shook, hardy & bacon
Antitrust News

December 2004 www.shb.com

In This Issue

The Unilateral Effects Doctrine Does a Tango: Oracle/PeopleSoft

Congress Provides Additional Leniency Program Incentives, Enhances Antitrust Criminal Penalties

Criminal Penalties and the Alternative Maximum Fine

U.S. Department of Justice Withdraws Grant of Conditional Amnesty to Stolt-Nielsen in the International Parcel Tanker Shipping Investigation

Prometheus (and others similarly situated) Unbound

Seventh Circuit Approves Use of Separate Juries to Deal with Prejudicial Evidence Admissible Against Only One Defendant

Fighting Foreign Wars: The *Intel Corp.* Case

Supreme Court Limits Extraterritorial Reach of Sherman Act

Eighth Circuit Grapples with "Per Se" Versus "Rule of Reason"

Ohio Supreme Court Soon to Decide Indirect Purchaser Standing Under the Valentine Act; New York Trial Court Rejects Donnelly Act Claims of "Too Indirect" Purchaser

Washington Update

The Unilateral Effects Doctrine Does a Tango: Oracle/PeopleSoft

By James R. Eiszner
Chairman, SHB Antitrust Practice Group
jeiszner@shb.com

In a merger opinion rivaling for length the United States Supreme Court's 76-page opinion (including dissents) in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) ("*PNB*"), Chief Judge Vaughn R. Walker of the U.S. District Court for the Northern District of California recently rejected the Antitrust Division's challenge to the proposed acquisition of People-Soft, Inc. ("PeopleSoft") by Oracle Corporation ("Oracle"). *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1098-1176 (N.D. Cal. 2004). It is often said of the *PNB* decision that it contains something for everyone; the same can be said of *Oracle*. The antitrust enforcement agencies are surely delighted that, in that opinion, the court adopted the unilateral effects analysis articulated by the agencies' Merger Guidelines but little discussed by the courts—even if the government was openly disappointed that its challenge to Oracle's takeover bid ultimately failed to persuade the district court. *See* DOJ Press Release, *Justice Department Statement Regarding District Court's Decision in U.S. v. Oracle* (Sept. 9, 2004), *available at* **http://www.usdoj.gov/atr/public/press_releases/2004/205372.htm**. The *Oracle* decision is worthwhile reading because it makes an effort to discuss unilateral effects analysis, and judges will surely turn to this discussion when confronted with an argument based on unilateral effects in the future. At the same time, Judge Walker may have struck a serious blow to use of unilateral effects analysis in future litigated cases.

Oracle's Tender Offer, the Nature of the Parties' Businesses, and the Theory of the Government's Unsuccessful Challenge: Oracle and PeopleSoft are producers of enterprise resource planning software ("ERP")—applications programs that integrate a company's data across most or all of the company's activities. ERP programs contain sub-categories (called "pillars") relating to specific corporate functions such as human relations, financial management, customer relations, and the like. When Oracle began a hostile tender for PeopleSoft, the Department of Justice's Antitrust Division brought suit, contending that the acquisition would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, under both a coordinated effects theory and a unilateral effects theory in two markets: high functionality software for the human relations pillar of ERP and high functionality software for the financial management pillar of ERP. *See generally* DOJ Press Release, *Justice Department Filing Lawsuit to Block Oracle's Proposed Acquisition of PeopleSoft* (Feb. 26, 2004), *available at* **http://www.usdoj.gov/atr/public/press_releases/2004/202575.htm.**

After a year of discovery and hearings, with the tender offer miraculously holding on, the court ruled on September 9, 2004 that the acquisition, if consummated, would not violate the Clayton Act. *See* 331 F. Supp. 2d at 1175-76. The opinion discusses the coordinated effects and unilateral effects modes of analysis at great length. *See id.* at 1112-23. With respect to the unilateral

effects analysis, the court engages in an elaborate and careful discussion of the economics behind this mode of analysis and discusses the legal authority for using unilateral effects analysis in merger analysis. Important to its later analysis, the court specifically notes in this discussion that a relevant market for unilateral effects analysis may be different than the relevant market for coordinated effects analysis, *id*. at 1118, 1122, and argues that the notion of sub-markets endorsed by the courts is flexible enough to accommodate the notion of the relevant market for a single product varying with the mode of analysis, *id*. at 1119.

Defects in the Government's Coordinated and Unilateral Effects Cases and in Oracle's Efficiencies Defense: The district court found for the defendant on the coordinated effects theory. *Id*. at 1165-66. Because it had failed to show the relevant market, the government could not prevail on a coordinated effects theory. According to the court, it would be improper to define the market as high functionality software for an ERP pillar when it had not been shown that prices for this software were not constrained by medium functionality software for ERP pillars, by outsourcing firms, or by system integrators. *Id*. at 1158-61. The court clearly considered the government's proposed market to be highly artificial and not reflective of competitive reality.

The court also rejected the government's argument based on unilateral effects. According to the court, application of a unilateral effects analysis to the facts of this case was improper: such an analysis is appropriate only when a substantial number of consumers regarded the products of the merging firms as the *closest* substitutes, yet the government had merely shown that the products of the merging firms were *close* substitutes. *Id*. at 1172. Even if use of a unilateral effects analysis were appropriate, the court rejected the government's proof that unilateral effects would occur as a result of the merger. The government's statistical proof of a unilateral effect was flawed because a variable in the analysis was based on share of the market for high functionality software for ERP human resources and financial management pillars. The court had already rejected this "market" as a proper one in the context of coordinated effects. Consequently, the court reasoned that the unilateral effects analysis could not properly contain a variable based on shares of this improper market. *Id.* at 1172-73. (One cannot help noting that this reasoning conflicts with the court's own earlier statement that the proper relevant market definition could be different for a unilateral effects analysis than for a coordinated effects analysis).

