice acknowledged that by asserting those rights, individual plaintiffs also deter cartel behavior.

For these reasons, *Pfleiderer* is an important counterpoint to the EC's logic against the

production of leniency records. Overall, *Pfleiderer* suggests that European courts do not oppose disclosure of documents from EC files to parties injured by breaches to Europe's competition laws.

CONCLUSION

For plaintiffs arguing in U.S. courts to compel the production of records from EC leniency deals, *Pfleiderer* may create new opportunities. In *Société Nationale*, the U.S. Supreme Court instructed judges to conduct a comity analysis when deciding whether to compel production of documents held in foreign jurisdictions.

Pfleiderer can help plaintiffs tip the balance in favor of production.

First, plaintiffs can now point to a body speaking on behalf of the EU, which recognizes a compelling interest in allowing injured parties to obtain records of anticompetitive conduct. The Court of Justice specifically held that laws should not be interpreted to preclude injured parties from obtaining leniency documents.

Second, *Pfleiderer* also contains strong support for the argument that civil litigation will not necessarily undermine the EU's antitrust regulatory system; rather, civil litigation can reinforce the EU's competition laws by holding cartels accountable for their conduct.

Consequently, *Pfleiderer* should be a step forward in allowing U.S. courts to permit more discovery of E.C. antitrust proceedings. WJ

NOTES

[1] For a full description of how the EC's leniency program operates, *see* ECN Model Leniency Programme at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

[2] A number of cases discussed throughout this article have been litigated in U.S. courts. For a recent example, see *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* No. 05-MD-1720, 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010). In fact, the United States may be a particularly attractive venue for plaintiffs because the antitrust laws in the United States provide recovery for treble damages. *See Ingrid Vandenborre, The Confidentiality of EU Commission Cartel Records in Civil Litigation: The Ball Is in the EU Court,* 32 Eur. Competition L. Rev. 116, 117-18 (2011) (explaining that the first serious attempts to obtain confidential EC materials were initiated in the United States because of its antitrust laws and discovery rules).

[3] The EC has taken a variety of steps to contest the disclosure of materials, including writing letters to the court, appearing as *amicus curiae* and intervening as a party. Vandenborre, *supra* note 2, at 1.

[4] *See, e.g.,* Declaration of Philip Lowe at 5, *In re Flat Glass Antitrust Litig. (II),* Civ. No. 08-mc-180 (W.D. Pa. Oct. 8, 2009) (No. 199-1) (director general of EC's Directorate General for Competition, stating, "The ordered production, or uncertainty in this regard, of submissions that a company has prepared and produced exclusively for the European Commission's antitrust proceedings in civil proceeding for damages could seriously undermine the effectiveness of the Leniency Programme and jeopardize the European Commission's investigation of cartels.").

[5] *See id.* at 1-2 ("Disclosure of information from the European Commission's file in the context of private litigation in third jurisdictions, in particular of leniency statements submitted during the investigation, is very likely to seriously undermine the effectiveness of public antitrust enforcement in the European Community.").

[6] *See* Samuel R. Miller, Kristina Nordlander & James C. Owens, *U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials,* CPI Antitrust J. (March 2010), at 14 ("[T]here appears to be a growing consensus that the importance to the sovereign interests of the United States and the EU of preserving the viability of anti-cartel leniency programs warrants applying privilege and comity principles more widely than in other contexts.").

[7] Payment Card, 2010 WL 3420517, at *5 (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa,* 382 U.S. 522, 544 n.27 (1987)).

[8] Case C-360/09, *Pfleiderer AG v. Bundeskartellamt,* http://curia.europa.eu, ¶ 32 (June 14, 2011) (search by "Case no" and then click on the line marked "Judgment").

[9] Fed. R. Civ. P. 26(b)(1).

[10] *Id.*

[11] *Hickman v. Taylor,* 329 U.S. 495, 500 (1947).

[12] *Id.* at 501.

[13] *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.,* No. 05-MD-1720, 2010 WL 3420517, at *4 (E.D.N.Y. Aug. 27, 2010).

[14] *Poller v. Columbia Broad. Sys. Inc.,* 368 U.S. 464, 473 (1962); accord *Hosp. Bldg. Co. v. Trs. of Rex Hosp.,* 425 U.S. 738, 746 (1976).

[15] *Nat'l Grid Elec. Transmission Plc v. ABB Ltd. & Ors,* [2011] EWHC (Ch) 1717, [9] (Eng.), available at http://www.bailii.org/ew/cases/EWHC/Ch/2011/1717.html. Once suspicions come to the attention of counsel, investigation may uncover initial evidence of collusion, but discovery remains a crucial part of litigating such claims.

[16] *In re Uranium Antitrust Litig.,* 480 F. Supp. 1138, 1155 (N.D. Ill. 1979).

[17] *See, e.g., id.* at 1142-43 (discussing blocking statutes of four foreign jurisdictions); *Minpeco S.A. v. Conticommodity Servs.,* 116 F.R.D. 517, 526 (S.D.N.Y. 1987) (discussing the likelihood of criminal sanctions under a Swiss statute prohibiting the disclosure of banking information).

[18] *See, e.g., Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa,* 482 U.S. 522, 526 (1987) (arguing that the plaintiffs must follow the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters in order to compel discovery).

[19] Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions,* 73 Notre Dame L. Rev. 1017, 1018 (1998).

[20] *Id.* at 1020 ("[The] civil law system has no 'pretrial,' let alone pretrial discovery.").

[21] *Id.* at 1026 ("An act of imagination is required to appreciate how German judges could interpret an American demand that they produce evidence in trans-border discovery in civil litigation as an attack on the constitutional foundation of the democratic regime in modern Germany.").

