

February 15, 2010

Steven Levitsky and
David Turetsky, Editors



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 court and FCC-appointed management trustee for businesses required to be divested under merger consent decrees; and antitrust advisor to the Obama DoJ transition team. He handles litigations, mergers, investigations, compliance, regulatory and competition policy matters for US and global clients in sectors such as tech, media, telecom, insurance, electricity, energy, transportation, sports, consumer products and manufacturing.

David.Turetsky@dl.com

202 346 8077



Steven Levitsky concentrates on complex international mergers and joint ventures in a variety of industries, including financial services, title insurance, oil, gas,

pipeline, coal, electric generation, electric transmission, manufacturing, motion pictures, fine papers, commercial papers, Mylar balloons, funeral planning services, skis, railroads, technology, music, Internet search engines, soft drinks, and automotive markets. He has supervised US and international competition clearances for such transactions as 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.

Steven.Levitsky@dl.com

212 259 8309

DEWEY & LEBOEUF

Antitrust News *in Five Minutes*

In This Issue

- DoJ Leniency Program: leniency documents not subject to discovery (p. 2)
- Pleading: Second Circuit revives conspiracy case that had been dismissed under *Twombly* (p. 2)
- Insurance Exemption: Partial repeal of McCarran-Ferguson slated to move ahead, yet again (p. 3)
- Price fixing: Second Circuit affirms dismissal of title insurance antitrust case (p. 3)
- Monopolization: DoJ condemns Google settlement (p. 4)
- European Competition Law Enforcement (p. 4)

Antitrust News in Five Minutes

DoJ Leniency Program

Leniency documents not subject to discovery

In 2002, Micron participated in the DoJ “leniency program” regarding a price-fixing conspiracy in the DRAM (dynamic random access memory chip) market.

The DoJ “leniency program” offers immunity from criminal prosecution to the *first* (only the first) party who informs on criminal antitrust violations, including that party’s co-conspirators. One of the conditions is that the informer must reveal full details of the other conspirators’ participation in the criminal antitrust violations.

Recently, the plaintiffs in a securities class-action tried to obtain the documents related to Micron’s participation in the leniency program.

A federal district judge refused to allow disclosure of the documents, holding that they were protected by the “law enforcement privilege.” The judge concluded that allowing disclosure of the documents would chill future participation in the leniency program.

Antitrust Pleading

Second Circuit revives conspiracy dismissal that had been dismissed under *Twombly*

The complaint in *Starr v. Sony BMG Music Entertainment* claimed that Sony, Capitol Records, Bertelsmann, and Time Warner fixed prices for digital music.

A federal district judge dismissed the case, citing *Twombly*, the 2007 U.S. Supreme Court decision that imposed stricter pleading standards in federal cases reversing the Second Circuit.

Now, the Second Circuit had overturned the *Starr* dismissal and revived the case. Although it is difficult to make long-term assessments, many believe that the Second Circuit is interpreting *Twombly* more generously for plaintiffs than other circuits.

The four music companies in this case sold music to consumers over the internet. They had all entered into joint ventures with either MusicNet or pressplay. Both the joint ventures and the Recording Industry Association of America (“RIAA”) provided a forum through which defendants could allegedly communicate about pricing, terms, and use restrictions. The music companies allegedly all required consumers to sign up for costly membership fees and to agree to restrictive music use conditions.

The antitrust question in the case was whether the complaint properly alleged a conspiracy (or whether the defendants’ conduct was just as consistent with independent action). *Twombly* required that “[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)” and that the complaint provide “enough facts to state a claim to relief that is plausible on its face.”

Here, the Second Circuit concluded that the complaint alleged enough facts to suggest a “preceding agreement,” not just independent but parallel conduct. Among the important facts allegations cited were that the defendants formed MusicNet and pressplay, both of which charged unreasonably high prices, imposed digital rights restrictions, did not

Antitrust News in Five Minutes

lower their charges when their costs went down, and that they all refused to do business with eMusic, the number two internet music retailer (a lower priced music subscription service with no digital rights restrictions).

The Second Circuit concluded that “in this case, plaintiffs have alleged behavior that would plausibly contravene each defendant’s self-interest in the absence of similar behavior by rivals.”