Finally, although it had already determined that the government had not carried its burden of proof to show that the merger was likely to harm competition, the court considered and rejected as speculative Oracle's defense that the merger would achieve meaningful efficiencies. *Id*. at 1173-75. Expert testimony on cost-savings efficiencies founded on "personal estimations" of Oracle's experts lacked credibility with the court, while purported efficiencies deriving from future innovation failed to find support in internal company documents. "Accordingly, both claimed efficiencies are much too vague and unreliable to rebut a showing of anticompetitive effects" had the government been successful in demonstrating such effects. *Id*. at 1175.

Lessons from *Oracle*: The *Oracle* decision will be important for years to come. It will be an important source of legal authority for applying the unilateral effects analysis in litigated cases. Importantly, the Antitrust Division has recently announced it will not appeal the decision, so there is no threat of appellate reversal. *See* DOJ Press Release, *Justice Department Will Not Appeal Oracle Decision* (Oct. 1, 2004), *available at* **http://www.usdoj.gov/atr/public/press_releases/2004/205633.htm**. The court's acceptance of the unilateral effects analysis in merger cases is clearly a step forward for the government, which has had precious little legal authority beyond its own Merger Guidelines to support the use of unilateral effects analysis. *See* 331 F. Supp. 2d at 1113 (acknowledging that "[t]here is little case law on unilateral effects merger analysis").

But if the decision was a step forward for the acceptance of unilateral effects analysis, it may also be a step or two back as to its application. One step back is that the decision reinforces the frequently made argument that unilateral effects analysis is superfluous. In *Oracle*, both the unilateral and coordinated effects theories were unsuccessful. It continues to be true that no litigated case has found a merger unlawful under a unilateral effects analysis alone.

The analysis of market definition in Judge Vaughn's decision may be at least another half-step back for unilateral effects theory. To many, use of unilateral effects analysis was a way to obviate the need for a relevant market analysis: why define a market when unilateral effects analysis answers the ultimate question of consumer harm? In light of *Oracle*, a credible argument can be made that one must first define the relevant market before conducting the analysis. The *Oracle* decision may therefore limit the utility of unilateral effects arguments in litigated merger cases. Because litigated merger cases are a rarity—many companies do not have the resolve shown by Oracle and will abandon mergers upon a decision by one of the federal antitrust enforcement agencies to file a complaint—it is likely that the antitrust enforcement authorities will nevertheless continue to use unilateral effects analysis in deciding whether to mount a merger challenge.

Congress Provides Additional Leniency Program Incentives, Enhances Antitrust Criminal Penalties

By Jerrod Westfahl
jwestfahl@shb.com

On June 22, 2004, President Bush signed into law the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (the "Act"). The Act contains a framework for extending benefits of the corporate leniency program run by the Antitrust Division of the U.S. Department of Justice (the "Antitrust Division" or "Division") to leniency applicants facing liability for civil claims predicated on conduct that is covered by a leniency agreement. It also increases criminal fines and jail sentences for Sherman Act violations.

The most intriguing aspect of the Act is its recognition of, and attempt to address, one of the main disincentives antitrust defendants have faced under the Division's leniency program. That program generally provides conditional amnesty from criminal prosecution for the first defendant to self-report possible anticompetitive conspiracies. *See* Antitrust Division, Department of Justice, *Corporate Leniency Policy* (issued Aug. 10, 1993), *available at* **http://www.usdoj.gov/atr/public/guidelines/0091.htm**. The Division's program does not, however, provide commensurate civil liability protections. Historically, participation in the program has invited an onslaught of parallel civil claims against program participants. *See generally* Phillip C. Zane, *The Price Fixer's Dilemma: Applying Game Theory to the Decision Whether to Plead Guilty to Antitrust Crimes*, 48 Antitrust Bull. 1, 2-6 (2003) ("As large as U.S. criminal fines might be, they are only the beginning of the problem."); DOJ Press Release, *Assistant Attorney General for Antitrust*, *R. Hewitt Pate*, *Issues Statement on Enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004* (June 23, 2004) (suggesting that the risk of treble damages liability had presented "a major disincentive for submitting amnesty applications"), *available at* **http://www.usdoj.gov/atr/public/press_releases/2004/204319.htm**.

The Act "De-Trebles" Civil Damages For Qualifying Defendants: Last year, the Division reported that, since the revision of its antitrust corporate leniency program in 1993, it had received on average more than one amnesty application—and during some periods an average of as many as three applications—a month and that this program was the "most successful leniency program" operated by the U.S. Department of Justice. *See* James M. Griffin, Deputy Assistant Attorney General, *The Modern Leniency Program After Ten Years:* "*A Summary Overview of the Antitrust Division's Criminal Enforcement Program*," Remarks at the Annual Meeting of the American Bar Association 7 (Aug. 12, 2003), *at* **http://www.usdoj.gov/atr/public/speeches/201477.htm**. Recognizing the leniency program's success to date as a competition enforcement tool, Congress sought to bolster its efficacy by giving courts the express authority to

extend the leniency program's incentives beyond the criminal realm. To accomplish this purpose, the Act contains a "de-trebling" provision that limits Division leniency program participants' liability in related civil actions to the actual damages attributable to their conduct. The Act provides that:

> in any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b) [mandating that the leniency applicant "provide[] satisfactory cooperation to the claimant with respect to the civil action"], together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.