[22] France's blocking statute is among the most discussed examples. *See, e.g., Société Nationale,* 482 U.S. at 525-26; *Strauss v. Credit Lyonnais S.A.,* 242 F.R.D. 199, 206-07 (E.D.N.Y. 2007); *Bodner v. Paribas,* 202 F.R.D. 370, 375 (E.D.N.Y. 2000). For an English translation of the statute, see *Société Nationale,* 482 U.S. at 526 n.6.

[23] *Société Nationale,* 482 U.S. at 533-34.

[24] *Id.* at 533. ("[P]etitioners correctly assert that both the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States. ... [W]e must analyze the interaction between these two bodies of federal law.").

[25] *Id.* at 543-44.

[26] *Id.* at 544 n.28 (citing Restatement of Foreign Relations Law of the United States) § 437(1)(c) (1986).

[27] *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.,* No. 05-MD-1720, 2010 WL 3420517, at *1 (E.D.N.Y. Aug. 27, 2010).

[28] *Id.* at *5.

[29] *Id.* at *4.

[30] *Id.* at *3.

[31] *In re Air Cargo Shipping Servs. Antitrust Litig.,* No. 06-MD-1775, 2010 WL 1189341, at *1 (E.D.N.Y. Mar. 29, 2010).

[32] *Id.* at *4.

[33] *Id.* ("[At] least implicitly, France has already made the judgment that its interest in combating anticompetitive behavior outweighs its desire to limit access to information about its citizens.").

[34] *Payment Card,* 2010 WL 3420517, at *8.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *In re Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007).

[39] *Id.* at 1083.

[40] *Id.* at 1084.

[41] *Payment Card,* 2010 WL 3420517, at *9.

[42] *Id.*

[43] *Id.* at *10.

[44] *Id.*

[45] Case C-360/09, *Pfleiderer AG v. Bundeskartellamt,* http://curia.europa.eu, ¶ 9 (June 14, 2011).

[46] *Id.* ¶ 10.

[47] *Id.*

[48] *Id.* ¶¶ 11-12.

[49] *Id.* ¶ 13.

[50] *Id.* ¶ 14.

[51] *Id.* ¶ 16.

[52] *Id.* ¶ 18.

[53] *Id.*

[54] *Id.* ¶¶ 20-22.

[55] *Id.* ¶ 30.

[56] *Id.*

[57] *Id.* ¶ 29.

[58] *Id.* ¶ 32.

[59] *Nat'l Grid Elec. Transmission Plc v ABB Ltd. & Ors,* [2011] EWHC (Ch) 1717 (Eng.), *available at* http://www.bailii.org/ew/cases/EWHC/Ch/2011/1717.html.

[60] *Id.* ¶ 36.

[61] *Id.* ¶ 37. Before setting a hearing on how to proceed, the *National Grid* court noted it intended to request documents from the EC, *id.* at ¶¶ 11 -12, and intended to order two defendants to disclose certain documents they had obtained from the E.C. *Id.* ¶¶ 18 & 28.

[62] *Id.* ¶ 16 ("The Commission is requiring a high level of protection of information that has been specifically prepared by the parties for voluntary submission to the Commission within the framework of its leniency program set out in the Commission Leniency Notice. Such information is of vital importance to the Commission's ability to accomplish the tasks entrusted to it.").

Heidi M. Silton, (left) a partner at **Lockridge Grindal Nauen** in Minneapolis, focuses her practice on complex litigation and antitrust law. She represents businesses in federal and state courts around the country. She is regularly named one of Minnesota's top lawyers by a peer review list of top attorneys. **Craig S. Davis**, (center) an associate in the firm, practices in the complex-litigation and class-action group. His work is focused on lawsuits about business, including antitrust or competition law. **Daniel Levisohn**, (right) a law clerk at the firm and a second-year student at the University of Minnesota Law School, is interested in public policy and good government.

Acquisition

CONTINUED FROM PAGE 1

AT&T Inc. is surprised and disappointed at the government's decision and will vigorously contest the matter, according to an Aug. 31 statement from Wayne Watts, the company's senior executive vice president and general counsel.

He said the proposed merger would improve wireless service for millions.

The government disagrees.

AT&T's purchase of its competitor T-Mobile USA Inc. would create "higher prices, fewer choices and lower-quality products for mobile wireless services," Deputy Attorney General James M. Cole said in an Aug. 31 press release.

The government says the two companies compete "head to head" in 97 of the country's largest 100 markets.

According to the DOJ, T-Mobile has been "a disruptive force through low pricing and innovation by competing aggressively in the ... marketplace."

> The government says the two companies compete head to head in 97 of the country's largest 100 markets.

AT&T has felt the heat from its competitor in several ways, the government insists.

T-Mobile has been responsible for:

- The first handset using the Android operating system.
- BlackBerry wireless e-mail.
- National Wi-Fi "hotspot" access.
- The first nationwide high-speed data network based on advanced high-speed packet access technology.

But Watts says the merger will have beneficial effects on the market, including the expansion of 4G LTE broadband to millions more consumers. He also claims the deal will create "tens of thousands of jobs."

The government says in the complaint that it is convinced the proposed merger will not create any benefits that outweigh its "substantial adverse impact on competition and consumers."

Watts said he is confident AT&T will prevail in court. WJ

Related Court Document:
Complaint: 2011 WL 3823252

See Document Section A (P. 21) for the complaint.

Instant view: U.S. government to block AT&T bid for T-Mobile

NEW YORK, Aug. 31 (Reuters) – The Obama administration has sued to block AT&T Inc.'s $39 billion acquisition of T-Mobile USA from Deutsche Telekom because of anticompetitive concerns.

