

Editors' Note

Dear Readers,

Welcome to "Antitrust News in Five Minutes," our new publication. We designed it to fill a gap in antitrust newsletters. We do not try to be comprehensive, and will not run long articles. Instead, we offer *quick-read* alerts on the most important antitrust developments that could affect your business. Please tell us how we can make this more useful to you.

Blackberry Access: If you prefer to receive this newsletter on your Blackberry, please send an email to Steven.Levitsky@dl.com with "Blackberry" in the subject field.

If you have any questions, please call or email your Dewey & LeBoeuf lawyer or one of us.

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David Turetsky is co-chair of the Antitrust Practice Group. He was Deputy Assistant Attorney General for Antitrust during the Clinton Administration; a senior legal officer of a telecom company; twice a federal

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Steven Levitsky concentrates on complex international mergers and joint ventures, and competition issues in the insurance and energy industries. He has supervised the US and international competition clearances

for transactions like MetLife's \$11.8 billion acquisition of Travelers from Citigroup; The St. Paul's \$16 billion merger with Travelers Property Casualty; AEGON's \$5.4 billion sale of Transamerica Financial Services to General Electric; and National Grid's \$8.9 billion acquisition of Niagara Mohawk.

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DC Circuit rejects FCC 30 percent subscriber cap as “arbitrary”

On August 28, 2009, the DC Circuit vacated an FCC rule that had placed a 30 percent cap on the proportion of subscribers a cable company could have in any market.

Comcast and other companies had intervened to argue that the 30 percent cap (originally set in 1993 and re-adopted after a judicial remand in 2001) failed to take into account the changed market conditions since 1993.

Referring to its earlier order, the DC Circuit commented that “we said in no uncertain terms that ‘in revisiting the horizontal rules the Commission will have to take account of the impact of [direct broadcast satellite] on [cable operators’] market power.’”

The court concluded that “In view of the overwhelming evidence concerning ‘the dynamic nature of the communications marketplace,’ 47 U.S.C § 533(f)(2)(E), and the entry of new competitors at both the programming and the distribution levels, it was arbitrary and capricious for the Commission to conclude that a cable operator serving more than 30 percent of the market poses a threat either to competition or to diversity in programming.”

Note: *The FCC will probably ask – in the light of competition, impact on programmers, and other considerations – whether a cable*

ownership rule is required at all and what limits should be imposed. In the meanwhile, cable acquisitions will continue to be subject to review under antitrust and other communications laws and rules.

Rambus moves closer to trial – and its stock climbs

Rambus has a \$12 billion antitrust case against Micron, Hynix and Samsung pending in California state court. The California Appellate Court recently denied the defendants’ last-ditch attempt to halt the trial. It is now scheduled to start September 28, 2009.

Rambus’ lawsuit claims the defendants had conspired to block Rambus’ DRAM memory chip from the market.

Rambus itself had been hit with accusations that it had destroyed important documents related to pending litigation. It had also been accused of failing to disclose to the Joint Electron Device Engineering Council, a technology standard-setting group, that it intended to seek patent protection for technology the group was considering. Earlier this year, a California jury concluded that Rambus had no disclosure obligation and awarded Rambus \$397 million in damages against Hynix.

Note: *Standard-setting issues frequently carry high stakes in both*

the business and legal arenas, and generate concern by government antitrust enforcers. This is an area where companies are well-advised to work closely with counsel.

MDL Panel consolidates health reimbursement price-fixing cases

Four antitrust and RICO class actions have been consolidated by the Panel on Multidistrict Litigation in the Western District of Washington.

They claim that insurance companies intentionally used false data to set out-of-network reimbursement rates, and that the implementing agreements were a price-fixing scheme. The data was prepared by Ingenix, a medical billing and reporting company owned by UnitedHealth Group.

An investigation of similar allegations by NY Attorney General Cuomo reportedly found that Ingenix underreported the “usual and customary rate” by 10 to 28 percent.

NY federal court refuses to dismiss air-cargo price-fixing cases

Overruling one of the recommendations of a magistrate judge, a federal judge in the EDNY refused to dismiss federal antitrust claims that alleged a wide conspiracy among major world airlines to fix fuel air cargo surcharges.

U.S. Supreme Court decisions in *Twombly* and *Iqbal* tightened pleading standards. Relying on them, a magistrate judge concluded that the complaint did not allege “enough specifics to support a plausible conspiracy.”

The federal judge rejected that conclusion. He held that the complaint did provide “plausible grounds” to infer an antitrust conspiracy. He also pointed to the significant number of guilty pleas in related criminal cases.

Note: *This decision suggests that the existence of a number of criminal antitrust pleas may make it more difficult for a company to have an antitrust complaint dismissed, even though otherwise it might lack plausibility.*

Apple and AT&T deny any agreement to exclude Google Voice on iPhone

In our last issue, we reported that the FCC was investigating claims that Apple’s refusal to approve Google Voice for its App Store was the result of an agreement between Apple and AT&T.

Since then, Apple has sent a letter to the FCC denying that it has rejected the application, but also stating that “the application has not been approved because, as submitted for review, it appears to alter the iPhone’s distinctive user experience.” In the meantime, AT&T has answered

the FCC, declaring that “AT&T was not asked about the matter by Apple at any time, nor did it offer any view one way or the other.”

Microsoft, Yahoo and Amazon.com join up to object to Google Book settlement

We already reported on the DoJ and EU reviews of the competitive aspects of the Google Book settlement. It would resolve copyright claims made by publishers and authors by authorizing Google, on a non-exclusive basis and in return for approximately \$125 million, to make available online for search and sale a vast quantity of material, subject to opt-out by copyright holders.

Now, various companies and groups, including Microsoft, Yahoo and Amazon.com have reportedly joined forces to object to the settlement.

DoJ clears Sun/Oracle merger

On August 20, the DoJ cleared the \$7 billion Sun/Oracle merger. Although there had been a Second Request, the investigation finished just a few months later, and no consent decree was required.

The Department of Justice was thought to be investigating certain horizontal overlaps involving “middleware” and database

software, and possible vertical implications of Oracle gaining control through the acquisition of Sun over Java. Java is, among other things, a programming language that is important in Oracle’s own software products, as well as that of Oracle’s competitors. Java runs on more than 7 billion electronic devices.

The EU has yet to complete its own review of the transaction.

Dewey & LeBoeuf’s Antitrust Practice Co-Chair David Turetsky had been quoted in the press, cautioning that, even though there had been a Second Request, it did not mean that the deal was in trouble from an antitrust standpoint.

Sea cargo price-fixing case dismissed under “filed rate” doctrine

A federal judge in Washington has dismissed a price-fixing claim against five shipping companies for the US-Hawaii-Guam market.

The complaint alleged a ten-year scheme of price fixing and other collusion. The judge concluded that the complaint alleged “nothing more than parallel conduct and a bare assertion of conspiracy.”

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