Act § 213(a). Defendants not part of a Division leniency agreement are not eligible for protection under the Act and remain jointly and severally liable in civil actions. *Id.* § 214(3).

Presiding Judges Determine Whether A Defendant's Cooperation is Sufficient: To qualify for the Act's "de-trebling" protection, a defendant must not only be a Division leniency program applicant, but the court presiding over the civil action must determine that the defendant has "provided satisfactory cooperation to the claimant with respect to the civil action." *Id.* § 213(b). Requisite cooperation includes providing a full account to the claimant of all potentially relevant facts and furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody or control of the applicant or cooperating individual. Where the defendant is an individual, he or she must participate honestly and fully in all interviews, depositions, and testimony that are reasonably required by the claimant in connection with the civil action. Where the defendant is a company, it must use its best efforts to secure and facilitate the cooperation of individuals covered by the leniency agreement. *See id.*

The relative timing of a civil action and a related leniency agreement impacts the court's analysis. Where the leniency program applicant's initial contact with the Antitrust Division occurs after a civil action has been filed, "the court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant's initial cooperation with the claimant." *Id.* § 213(c).

Increased Criminal Penalties: Another major feature of the Act increases the maximum penalties for criminal violations of Sections 1, 2 or 3 of the Sherman Act to $100 million for corporations (a ten-fold increase over the $10 million maximum penalty available under prior law) and $1 million for individuals (a nearly three-fold increase over the $350,000 maximum penalty previously available). The Act also more than triples the maximum prison sentences, from three years under prior law to ten years under the amended Sherman Act, for individuals found criminally liable under those statutes. *Id.* § 215 (amending 15 U.S.C. §§ 1-3). The increases are intended to bring penalties for antitrust violations in line with other penalties, such as those imposed by the Sarbanes-Oxley Act, although they are likely to be seen as formalities. The Division has had success in recent years in obtaining fines well above $100 million under the alternative maximum fine provisions of 18 U.S.C. § 3571(d). *See* James M. Griffin, *supra* at 6-7 ("Since the beginning of FY 1997," and as of August 2003, "the Division has obtained over $2 billion dollars [*sic*] in criminal fines," including "thirty-nine corporate fines of $10 million or more, six fines of $100 million or more, and one fine of $500 million—the largest criminal fine ever imposed in the United States under any criminal statute.").

The Act's Express Limitations: The Act contains a handful of additional express limits on its scope and effect. First, the Act does not affect the Antitrust Division's right to seek a stay or protective order in a civil action to prevent interference with or impairment of an investigation or prosecution by the Division concerning

conduct covered by a leniency agreement. Act § 214(1). Second, the Act does not "create any right to challenge any decision by the Antitrust Division with respect to an antitrust leniency agreement." *Id.* § 214(2). Finally, nothing in the Act changes provisions in the Clayton Act relating to recovery of costs of suit, reasonable attorney fees and interest on damages. *Id.* § 213(d).

Unanswered Questions: Several questions linger about the Act's effect and applicability in certain situations.

- *First*, on its face, the Act's "de-trebling" provision applies only where a civil claim is based on Sherman Act Sections 1 or 3 or "any similar State law." *Id.* § 213(a). Which state laws are "similar" to Section 1 or Section 3 of the Sherman Act for these purposes?

- *Second*, the Act's "de-trebling" provision only limits the amount of damages a "claimant" can obtain. *Id.* "Claimant" is defined to exclude "a State or a subdivision of a State with respect to a civil action brought to recover damages sustained by the State or subdivision." *Id.* § 212(4). In light of this definitional exclusion, are claims brought by a state in a *parens patriae* or other comparable representational capacity excluded from the Act, such that a leniency program applicant cannot seek the Act's "de-trebling" protections with respect to such actions?

- *Third*, what effect, if any, does a leniency program applicant's payment of 100% of single damages have on the remaining defendants' joint and several liability? Can they claim that there are no damages left to pay?

- *Finally*, is the Act retroactive? For example, if a leniency program applicant received amnesty from the Division prior to the Act's effective date, is the applicant able to seek the Act's "de-trebling" protection only if a civil action is brought after the Act's effective date? Similarly, if a civil action commenced before the Act's effective date but the leniency applicant's civil liability had not been determined as of the effective date, can the applicant seek the Act's "de-trebling" protection?

Difficult issues such as these likely will have to be worked out by the courts, perhaps with the help of Congress, in the years ahead. In the meantime, antitrust defendants will need to consider carefully the potential impact of corporate amnesty agreements on their civil and criminal exposure in order to successfully manage or avoid such "hidden risks" that may still be lurking beneath the surface of these amendments.