Here are some comments on the news:

Steve Clement, *Pacific Crest analyst*

It's surprising. Clearly AT&T didn't expect this. AT&T put itself in a position where it would have to pay a hefty breakup fee to T-Mobile USA.

"It changes things for them with respect to the spectrum flexibility they'd have. They're going to have to be in the market to buy incremental spectrum.

"It's mixed for Sprint. On the one hand, they were potentially going to lose T-Mobile USA as a competitor at the low end of the market. Now it's going to face a T-Mobile that's in a better position prior to the merger proposal, with extra cash and spectrum and a new roaming agreement with AT&T.

It also puts T-Mobile USA back in play as a potential merger candidate for Sprint.

Pacific Crest analyst Steve Clement

Andrew Hogley, *Espirito Santo Telecoms analyst*

The momentum had been building on the positive case. A lot of state governors, attorneys-general had been coming out in support of the case. AT&T had been lobbying on creating 5,000 more U.S. jobs, guaranteeing no more call center redundancies.

We thought the weight of AT&T's lobbying was having some success; this very much undermines that. It's very uncertain where this leaves us at the moment. The stock price reaction is probably a little bit overdone today [Aug. 31] but it's still clearly a negative development, given the commentary we'd seen so far.

Tim Daniels, *telecom analyst at London-based stockbroker Olivetree Securities*

I don't think you can call the deal 100 percent dead yet but it is almost certain not to progress in its original form. If the FCC [Federal Communications Commission] rules against it as well, I don't see how AT&T can maintain any argument that the deal is in the public interest.

Richard Dineen, *HSBC analyst*

The news clearly throws the deal into considerable doubt. The DOJ [Department of Justice] has said the door remains open for remedies, but if you're talking about market concentration as the point of contention, there's only so much in terms of subscriber divestments you can achieve without undoing the economies of scale you were seeking in the first place.

AT&T is going to be on the hook for breakup fee of $3 billion plus spectrum and a roaming deal, but AT&T will still be a formidable player with huge scale. It makes a big difference to Sprint, since the competitive efforts of the big guys would be diluted.

It would also be a big deal for T-Mobile's owner, Deutsche Telekom, which now has the problem it had before, with a subscale operation in the U.S. All those problems now come back.

The DOJ's concerns imply that they don't want less than four big national players. There had been speculation that Sprint and T-Mobile may get together, but it looks on this basis that even that would be objectionable."

James Cole, *U.S. deputy attorney general*

The department filed its lawsuit because we believe the combination of AT&T and T-Mobile would result in tens of millions of consumers all across the United States facing higher prices, fewer choices and lower-quality products for their mobile wireless services.

AT&T and T-Mobile currently compete head to head in 97 of the nation's largest 100 cellular marketing areas. They also compete nationwide to attract business and government customers.

Were the merger to proceed, there would only be three providers with 90 percent of the market, and competition among the remaining competitors on all dimensions — including price, quality and innovation — would be diminished.

Wayne Watts, *AT&T general counsel*

We are surprised and disappointed by today's action, particularly since we have met repeatedly with the Department of Justice and there was no indication from the DOJ that this action was being contemplated.

We plan to ask for an expedited hearing so the enormous benefits of this merger can be fully reviewed. The DOJ has the burden of proving alleged anticompetitive affects and we intend to vigorously contest this matter in court.

REUTERS/John Gress

"Although our process is not complete, the record before this agency also raises serious concerns about the impact of the proposed transaction on competition," Federal Communications Commission chairman Julius Genachowski said.

Julius Genachowski, *FCC chairman*

Competition is an essential component of the FCC's statutory public interest analysis, and although our process is not complete, the record before this agency also raises serious concerns about the impact of the proposed transaction on competition.

Harold Feld, Public Knowledge legal director

Fighting this job-killing merger is the best Labor Day present anyone can give the American people. AT&T's effort to recreate "Ma Cell" by holding rural broadband hostage and threatening American jobs deserves nothing but scorn.

The FCC should move as quickly as possible to follow the lead of the Department of Justice and reject the merger.

Andrew Schwartzman, *Media Access Project senior vice president and policy director*

This is arguably the most anticompetitive move in recent American economic history. It is heartening that the Department of Justice has withstood withering political pressure from AT&T to do the right thing for the American public.

Jack Gold, *J. Gold Associates principal*

AT&T swallowing T-Mobile will essentially result in the U.S. becoming a duopoly with AT&T and Verizon Wireless controlling the vast majority of the market. It will hurt Sprint, and certainly many of the smaller players.

And since it's astronomically expensive to start a mobile carrier these days, it's unlikely that any new competitors will arise unless a big international funding group steps in — perhaps from China — which is unlikely to win approval politically.

So the bottom line for me is that even though AT&T certainly would benefit from the increased spectrum available from the T-Mobile acquisition, it may not be in the best interest of the consumer ultimately.

On the flip side of course, it may be impossible for T-Mobile to remain an independent player longer term, so an acquisition by AT&T might be in its best business interest. But if T-Mobile goes, it will put incredible pressure on Sprint to find a big brother as well.

Rebecca Arbogast, *Stifel Nicolaus analyst in research note*

Based on our quick review of the complaint, we believe the filing is serious and not meant as merely a negotiating strategy to bring AT&T to the table to negotiate conditions and concessions.

We expect that AT&T will fight, rather than merely step down as is more common when DOJ moves to block mergers.