Insurance Immunity

Partial repeal of McCarran-Ferguson slated to move ahead, yet again

The McCarran-Ferguson partial repeal provision had originally been contained in the now-stalled health care bill.

But Democrats in the House have promised that the repeal will proceed in an independent bill, no longer linked to the health care legislation. While the latest bill text has not been released yet, the repeal provisions reportedly have been narrowed further, and are now confined to health insurance. Provisions that would also repeal the federal antitrust exemption for the medical malpractice business and allow the FTC to conduct certain insurance industry studies have reportedly been removed to accommodate the wishes of property and casualty insurers.

The new bill’s sponsors have stated:

“In the last 14 years, there have been 400 mergers among health care insurers so that 95 percent of health insurance markets are ‘highly concentrated,’ which means consumers have little or no choice between insurers.

“This noncompetitive market has led to health insurance premiums having more than doubled in the past decade”

The analysis by insurers of proposals to repeal McCarran-Ferguson often focuses on whether passage would materially increase their antitrust exposure arising under Section 1 of the Sherman Act, which prohibits certain anticompetitive agreements. The sponsors’ claims highlight that analysis under Section 2 of the Sherman Act, which involves unilateral conduct, may be important in this instance given the allegations of high market concentration for health insurance in some states.

Price-Fixing/Filed-Rate Doctrine

Second Circuit affirms dismissal of title insurance antitrust case

We previously reported on dismissals, around the country, of many of the antitrust class actions brought against title insurance companies. Those cases claimed that title insurers conspired to fix process *largely in the context of state-mandated rate-setting procedures that led to state-approved filed rates.*

All these now-dismissed cases had been based on a complaint that had been filed in federal court in New York in February 2008. Now, the Second Circuit affirmed the dismissal of the original case on the basis of the “filed rate” doctrine. According to the court’s order, “any ‘filed rate’ – that is, one approved by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings brought by ratepayers.”

The filed-rate doctrine acknowledges that courts should not displace agency determinations.

Antitrust News *in Five Minutes*

Monopolization

DoJ condemns Google settlement

After months of investigation, the DoJ has now condemned the revised Google settlement, and has thrown yet another wrench into Google's attempt to proceed with its digital publishing program.

The basis of the DoJ's objections is that Google supposedly misuses the class-action settlement structure to obtain a clean slate for its future operations. The DoJ filing claimed that "it is an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court in this litigation," and that "those rights, in turn, confer significant and possibly anticompetitive advantages on a single entity, Google."

The DoJ filing concluded that, under the recently-altered proposed settlement,

"Google would remain the only competitor in the digital marketplace with the rights to distribute and otherwise exploit a vast array of works in multiple formats. Google also would have the exclusive ability to exploit unclaimed works — including so-called 'orphan works' — without risk of liability. The [proposed settlement's] pricing mechanisms, though in some respects much improved, also continue to raise antitrust concerns."

European Competition Law Enforcement

New Commissioner's Views

The new Commissioner for Competition of the European Union, Joaquin Almunia, signaled that he will continue to seek fines large enough to deter competitive wrongdoing which suggests that his approach may be similar to that of his predecessor, who imposed substantial fines, such as \$1.5 billion against Intel. He also indicated that tough economic times do not justify a more lenient approach to enforcement, which also aligns him with senior US antitrust enforcers.

Antitrust News in Five Minutes

Editors

Steven Levitsky, *New York*

*David Turetsky, *Washington, DC*

Aldo Badini, *New York*
Beth Bradshaw, *Chicago*
John Collins, *New York*
Peter Crowther, *London*
David Feher, *New York*

Margaret Keane, *Silicon Valley*
Michael King, *Chicago*
Ren Jiang, *Hong Kong*
Jeffrey L. Kessler, *New York*
James Lerner, *New York*

*Eamon O'Kelly, *New York*
*A. Paul Victor, *New York*
Sergei Volfson, *Moscow*

*Antitrust Practice Co-Chair

Advisory Board

Our Antitrust practice has more than 60 lawyers, many with special areas of concentration. Our 25 offices in 15 countries allow us to handle our clients' antitrust problems around the world.