Criminal Penalties and the Alternative Maximum Fine

By Lisa Burke
eburke@shb.com

This past June, Congress amended the Sherman Act, raising the maximum criminal fine for a corporation from $10 million to $100 million. Pub. L. No. 108-237, § 215, 118 Stat. 661, 668 (2004). Although the U.S. Department of Justice ("DOJ") had previously been able to obtain fines in excess of $10 million from corporate defendants through the use of the alternative maximum fine provision, *see Comments of the ABA Section of Antitrust Law on H.R. 1086: Increased Criminal Penalties, Leniency Detrebling and the Tunney Act Amendment* at 6 (Jan. 2004) ("ABA Comments"), *available at* **http://www.abanet.org/antitrust/comments/2004/increasedcriminalpenalties.pdf**, a Supreme Court decision rendered in 2000 should have made that practice less effective.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Stevens, J.), the Supreme Court held that a white criminal defendant who was accused of firing a gun into the home of an African-American family and who pleaded guilty to violating a state firearm possession statute

(which provided a maximum penalty of 10 years in prison) could not be sentenced to 12 years in prison under the state's hate crime statute (which provided a maximum penalty of 20 years in prison) in spite of the fact that the sentencing judge found that the crime was racially motivated. The rule established by *Apprendi* is that any fact (other than a prior conviction) that increases the penalty for a crime beyond the statutory maximum must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. 530 U.S. at 490. The Supreme Court has since clarified that the "statutory maximum" means "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004) (Scalia, J.) (emphasis in original).

The Criminal Fines Act allows a court to impose a fine that is not more than the greater of (1) the amount contained in the law setting forth the criminal offense or (2) double the pecuniary gain or loss caused by the offense. 18 U.S.C. § 3571. Under this alternative maximum fine provision, a corporation accused of criminal anticompetitive conduct that caused its customers damages of $15 million could be subject to a $30 million fine. Presumably, the possibility that a judge could impose this higher fine allowed DOJ to obtain plea agreements under which corporate defendants agreed to pay a fine that was more than the $10 million Sherman Act maximum but less than the total possible liability under Section 3571. But when the amount calculated under the alternative maximum fine provision exceeds the amount contained in the law setting forth the crime, the rule of *Apprendi* is implicated.

The alternative maximum fine should not come into play in criminal antitrust cases unless the government includes the amount of pecuniary gain or loss in the indictment and would be able to prove it beyond a reasonable doubt to a jury.

Because of the uncertainty inherent in determining the amount of pecuniary gain or loss caused by anticompetitive conduct and in light of *Apprendi*, corporate antitrust defendants accused of criminal behavior should have little incentive to pay more than the Sherman Act statutory maximum. Interestingly, after *Apprendi* was decided and before the maximum fine was raised to $100 million, at least seven corporations paid fines in excess of $10 million, including Mitsubishi Corporation, which paid $134 million to settle charges of fixing prices for graphite electrodes. *See* ABA Comments, Appendix 1; *see also* DOJ Press Release, *Mitsubishi Corporation Fined $134 Million for Its Role in International Price-Fixing Cartel* (May 10, 2001), *available at* **http://www.usdoj.gov/atr/public/press_releases/2001/8186.htm**. Since the maximum fine was raised to $100 million, DOJ has continued to negotiate fines that exceed the statutory maximum—Infineon Technologies AG recently agreed to pay a $160 million fine and to plead guilty to conspiring to fix prices for memory chips. *See* DOJ Press Release, *Infineon Technologies AG Agrees to Plead Guilty to Participating in DRAM Price-Fixing Conspiracy* (Sept. 15, 2004), *available at* **http://www.usdoj.gov/atr/public/press_releases/2004/205437.htm**.

While the increase in the statutory maximum to $100 million provides a surer footing for DOJ's negotiation of large settlements with corporate defendants, the Supreme Court's decision in *Apprendi* is still relevant, and it weakens any threat of a fine in excess of $100 million. If a corporate defendant chooses to do so, it can waive its *Apprendi* rights by either stipulating to the relevant facts or consenting to judicial factfinding. *See Blakely*, 124 S. Ct. at 2541. But given the fact that civil suits are almost certain to follow a criminal antitrust investigation, corporations will surely be hesitant to stipulate to facts that will affect their civil liability.

U.S. Department of Justice Withdraws Grant of Conditional Amnesty to Stolt-Nielsen in the International Parcel Tanker Shipping Investigation

By Laurie A. Novion
lnovion@shb.com

In March 2004, the Antitrust Division of the U.S. Department of Justice ("DOJ") took the somewhat extraordinary step of expelling Stolt-Nielsen SA and Stolt-Nielsen Transportation Group (collectively "Stolt-Nielsen") from its Corporate Leniency Program and revoked the entities' conditional amnesty with respect to DOJ's investigation of the parcel tanker shipping industry. A year earlier, in February 2003, DOJ had granted conditional amnesty to Stolt-Nielsen with respect to parcel tanker operations. This marks the first time that DOJ has withdrawn a grant of conditional amnesty to an applicant under the Antitrust Division's Corporate Leniency Policy. *See* James Bandler and John R. Wilke, *U.S. Revokes Deal Offering Amnesty to Stolt-Nielsen*, Wall St. J., Mar. 23, 2004, at A3.

In DOJ's ongoing investigation, two companies have pleaded guilty to participating in an international cartel in the parcel tanker shipping industry to rig bids, allocate customers, and fix prices on contracts for the shipment of bulk chemicals and other liquids to and from the United States: the Dutch company Jo Tankers B.V. (June 2004) and Odfjell Seachem AS of Norway (October 2003). Those companies agreed to pay criminal fines of $19.5 million and $42.5 million, respectively. *See* DOJ Press Release, *Dutch Company Agrees to Plead Guilty in International Parcel Tanker Shipping Investigation* (Apr. 19, 2004), *available at* **http://www.usdoj.gov/atr/public/press_releases/2004/203321.htm**.