We would be astonished if the FCC were to approve the deal while litigation is pending before the District Court. WJ

(Reporting by Sinead Carew in New York; Kate Holton, Georgina Prodhan and Victoria Howley in London; Karey Wutkowski and Jasmin Melvin in Washington; Bill Rigby in Seattle; and Toni Clarke in Boston; compiled by Tiffany Wu)

AT&T sues customers seeking to block T-Mobile deal

New York, Aug. 17 (Reuters) – AT&T Inc. is turning to the federal courts to thwart an effort led by law firm Bursor & Fisher to derail its $39 billion takeover bid for Deutsche Telekom AG's T-Mobile.

In eight lawsuits, AT&T accused Bursor & Fisher and a second plaintiffs' firm, Faruqi & Faruqi, of trying to pressure it into "an extortionate settlement" by encouraging AT&T customers to file multiple claims against the merger.

Bursor & Fisher launched a "Fight the Merger" campaign in July, saying the megadeal would violate federal antitrust law and restrict competition. So far, the firm has filed 26 arbitration demands and more than 900 notices of dispute on behalf of AT&T customers who oppose the merger.

In the lawsuits, AT&T argued that the claims, brought under antitrust law, could not be decided in arbitration. The company accused the firms of "taking a thousand bites at the apple" in hopes of finding one arbitrator willing to block the merger.

The suits are a dramatic turnaround for AT&T, which just last November argued strongly in favor of arbitration in the U.S. Supreme Court case, *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011).

In that case, customers sued AT&T for allegedly advertising discounted cell phones, but charging sales tax on the full price. The Supreme Court sided with AT&T in April, finding that customers who signed phone contracts containing mandatory arbitration clauses waived their right to bring class-action lawsuits against the company. Customers, the court held, had to resolve their disputes with the company in arbitration.

By filing close to a thousand individual arbitration claims, Bursor & Fisher is trying to circumvent the Supreme Court's ruling, AT&T's lawyers said in the eight complaints, which were filed in federal courts across the country.

REUTERS/Rick Wilking

The complaints point to specific language from customer contracts that state that customers can only bring claims in their "individual capacity" and "not as a plaintiff or class member in any purported class or representative proceeding."

CLASS-WIDE RELIEF

AT&T argued that although the arbitrations were filed by individual customers, they are not seeking damages for any personal harm they suffered. Rather, they are seeking an injunction to block a $39 billion merger that would affect more than 120 million wireless customers, one complaint said.

"Our arbitration agreement prohibits any form of class-wide relief. The Supreme Court upheld that," AT&T's lawyer, Andrew Pincus, told Reuters. Pincus, of Mayer Brown, also argued the *Concepcion* case before the Supreme Court.

Scott Bursor, the lawyer behind the "Fight the Merger" campaign, said the American Arbitration Association has already overruled AT&T's objections and moved forward with the arbitration process.

"AT&T's filing of these lawsuits appears to be an act of desperation, since AT&T now realizes it faces substantial likelihood that one or more of these arbitrations will stop the takeover from happening," he said in an email, describing the company's legal arguments as "frivolous."

Richard Brunell, the director of legal advocacy at the American Antitrust Institute, described AT&T's legal action as "ironic," given AT&T's prior arguments in the *Concepcion* case. The problem with the lawsuits, he said, is that AT&T would also prevent customers from filing lawsuits in federal court. "So their preferred position is that consumers not be able to bring class actions anywhere, which divests consumers of their right to challenge anticompetitive conduct."

In the lawsuits, AT&T argued that the claims, brought under antitrust law, could not be decided in arbitration.

But Pincus argued that a single arbitrator should not be able to make a decision that affects "the whole world," preempting official reviews by the U.S. Federal Communications Commission, the U.S. Department of Justice and numerous state regulators. Arbitration is not the appropriate venue for an "extremely complicated" analysis of relevant markets, potential effects of the merger on competition and prices, and possible enhancements of technological innovation, the complaint said.

Michael Hausfeld, a lawyer who has represented plaintiffs in unrelated antitrust arbitrations, said he knew of no merger that has ever been blocked by an arbitration filed by an individual customer. A pending Justice Department investigation would likely prevent arbitration proceedings from moving forward, he said. WJ

(Reporting by Terry Baynes; editing by Eddie Evans and Gerald E. McCormick)

Apple, publishers colluded to drive up e-book prices, suit says

Apple participated in a conspiracy with five large book publishers houses to keep the prices of e-books artificially high in order to stanch the exponential growth of Amazon's Kindle e-book reader, according to a putative class-action lawsuit.

Petru et al. v. Apple Inc. et al., No. 11-CV-08392, complaint filed (N.D. Cal. Aug. 9, 2011).

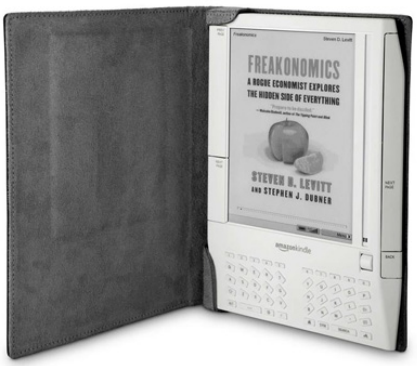
Plaintiffs Anthony Petru and Marcus Mathis sued Apple in the U.S. District Court for the Northern District of California. Hachette Book Group Inc., Harpercollins Publishers, Macmillan Publishers, Penguin Group USA and Simon & Schuster also are named defendants.

The plaintiffs' five-count complaint states claims under the Sherman Antitrust Act, 15 U.S.C. § 1; California's Cartwright Antirust Act, Cal. Bus. & Prof. Code § 16270; the state's unfair-competition law, Cal. Bus. & Prof. Code § 17200; and other states' equivalent statutes. It also alleges unjust enrichment.

Petru and Mathis are seeking to lead a nationwide class of all people who purchased e-books from the five publishers at allegedly anticompetitive prices.