Worldwide Offices

New York

1301 Avenue of the Americas
New York, NY 10019-6092
tel +1 212 259 8000
fax +1 212 259 6333

125 West 55th Street
New York, NY 10019-5389
tel +1 212 424 8000
fax +1 212 424 8500

London

multinational partnership
No. 1 Minster Court
Mincing Lane
London EC3R 7YL
tel +44 20 7459 5000
fax +44 20 7459 5099

Washington, DC

1101 New York Avenue, NW
Washington, DC
20005-4213
tel +1 202 346 8000
fax +1 202 346 8102

Albany

99 Washington Avenue
Suite 2020
Albany, NY 12210-2820
tel +1 518 626 9000
fax +1 518 626 9010

Almaty

Ken Dala Business Center
5th Floor
Prospekt Dostyk, 38
Almaty 050010
tel +7 727 250 7575
fax +7 727 250 7576

Beijing

Beijing Kerry Center
South Tower
Suite 1429
No. 1 Guanghai Road
Beijing 100020
tel +86 10 6583 9500
fax +86 10 6583 9600

Boston

260 Franklin Street
Boston, MA 02110-3173
tel +1 617 748 6800
fax +1 617 439 0341

Brussels

Arts/Lux Building
Rue du Luxembourgstraat
14A
B-1000 Brussels
tel +32 2 227 0900
fax +32 2 227 0909

Chicago

Two Prudential Plaza
180 North Stetson Avenue
Suite 3700
Chicago, IL 60601-6710
tel +1 312 794 8000
fax +1 312 794 8100

Doha

Qatar Financial Centre
Branch
Al Fardan Office Tower
8th Floor
61 Al Funduq Street
P.O. Box 31316
Doha
tel +974 410 1717
fax +974 410 1500

Dubai

Suites 102-104, Level 1
The Gate Village Building 4
Dubai International Financial
Centre
P.O. Box 506675
Dubai
tel +971 4 425 6300
fax +971 4 425 6301

Frankfurt

Skyper
Taunusanlage 1
60329 Frankfurt
tel +49 69 3639 30
fax +49 69 3639 3333

Hong Kong

Citibank Plaza
2008, ICBC Tower
No. 3 Garden Road
Central, Hong Kong
tel +852 3697 7000
fax +852 3697 7099

Houston

RRI Energy Plaza
1000 Main Street
Suite 2550
Houston, TX 77002
tel +1 713 287 2000
fax +1 713 287 2100

Johannesburg

11th floor, The Forum
Building
2 Maude Street
P.O. Box 781033
Sandton, Johannesburg
2196
tel +27 11 911 4300
fax +27 11 784 2855

Los Angeles

333 South Grand Avenue
Suite 2600
Los Angeles, CA
90071-1530
tel +1 213 621 6000
fax +1 213 621 6100

Madrid

Calle de Velázquez, 57
28001 Madrid
tel +34 91 781 55 00
fax +34 91 577 90 48

Milan

Via F.lli Gabba 4
20121 Milan
tel +39 02 3030 9330
fax +39 02 3030 9340

Moscow

Nikitsky Pereulok 5
125009 Moscow
tel +7 495 737 5000
fax +7 495 737 5050

Paris

multinational partnership
51, rue Pierre Charron
75008 Paris
tel +33 1 53 93 77 00
fax +33 1 42 56 08 06

Riyadh

Khalid A. Al-Thebity Law Firm
affiliated office
King Fahad Road
Sky Towers - 8th Floor
P.O. Box 300807
Riyadh 11372
tel +966 1 416 9990
fax +966 1 416 9980

Rome

Via Giovanni Battista De
Rossi, 30
00161 Rome
tel +39 06 4520 6220
fax +39 06 4520 6230

San Francisco

One Embarcadero Center
Suite 400
San Francisco, CA
94111-3619
tel +1 415 951 1100
fax +1 415 951 1180

Silicon Valley

1950 University Avenue
Suite 500
East Palo Alto, CA
94303-2225
tel +1 650 845 7000
fax +1 650 845 7333

Warsaw

Stock Exchange Building
ul. Książęca 4
00-498 Warsaw
tel +48 22 690 6100
fax +48 22 690 6222

06-30-2009

8563 REV3 02-17-2010