The Antitrust Division's Corporate Leniency Policy sets forth explicit conditions that must be met in order for an applicant to qualify for conditional amnesty. Included among those conditions are the following actions: taking "prompt and effective action to terminate [the company's] part in the conspiracy," "report[ing] the wrongdoing with candor and completeness," and providing "full, continuing and complete cooperation to the Division throughout the investigation." *See* Antitrust Division, Department of Justice, *Corporate Leniency Policy* (issued Aug. 10, 1993), *available at* **http://www.usdoj.gov/atr/public/guidelines/0091.htm**. Stolt-Nielsen's conditional amnesty most likely was revoked due to incomplete or false representations made by it to DOJ and/or a failure to comply with the requirements under its corporate leniency agreement. For example, available information suggests that Stolt-Nielsen's involvement in anticompetitive activities in the parcel tanker shipping industry may have continued for as much as eight months longer than originally believed by DOJ. *See* Laura Johannes, *Stolt Continued Known Cartel, According to Filing*, Wall St. J., Oct. 6, 2004, at A3.

Such a conclusion can be reasonably inferred from statements made by DOJ. In response to the withdrawal of the grant of conditional amnesty to Stolt-Nielsen, DOJ emphasized in a press statement that "[a]s part of its enforcement efforts, throughout [an] investigation, the Division verifies the representations of the corporate leniency applicant. At any time throughout the process, the Division may expel an applicant after concluding that a company has made false representations to the Division or has otherwise not fully complied with the leniency program requirements." *See Justice Department Statement Regarding Antitrust Division's Corporate Leniency Program* (Mar. 24, 2004), *available at* **http://www.usdoj.gov/opa/pr/2004/March/04_at_176.htm**.

A similar sentiment was echoed by R. Hewitt Pate, Assistant Attorney General for DOJ's Antitrust Division, at the annual Spring Meeting of the American Bar Association's Section of Antitrust Law on April 2, 2004. There, Pate emphasized that although the withdrawal of

Stolt-Nielsen's amnesty does not reflect any substantive change in DOJ's Corporate Leniency Policy, applicants should be aware that, in the words of one report, "a participant in the leniency program may be expelled if it has made false representations to the Antitrust Division or has otherwise not fully complied with the leniency program requirements." *See Enforcers Offer Perspectives to ABA Spring Meeting Attendees*, Trade Reg. Rep. (CCH) No. 833, at 4 (Apr. 7, 2004). Pate concluded: "I think in the fullness of time it will be very clear that there is absolutely no change to the program reflected by this case, but that we mean what we say when there are obligations that have to be followed." *Roundtable Conference with Enforcement Officials*, 72 Antitrust L.J. 283, 295-96 (2004).

Prometheus (and others similarly situated) Unbound

By James R. Eiszner
Chairman, SHB Antitrust Practice Group
jeiszner@shb.com

On December 1, 2003, with very little fanfare, amendments to certain provisions of the federal class action rule—Rule 23 of the Federal Rules of Civil Procedure—took effect. Some of these amendments codified existing practice—for example, an amendment that requires class certification issues to be addressed at an early practicable time (see Fed. R. Civ. P. 23(c)(1)(A)) —while others made new law—for example, the amendment that only settlements with certified classes require court approval (*see* Fed. R. Civ. P. 23(e)(1)(A)). But one amendment is especially deserving of note because it will likely have enormous impact. The new provision states that "[i]n an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." Fed. R. Civ. P. 23(e)(3). The provision thus gives courts presiding over class actions the discretion to permit class members to opt-out of the class with each settlement with any defendants.

On its face, the new provision seems helpful. Giving class members the ability to vote on proposed settlements with their feet is similar to the right retained by any party who hires a lawyer—the right to fire one's attorney because of poor performance. If a class settlement is reached that is unsatisfactory to a class member, new Rule 23(e)(3) allows the court to permit class members to opt-out of the case and opt-out of the settlement, and to impose conditions on the exercise of that right. But is it really necessary for a class member to opt-out of the class because there has been a settlement that the class member regards as inadequate? This seems doubtful. Class members have always had the ability to object to a proposed settlement, in which case the court decides the adequacy of the settlement. It may be that some courts will use new Rule 23(e)(3) in order to avoid making a meaningful decision on the merits of a proposed class settlement and that some class members will refrain from objecting to class settlements because they intend to opt-out of the class. If so, the new rule may undercut the protections that court approval of class settlements has always provided, an unintended result that would be unfortunate for class members.

Conundrums for Defendants: New Rule 23(e)(3) presents opportunities for mischief in other ways. In particular, it has the potential to wreak havoc in class actions involving multiple defendants. Consider the typical antitrust price-fixing class action case where there are numerous defendants accused of price-fixing, where the defendants have joint and several liability, and where a settlement with one defendant is to be deducted from the trebled damages (if any) awarded against any defendants who go to trial and lose. In such a case, there is often an early settlement involving one or two defendants; the plaintiff class bar often uses the early settlement as a war chest to fund the litigation against the remaining defendants. The early settlement usually triggers a certification of the plaintiff class (whether as a settlement class or otherwise), at which point members of the certified

class will be given an opportunity to opt-out. In the typical case, other defendants will reach settlements (in most cases, even the most innocent of defendants cannot afford the risk of losing at trial). With each of these subsequent settlements, the new Rule 23(e)(3) provision comes into play. In all but the rarest cases, there will be only a single distribution of funds to class members, who must wait to get their recovery until all the defendants have settled or gone to trial so that there are no further monies to distribute.