KINDLE'S LAUNCH

The case stems from the defendants' reaction to Amazon.com's November 2007 Kindle launch. According to the complaint, Amazon.com began selling e-book versions of popular first-release bestsellers for $9.99, a price often equal to or greater than Amazon's wholesale price for the titles at issue.



REUTERS/Amazon.com

The plaintiffs say the case stems from the defendants' reaction to Amazon.com's November 2007 launch of the Kindle e-book reader, shown here.

Amazon did this, the plaintiffs claim, to further its "first mover" advantage in the e-book space and to expand the installed base of the Kindle.

THE PUBLISHERS STRIKE BACK

The publisher defendants saw Amazon's move as a direct threat to their longstanding business model, the complaint says. To keep Amazon and others from selling books at a discount, the publishers responded by fundamentally changing their pricing model.

According to the suit, retailers previously bought books at wholesale and applied a markup before selling them to the general public at retail. Under the new model, publishers now set the retail book price and pay retailers, including Apple's e-book store, a 30 percent commission, the complaint says.

"Being hidebound and lacking innovation for decades, the publishers were particularly concerned that Amazon's pro-consumer pricing of eBooks would negatively impact their moribund sales model, and in particular the sale of higher-priced physical copies of books," the complaint says.

APPLE'S INVOLVEMENT

Petru and Mathis claim that where the publishers saw a competitive threat to their pricing model from Amazon and the Kindle, Apple saw a similar threat to its upcoming iPad device.

The publishers allegedly allowed Apple to use their trademarks to promote the iPad when it was first released in January 2010 and to sell their e-books through its iBookstore for less than what Amazon was charging.

"As a result," the plaintiffs say, "the price of eBooks has soared. eBooks now often cost more than their print counterparts."

Defendants

- Apple Inc.
- Hachette Book Group Inc.
- HarperCollins Publishers Inc.
- Macmillan Publishers Inc.
- Penguin Group (USA) Inc.
- Simon & Schuster Inc.

Claims

- Sherman Antitrust Act
- California's Cartwright Antitrust Act
- California's unfair-competition act
- Other states' equivalent statutes
- Unjust enrichment

Allegations

Apple and the publishers conspired to raise the prices of e-books to block competition from Amazon.com in e-book sales and sales of its Kindle e-book reader.

Relief sought

Class certification, damages, costs, declaratory and injunctive relief, and attorney fees

RELIEF SOUGHT

In addition to class certification, the plaintiffs are seeking damages, costs, declaratory and injunctive relief, and attorney fees. WJ

Attorney:
Plaintiffs: Jeff D. Friedman, Hagens Berman Sobol Shapiro LLP, Berkeley, Calif.

Related Court Document:
Complaint: 2011 WL 3539583

See Document Section B (P. 30) for the complaint.

Google–Motorola tie-up may draw antitrust scrutiny

NEW YORK, Aug 15 (Reuters) – Google Inc., already the subject of antitrust inquiries, likely opened itself up to more regulatory scrutiny with its proposed $12.5 billion cash acquisition of Motorola Mobility Holdings Inc.

Legal experts said government agencies will want to review how Google's largest takeover ever will affect competition in the mobile phone market. Google is already under investigation by the Federal Trade Commission over whether it uses its strength in online searches to thwart competitors.

"It seems inevitable that the U.S. government will have to come into the mobile space and lay down some ground rules," said Eric Goldman, an associate professor at the Santa Clara University School of Law. "Way too many dollars are at stake."

Google, the maker of Android mobile phone software, portrays the takeover as a way to stay competitive against such rivals as Apple and Microsoft.

Last month, Google lost out to Apple, Microsoft, Research in Motion Ltd. and three others in an auction to buy bankrupt Nortel Networks Corp.'s wireless patents.

Google Chief Executive Larry Page said on a conference call Aug. 15 that Motorola's patent portfolio would protect Android from anticompetitive threats.

"They're going to go on the offensive by saying they're the victim here," said Daniel Crane, a law professor at the University of Michigan.

In one sense, that could be true. While Google is dominant in Internet searches, it is less strong in mobile phones.

"It really shows the steps that competitors are taking in a very competitive marketplace," said David Olson, a professor at Boston College Law School. "It also shows how patent law requires large companies to have a huge patent portfolio for hardware they're going to use for their software."

CONCERN RAISED

The likely concern regulators would have is that Google will vertically integrate its Android software with Motorola's hardware and attempt to shut out other hardware manufacturers, such as Samsung Electronics Co. and HTC Corp., that license Google's software.

But because Android is an open-source software, that's unlikely to happen, said Herbert Hovenkamp, professor of law at the University of Iowa.

"It's not clear to me how you can turn an open-source software into an exclusionary device," he said.

Richard Brunell, director of legal advocacy at the American Antitrust Institute, agreed that Google would not likely stop licensing Motorola's competitors but said the company "could foreclose them in other more subtle ways."

Google has already received positive support of the deal from Android licensees such as Samsung and HTC.

Smart phone companies "have a common interest that they want the Android platform to be more defensive from the (intellectual property) perspective," said Hendi Susanto, a technology analyst at asset manager Gabelli & Co. "Also, they want a strong relationship with Google."

Another legal issue could be how Google uses the patents it acquires from Motorola.

"It's possible that they may end up combining patents in such a way that they are able to block competitors out of certain technologies," said Beau Buffier, a lawyer with Shearman & Sterling. "I don't think that will be a major focus of the review, but it's something the Department of Justice would scrutinize."

Legal experts said that while legal issues tied to the Motorola takeover are different from FTC concerns, they may feed into a concern about Google's power.