In the above scenario, all but the first-settling defendant face a conundrum. Later-settling defendants face the prospect that the court may permit a new opt-out period under Rule 23(e)(3). This can affect the defendant in several ways. First, if the court permits a new opt-out period, it is possible that many of the class members will opt-out of the class, which can increase the financial risk of settlement to the settling defendant. It is one thing to pay $1 million to settle a case with a million class members, but quite another to pay $1 million to settle with 500,000 class members—particularly, in the latter instance, when it is accompanied by the prospect of ongoing litigation with some or all of the other 500,000 potential class members who have opted out of the $1 million settlement. The defendant must protect his settlement by putting in a “blow provision”—a provision that the settlement will not take effect unless a high percentage of the class does not opt-out, or possibly unless the court declines to permit a new Rule 23(e)(3) opt-out period.

Second, if the court permits a new opt-out period under Rule 23(e)(3), the later-settling defendant faces the problem of dealing with any class members who take advantage of the opportunity to opt-out. Those opt-outs will presumably sue the later-settling defendant, as well as the defendants who have reached no settlements at all, in individual actions; they will not sue the first-settling defendant because they were members of the class when that settlement was approved. This presents a logistical problem for the defendants because they must now defend multiple actions, perhaps in multiple jurisdictions. This is not an unusual problem—although it is one to which courts and the Rules Advisory Committee do not seem sufficiently sensitive. But the more difficult problem involves the handling of each individual opt-out action.

In any such individual case, the defendants now face a problem in terms of getting a reduction in their liability to the opt-out plaintiff as a result of the class settlement with the first-settling defendant in the class case. Defendants are entitled to a credit against their liability in the opt-out action for any amounts that the opt-out plaintiff derives from the settlement with the first-settling defendant in the class action. But because distributions of class settlements typically do not occur until the class has received all the settlements and judgments it can possibly get, it likely will be impossible to compute the amount by which any judgment in the individual opt-out cases should be reduced by virtue of the initial class settlement. And this problem is compounded if there is more than one opt-out period allowed under Rule 23(e)(3).

Problems for Class Counsel: New Rule 23(e)(3) can also cause problems for plaintiff’s counsel representing the class. Typically, class counsel is compensated by an award of a percentage of the total recovery of the class, a process that can occur only after the class has obtained all the settlements and judgments it can get. Rule 23(e)(3) confounds this process by permitting judges to allow class members to opt-out after one or more early settlements but before the class has obtained all the recovery that it can get. It would be patently unfair to class counsel if, for example, it reached successful settlements with all but one defendant, the last defendant then settled, and the vast majority of the class members then elected to opt-out of the class because a new opt-out period was ordered by the court pursuant to Rule 23(e)(3) when the last settlement was reached. Absent some condition imposed by the court as a requirement for opting out—perhaps a provision that class members who elect to opt-out must pay class counsel as a condition to opting out—a class member could then escape the obligation to compensate the class lawyers whose work has theretofore resulted in a large recovery for the class member who now is electing to opt-out. Moreover, in their subsequent opt-out actions, the opt-outs get a free ride off the work of the class counsel in the class case. In the long run, if Rule 23(e)(3) is used frequently, the incentives for class action lawyers to bring suit on behalf of a class may be severely undermined.

Remedies for Ill-Advised Good Intentions: Although it was surely well-intentioned, new Rule 23(e)(3) embodies a dangerous concept that may hurt, rather than help, the just resolution of claims. Serious consideration ought to be given to its repeal. Until that occurs, however, defendants in antitrust class actions must anticipate, and try to protect themselves against, the mischief that this new rule can cause. It is especially important that settlements with a class be subject to a condition either that, if Rule 23(e)(3) is employed, any opt-outs will not exceed a specified percentage of the class or that the court will not permit a new opt-out period pursuant to that rule.

Seventh Circuit Approves Use of Separate Juries to Deal with Prejudicial Evidence Admissible Against Only One Defendant

By Kristen Aggeler Page
kpage@shb.com

For the first time, a federal court of appeals has approved the use of two juries in a civil lawsuit to deal with prejudicial evidence that is admissible against only one of several antitrust defendants. A panel of the Seventh Circuit, in *In re High Fructose Corn Syrup Antitrust Litigation*, 361 F.3d 439 (7th Cir. 2004) (Posner, J.), held that the district judge, Michael M. Mihm, had the authority to impanel two juries to sit simultaneously in an effort to prevent prejudice that might result from the introduction of "damaging" evidence that is admissible against only one of several defendants. While both juries would hear the evidence simultaneously, the jury deciding the case of the defendant against whom the evidence is inadmissible would be excused during proceedings in which this evidence was introduced against the other defendant.

Lawsuits over alleged price-fixing with respect to high fructose corn syrup ("HFCS") began developing in the mid-1990's, culminating in the filing of a consolidated amended class action complaint in March 1996 before Judge Mihm in the U.S. District Court for the Central District of Illinois. Plaintiff class members are U.S. purchasers of HFCS who bought directly from any of five defendants between July 21, 1991 and June 30, 1995. Plaintiffs allege that, beginning as early as 1988, the defendants conspired to fix prices and allocate market shares for HFCS in violation of the Sherman Antitrust Act. The original named defendants were Cargill, Inc. ("Cargill"), Archer Daniels Midland Company ("ADM"), A.E. Staley Manufacturing Company ("Staley"), American Maize-Products Company ("American Maize"), and CPC International ("CPC"). Cargill, American Maize, and CPC settled, leaving ADM and Staley as the remaining defendants.

In the course of preparing this case for trial, Judge Mihm ruled that certain damaging evidence arising from criminal proceedings against ADM would be admissible against ADM only and not against Staley. Judge Mihm became concerned that if the jury heard the damaging evidence, jurors would not be able to put it out of their minds when considering the culpability of Staley, even if instructed to disregard it. *See In re High Fructose Corn Syrup Antitrust Litig.*, 293 F. Supp. 2d 854, 862 (C.D. Ill. 2003). In response to this concern, Judge Mihm suggested to the parties the idea of impaneling two juries, one to decide ADM's liability and the other to decide Staley's liability, with the second jury to be excused when the damaging evidence was put in against ADM. *Id.* at 862-63. Judge Mihm concluded that he was not authorized to employ such a device, but certified his ruling for immediate appeal pursuant to 28 U.S.C. § 1292(b). *In re High Fructose Corn Syrup Antitrust Litig.*, 303 F. Supp. 2d 971, 973-74 (C.D. Ill. 2004).

In considering the propriety of Judge Mihm's ruling, Judge Richard A. Posner, writing for a unanimous panel, noted that in only one case of which the Court was aware, *Martin v. Bell Helicopter Co.*, 85 F.R.D. 654 (D. Colo. 1980), has a court ever exercised the power to impanel separate juries in a civil case (although the power is more commonly used in criminal cases). 361 F.3d at 441. While this power has not often been used in civil cases, Judge Posner stated that "the existence of the power has not been denied, and we cannot see what there is to bar it." *Id.* He continued: "No rule, principle, precedent, statute, regulation, or other source of limitations on the power of district judges stands

athwart the procedure that the judge would like to employ." *Id.* Judge Posner stated that imaginative procedures designed to minimize the likelihood that a jury's verdict will be the product of confusion or inappropriate emotion, so long as they do not violate any legal norm, are to be encouraged rather than discouraged, and indeed are fundamental to the trial judge's administrative role and inherent powers in presiding over jury trials. The Court held that Judge Mihm "erred in thinking himself forbidden to impanel separate juries." *Id.*

The Court acknowledged the risk that the two juries could reach opposite, inconsistent verdicts: "Suppose the ADM jury finds that ADM violated the Sherman Act by conspiring to fix prices, but the other jury finds that Staley . . . did not conspire with ADM. ADM cannot be guilty of conspiracy unless it conspired with other firms, so the verdict against ADM would entail a finding that at least one of the other firms conspired with ADM, contrary to the verdict in favor of Staley." *Id.* The Court concluded, however, that these verdicts would not necessarily be inconsistent, since the two juries would hear different evidence. As a result, any "inconsistency would be in result rather than in logic." *Id.*

Fighting Foreign Wars: The *Intel Corp.* Case

By Edward O. Gramling
egramling@shb.com

The Supreme Court recently issued an opinion that may make it more difficult for international businesses located in the United States to avoid entanglement in foreign litigation. In *Intel Corporation v. Advanced Micro Devices, Inc.*,— U.S.—, 124 S. Ct. 2466 (2004) (Ginsburg, J.), the Court sought to clarify the scope of a federal statute that was designed to foster judicial comity between U.S. courts and foreign countries by authorizing federal courts to assist in discovery in aid of foreign proceedings. That statute, 28 U.S.C. § 1782(a), specifically allows a federal district court to order persons residing or "found" within its jurisdiction to testify or produce documents "for use in a proceeding in a foreign or international tribunal" should "any interested person" make such application. While ultimately emphasizing the discretion federal district courts maintain in applying *Intel*'s holding, the decision certainly expands the rationales these same federal district courts can call upon to order U.S. businesses to produce evidence for foreign tribunals.

Story of a U.S. Discovery Dispute Commenced in Support of a European Antitrust Proceeding: The facts of *Intel* are uncomplicated, and present a scenario in which international businesses residing in the United States might easily find themselves. As a competitor of Intel Corporation ("Intel"), Advanced Micro Devices, Inc. ("Advanced Micro") filed a complaint with the Directorate-General for Competition of the European Commission (the "Commission")—the antitrust enforcement agency of the European Union—alleging that Intel violated European competition prescriptions through loyalty rebates, exclusive purchasing agreements, price discrimination and standard-setting cartels. 124 S. Ct. at 2474-75. The filing of a complaint with the Commission is the only method any competitor has to initiate Europe-wide proceedings against a possible antitrust violator. To support its complaint, Advanced Micro pressed the Commission to seek documents Intel had produced during private antitrust litigation in the U.S. District Court for the Northern District of Alabama. After the Commission declined to seek judicial assistance from the Alabama court, Advanced Micro petitioned the U.S. District Court for the Northern District of California (where both Intel and Advanced Micro are headquartered) for an order directing Intel to produce the documents that had been produced in the earlier U.S. litigation. *Id.* at 2475 & n.5.

The California district court refused to order the production. *Id.* at 2475. But on appeal, the Ninth Circuit remanded with instructions to consider the following three holdings about Section 1782(a): (1) the statute allows for potential judicial assistance for matters before "bodies of a quasi-judicial or administrative nature" like the European Commission; (2) the statute has no requirement that the proceeding be "imminent"

or "pending" before an applicant can invoke it; and (3) the statute does not require the party seeking discovery to make a threshold showing to the federal district court that the production sought would be discoverable in the foreign proceeding. *Id.* at 2475-76. The Supreme Court granted *certiorari*, *Intel Corp. v. Advanced Micro Devices*, *Inc.*, 124 S. Ct. 531 (2003) (mem.), citing a circuit split "on the question whether § 1782(a) contains a foreign-discoverability requirement," 124 S. Ct. at 2476 & n.7.