"I don't think it further complicates issues that are being looked into," said Olson. "How they're using their software remains the same. But Android will now have bigger market share and the deal makes Google a bigger target generally for regulators." WJ

(Reporting by Andrew Longstreth and Lily Kuo; editing by Richard Chang)

REUTERS/Jason Lee

REUTERS/Vivek Prakash

Credit reporter suffered no antitrust injury, 8th Circuit affirms

The credit reporting company FICO suffered no antitrust injury when three credit data providers formed an entity that competed with the firm, the 8th U.S. Circuit Court of Appeals has affirmed.

Fair Isaac Corp. et al. v. Experian Information Solutions Inc. et al., No. 10-2281, 2011 WL 3686429 (8th Cir. Aug. 17, 2011).

The plaintiff's alleged damages — the existence of a competitor in the market and the subsequent lowering of its prices — do not constitute antitrust injury, the three-judge panel explained.

Fair Isaac Corp. and myFICO Consumer Services, together designated "FICO" by the appeals court, alleged three credit bureaus created a joint venture and enticed key lenders away from FICO's services.

In a complaint filed in the U.S. District Court for the District of Minnesota, FICO alleged defendants Experian Information Solutions, Equifax Inc. and Trans Union violated antitrust laws under the Clayton Act, 15 U.S.C. § 12.

The trio created a joint venture, VantageScore Solutions LLC, the fourth defendant, that used an algorithm similar to one developed by FICO to rate consumer financial creditworthiness, the suit says.

> FICO said the mere existence of a conspiracy that targeted the company is in and of itself proof of an antitrust injury.

The District Court dismissed the antitrust claims, and FICO appealed.

The plaintiff argued the District Court did not consider the merits of its antitrust claims and did not view the evidence in a light most favorable to FICO.

The plaintiff said the credit bureaus' alleged conspiracy targeted FICO specifically.

The appeals court rejected this argument.

"FICO's alleged damages — losses stemming from VantageScore's mere existence in the market and from FICO lowering its prices to compete — do not constitute antitrust injury," the panel said.

However, FICO said the mere existence of a conspiracy that targeted the company is in and of itself proof of an antitrust injury.

The appeals court said that is not the case, and a party may be the target of a conspiracy and still not suffer a recognizable antitrust injury.

Allegedly lesser-quality data provided by VantageScore, which FICO used to develop credit scores, also harmed it, the company said.

FICO said the lesser-quality date VantageScore provided undermined the predictive value of the scores FICO sells its customers and injured the plaintiff through a reduction in competition among the bureaus that created the new service.

The appeals court said FICO lacked standing to raise claims for this alleged damage, which would be to consumers, not FICO.

The panel also rejected FICO's claim that VantageScore infringed its registered trademark, "300-850," meant to describe the "qualities and characteristics" of credit scores, which would fall in that range.

The District Court rightly found the "300-850" mark to be descriptive and that such terms are generally not protectable, the appeals court said. WJ

Related Court Document:
Opinion: 2011 WL 3586429

Scan this code with your QR reader to see the opinion:

MERGER

2nd Circuit blocks NYC's challenge to insurers' merger

New York City failed to sufficiently define the relevant market in its challenge to a merger of health insurance companies that cover many of its workers, a 2nd U.S. Circuit Court of Appeals panel has ruled, affirming a lower court's dismissal of the suit.

City of New York v. Group Health Inc. et al., No. 10-2286, 2011 WL 3625097 (2d Cir. Aug. 18, 2011).

The panel also agreed with the U.S. District Court for the Southern District of New York that the city should not be allowed to amend its complaint.

New York sought to stop the merger of Group Health Inc. and the Health Insurance Plan of Greater New York, alleging it violated state and federal antitrust laws.

The city said most of its employees choose between health coverage from plans offered by the two companies.

The U.S. Department of Justice and the New York attorney general's office declined to bring antitrust challenges.

> A three-judge panel said the District Court rightly found the city's market definition was insufficient.

However, New York City sought an injunction from the District Court blocking the merger.

The city cited the Clayton Act, 15 U.S.C. § 12; the Sherman Act, 15 U.S.C. § 1; and the Donnelly Act, N.Y. Gen. Bus. Law § 340(1).

The merger would substantially reduce competition and increase the premiums city employees must pay, according to the city.

It defined the market as the "low-cost municipal health benefits market."

The defendants opposed the city's suit, arguing the market definition was based on the city's preferences and left out the market of competing insurance providers.

The companies also said the city failed to show antitrust injury because any premium increase would come not from the merger but from their conversion to for-profit businesses.

U.S. District Judge Richard J. Sullivan denied New York's motion to amend its complaint to change the market definition and granted summary judgment to the insurers.

The city appealed.

The 2nd Circuit reviewed the ruling *de novo*.

The three-judge panel said the District Court rightly found the city's market definition was insufficient.

"It is defined by the city's preferences, not according to the rule of reasonable interchangeability and cross-elasticity of demand," the panel said.

The city-defined market ignores the competition for New York's business among insurance providers, the panel added.

"The city does not allege any factor that would prevent insurance companies other than those it selects ... from proposing competitive products should the merged firm raise its premiums to supracompetitive prices," the judges said.

The panel added that the District Court was correct in denying the motion to amend because the city "exhibited undue delay" in making the motion and the amendment would unfairly prejudice the defendants. WJ

Related Court Document:
Opinion: 2011 WL 3625097

REGULATION

Global health care firm wins final OK for $3.4 billion takeover

Federal antitrust regulators have signed off on Spain's Grifols S.A.'s $3.4 billion purchase of a rival blood-plasma products maker after requiring the firm to sell some assets to resolve antitrust concerns.

In the Matter of Grifols S.A. et al., No. C-4322, final settlement order approved (F.T.C. July 22, 2011).

The global health care company agreed to sell the assets in a consent order reached June 1 so it could close its deal to acquire North Carolina-based Talecris Biotherapeutics Holdings Corp.

Grifols, whose headquarters are in Barcelona, Spain, first announced its planned takeover of Talecris June 6, 2010.

The Federal Trade Commission claimed in a regulatory complaint that the merger, as originally structured, would have lessened competition in the U.S. markets for several types of blood-plasma products.

As part of its agreement, Grifols is required to divest its plasma collection centers in Mobile, Ala., and Winston-Salem, N.C., along with one of Talecris' facilities in Melville, N.Y., to Kedrion S.p.A.

For the next seven years, Grifols also is required to manufacture three blood-plasma products for Italy-based Kedrion to sell in the United States.

The FTC made the consent order final July 22.

In a statement issued after the preliminary settlement was reached, Grifols said the regulatory conditions placed on it will not "affect the operating synergies that Grifols expects to achieve" through the Talecris merger.

Grifols is the leading plasma products maker in Europe and the world's fourth largest producer, according to the firm's website. WJ

3rd Circuit approves class certification in cable monopoly suit

Customers who allege Comcast Corp. has a monopoly over the cable television market in the Philadelphia area may pursue the case a class action, a federal appeals court has affirmed.

Behrend et al. v. Comcast Corp. et al., No. 10-2865, 2011 WL 3678805 (3d Cir. Aug. 24, 2011).

The ruling by the 3rd U.S. Circuit Court of Appeals clarifies the standards for class certification the court set out three years ago in another case, *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008).

"Nothing in *Hydrogen Peroxide* requires plaintiffs to prove their case at the class certification stage," the appeals court said.

The lawsuit, begun in 2003, alleges Comcast and its subsidiaries obtained and maintained monopoly power by "acquir[ing] cable systems and cable subscribers from their competitors in the Philadelphia [market] until the number of competing cable providers ... was substantially reduced."

> Comcast argued that the plaintiffs have not established a class-wide antitrust effect from the cable company's alleged activity.

In May 2007 U.S. District Judge John R. Padova of the Eastern District of Pennsylvania certified a class of "all cable television customers who subscribe or subscribed at any time since Dec. 1, 1999, ... to video programming services (other than solely basic cable services) from Comcast or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster."

REUTERS/Fred Prouser

Following the *Hydrogen Peroxide* decision, Judge Padova reaffirmed his class certification decision, and Comcast appealed.

The company argued the plaintiffs failed to identify a geographic market that must be defined to sustain an antitrust action.

Comcast said a geographic market is defined by "substitutability," that is, the area a consumer can look for similar goods and services. The defendant said the market in this case is a consumer's household, since subscribers can look no further than that for cable service.

In an Aug. 24 decision, the 3rd Circuit disagreed. The three-judge panel affirmed Judge Padova's determination that the Philadelphia area is a relevant geographic market "susceptible to proof at trial through available evidence common to the class."

The cable company also argued that the plaintiffs have not established a class-wide effect from Comcast's alleged antitrust activity.

The panel said the plaintiffs' burden at class certification stage is not to prove antitrust effect, but only to show that antitrust impact is capable of proof at trial.

In a partial dissent, Judge Kent A. Jordan said he would have remanded the case to the District Court to consider whether the class should be divided into subclasses for the purpose of proving damages.

However, Judge Jordan concurred in the majority's judgment. WJ

Related Court Document:
Opinion: 2011 WL 3678805

WESTLAW JOURNAL

CLASS ACTION

This reporter covers the proliferation of the class action lawsuit in numerous topic areas at the federal, state, and appeals court levels. Topics covered include consumer fraud, securities fraud, products liability, automotives, asbestos, pharmaceuticals, tobacco, toxic chemicals and hazardous waste, medical devices, aviation, and employment claims. Also covered is legislation, such as the 2005 Class Action Fairness Act and California's Proposition 64, and any new federal and state legislative developments and the effects these have on class action litigation.

REUTERS/Lucas Jackson

An employee fills a prescription at a pharmacy in New York, where a state legislator is trying to prevent health insurers from offering incentives, including lower co-payments or deductibles, for those who elect to use mail-order pharmacies.

LEGISLATION (ANTICOMPETITIVE EFFECTS)

FTC says N.Y. bill nixing mail-order meds hurts consumers

A bill in New York that would restrict health insurers from steering beneficiaries to lower-cost mail-order providers of prescription drugs has drawn criticism from the Federal Trade Commission.

In response to a request for comment from Republican state Sen. James L. Seward, the federal agency said New York Assembly Bill 5502-B could have anticompetitive effects for consumers.

The bill is designed to give patients more choices of how and where their prescriptions are filled.

But the FTC says it is "concerned" that the legislation will have the unintended consequence of harming consumers and ruin the "healthy competition" between retail and mail-order pharmacies.

"By reducing competition between pharmacies, this legislation likely will raise prices for, and reduce access to, prescription drugs, which are an increasingly important component of medical care," the FTC said in its Aug. 8 letter to Seward.

According to the agency, the legislation would limit a health plan's ability to encourage beneficiaries to use any particular mail-order pharmacy.

The bill would specifically bar insurers from requiring that long-term maintenance prescriptions be filled at mail-order pharmacies or from offering incentives, including lower co-payments or deductibles, for those who elect to use home delivery.

"These restrictions would undercut mail-order pharmacies' incentives to bid aggressively for a share of a health plan's business and would likely lead to higher mail-order prices," the FTC letter said.

The letter is available at http://www.ftc.gov/os/2011/08/110808healthcarecomment.pdf. WJ

Scan this code with your QR reader to see FTC letter:

California federal judge orders arbitration in title insurance dispute

A class-action dispute over whether the nation's largest title insurers and their affiliates monopolized California's title insurance market should be arbitrated in light of a recent U.S. Supreme Court decision, a federal judge in San Francisco has ruled.

In re California Title Insurance Antitrust Litigation, No. 3:08-CV-01341, 2011 WL 2566449 (N.D. Cal. June 27, 2011).

U.S. District Judge Jeffrey S. White of the Northern District of California agreed with five title insurance companies and their affiliates that the Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), allowed the court to enforce the arbitration agreements in policyholder contracts.

The Federal Arbitration Act, 9 U.S.C. § 2, requires courts to enforce arbitration agreements as any other contract and favors arbitration.

California's consumer protection law prohibits contract provisions that ban class-action arbitration, but *Concepcion* held that the Federal Arbitration Act preempts state law.

Many lenders require homebuyers to purchase title insurance to protect against the risk of legal challenges to the homebuyer's ownership of the property and the lender's position as the first lienholder of the property.

As the nation's foreclosure crisis continues, many title insurance companies have faced scrutiny over their businesses and procedures.

The plaintiffs alleged that competition among the title insurers is based on kickbacks and other inducements to real estate agents, rather than providing the lowest rates for policyholders.

Plaintiff Lynn Baron purchased a title insurance policy that included an agreement to arbitration disputes.

In March 2008 she filed a class-action complaint against title insurers Fidelity National Financial Inc., Ticor Title Insurance Co., First American Title Insurance Co., Stewart Title Guaranty Co., Old Republic National Title Insurance Co. and several of their affiliates in California federal court.

The complaint alleges a handful of insurers dominate the title insurance market, collectively controlling over 90 percent of the California market, and participate in a self-regulating trade association to illegally fix rates at excessive levels.

Her complaint stated claims for unjust enrichment and violations of the Sherman Act, 15 U.S.C. § 1, and Cal. Bus. & Prof. Code §§ 16720 and 17200.

The complaint asserted that a handful of insurers dominate the title insurance market, collectively controlling over 90 percent of the California market, and that they participate in a self-regulating trade association to illegally fix rates at excessive levels.

The complaint also said the insurers pay illegal rebates and kickbacks to real estate agents, lenders and builders instead of soliciting business directly from homebuyers.

The District Court consolidated the case with about a dozen others against the title insurers.

In May the insurers filed a joint motion to compel arbitration, arguing that *Concepcion* mandated that the court enforce the arbitration agreement.

Judge White granted the motion and stayed the class-action suit pending completion of arbitration. *Concepcion* found that federal law preempted the California law barring arbitration of class actions, he said.

The judge excused the insurers' failure to raise the arbitration issue earlier in the case, noting it would have been futile before *Concepcion* was decided.

Finally, he ruled that although the case had been litigated for some time, "substantive discovery has only recently commenced, and the trial is not set for well over a year."

Therefore, the plaintiffs "failed to establish either that defendants had knowledge of an existing right to compel arbitration or that they would suffer prejudice from inconsistent acts," he said. WJ

Attorneys:
Plaintiffs: Reed R. Kathrein and Jeff D. Friedman, Hagens Berman Sobol Shapiro LLP, Berkeley, Calif.

Defendants: Barry R. Ostrager, Kevin J. Arquit and Patrick T. Shilling, Simpson Thacher & Bartlett, New York

Related Court Document:
Order: 2011 WL 2566449

Scan this code with your QR reader to see the order:

JUDGE APPROVES SIRIUS XM'S ANTITRUST SETTLEMENT

A New York federal judge has approved a settlement agreement between Sirius XM Radio and subscribers who alleged the company illegally raised prices after it acquired rival XM. Under the terms of the settlement, Sirius will keep steady or lower base prices for about 14 million subscribers this year, Reuters reported Aug. 24. U.S. District Judge Harold Baer rejected objections to the proposed settlement from some subscribers. He said it was not clear if subscribers could have proven any antitrust violations since the Department of Justice and the Federal Communications Commission had approved Sirius' merger with XM Satellite Holdings Inc.

Blessing et al. v. Sirius XM Radio Inc., No. 1:09-cv-10035, 2011 WL 3739024 (S.D.N.Y. Aug. 24, 2011).

Related Court Document:
Opinion: 2011 WL 3739024

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DOJ MAKES GE SELL DIVISION OF ACQUIRED COMPANY

The Department of Justice is making General Electric Co. sell a division of a company it is buying that makes an electric motor used by oil refineries. The government says GE's purchase of Converteam Group SAS would have "substantially lessen[ed] competition in the development, manufacture and sale of low-speed synchronous electric motors" used in the oil and gas industry. Refinery customers in the United States will benefit from the condition the government has put on the merger, acting Assistant Attorney General Sharis A. Pozen said in an Aug. 29 statement. The arrangement will create a new and economically viable competitor, Pozen added.

GOOGLE BEATS ANTITRUST CLAIMS IN OHIO

An Ohio judge has dismissed claims that Google violated antitrust laws by favoring itself in online searches. MyTriggers.com, a search website that provides shopping comparisons, alleged in its lawsuit that Google was thwarting competition and making unfair agreements with other sites, according to a Sept. 1 Reuters report. The plaintiff said it is reviewing the ruling and considering its next steps. The Federal Trade Commission is continuing a separate investigation into whether Google it is wrongfully using its dominance to impede competitors, Reuters reported.

Google Inc. v. MyTriggers.com Inc. et al., No. 09-CV-H10-14836, case dismissed (Ohio Ct. Com. Pl., Franklin County Aug. 31, 2011).

CASE AND DOCUMENT INDEX