Supreme Court Provides Guidance to District Courts in Invoking Section 1782(a): After briefing and argument, the Supreme Court affirmed the Ninth Circuit holdings and added an additional holding that private litigants like Advanced Micro (and not just foreign sovereigns, as some courts had held in the past) may invoke Section 1782(a). *See id.* at 2472-73, 2476-77. More specifically, while emphasizing "that § 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to 'interested person[s]' in proceedings abroad," *id* at 2473, 2482, 2484, the Court, in a 7-to-1 decision (Justice O'Connor abstaining), clarified the scope of Section 1782(a) in several respects. The Court found, first, that "a complainant before the European Commission," although neither formally a litigant or a party in Commission proceedings nor an agent of the Commission, "qualifies as an 'interested person'" within the meaning of the statute who is entitled to apply for assistance under the statute and, second, that the Commission qualifies as "a foreign or international tribunal" whose proceedings may be aided by a discovery order of a U.S. federal district court under Section 1782(a), at least to the extent that the Commission "acts as a first-instance decisionmaker." *Id.* at 2472-73, 2477-79. Third, and more significantly, the Court held that the foreign "proceeding" with respect to which a party seeks to invoke Section 1782(a) need only "be in reasonable contemplation, but need not be 'pending' or 'imminent.'" *Id.* at 2473, 2479-80. Fourth, and probably more important still, the Court held that Section 1782(a) "contains no threshold requirement that evidence sought from a federal district court would be discoverable under the law governing the foreign proceeding," *id.* at 2473, 2480-81, nor does it require a threshold showing that requested discovery would be discoverable in a comparable action initiated in a U.S. district court, *id.* at 2482.

To guide federal district courts in determining whether judicial assistance under Section 1782(a) is appropriate—a question left unresolved by the district and appellate court decisions at the time of the Supreme Court's decision—the majority offered several factors to consider:

- First, if the person from whom discovery is sought is actually a participant in the foreign proceeding, aid by the federal district court seems unwarranted—as the foreign tribunal typically exercises sufficient jurisdiction over those appearing before it, including the power to compel production of documents or testimony. On the other hand, in instances where the request for production is made of a non-participant, the court should be cognizant that, without judicial assistance, the non-participant may be beyond the foreign tribunal's jurisdiction, and the information sought may be unobtainable without Section 1782(a). *Id.* at 2483.

- Second, the district court "may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance." *Id.* In other words, district courts should exercise restraint when foisting their authority on other independent proceedings or tribunals that may take offense at even well-intended interference. (In *Intel*, for example, the Commission, appearing in the Supreme Court as *amicus curiae*, told the Court "that it does not need or want the District Court's assistance" under Section 1782(a). *Id.* at 2484.)

- Third, the district court should be aware that parties may seek to misuse Section 1782(a) to make an end-run around "foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Id.* at 2483.

- Without providing a concrete example of this possible misuse, the Supreme Court closed out its list of factors by embracing the hardly controversial suggestion that the district court should reject burdensome or overly intrusive requests for production. *Id.*

One need not look far to see how the Supreme Court's discretionary balancing test has fared when applied by lower federal courts. A federal judge from the Southern District of New York recently denied petitioners' request for discovery under Section 1782(a), even though it found that the petitioners—certain German investors—met the threshold requirements for judicial assistance. *See Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 81 (2d Cir. 2004) (Feinberg, J.). The petitioners had sued Deutsche Telekom AG ("Telekom") in a German court and were seeking documents that Telekom had already produced in litigation still pending against it in the United States. In affirming the district court's decision to deny assistance under Section 1782(a), a panel of the Second Circuit, writing just a month after *Intel* was decided, first noted the significant discretion afforded district courts under *Intel*. *Id.* at 84. Relying on the first *Intel* factor, the Second Circuit then noted that since Telekom was a party to the German proceedings, the need for judicial aid was not readily apparent. *Id.* at 85. Finally, it observed that the German government had shown itself unreceptive to |judicial assistance from the district court, and suggested that petitioners might be using the Section 1782(a) application to get around access restrictions imposed by German authorities in response to petitioners' discovery efforts in the German litigation. *Id.* at 84-85. With these *Intel* factors in mind, the district court ruling was upheld. *Id.* at 85.

An Uncertain Future: The Supreme Court recognized in its *Intel* decision that "further experience" with applying Section 1782(a) in the lower courts is necessary before any specific "supervisory rules" would even be considered. 124 S. Ct. at 2483. Although this process has already begun, it may take several years to see how the district courts choose to apply *Intel*. In the meantime, international businesses located in the United States—which will feel the effects of this developing case law—will want to monitor closely whatever permutations begin to develop.

Supreme Court Limits Extraterritorial Reach of Sherman Act

By Charles C. Eblen
ceblen@shb.com

In our last issue, we reported on a circuit split concerning the proper construction of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"). The FTAIA generally provides that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations" except where "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or certain import or export commerce of the United States. 15 U.S.C. § 6a. On June 14, 2004, the United States Supreme Court resolved the circuit split in a unanimous decision (Justice O'Connor abstaining), holding that a foreign actor injured by the foreign effects of an international antitrust conspiracy lacks jurisdiction to sue in federal court under the Sherman Act. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,—U.S.—, 124 S.Ct. 2359 (2004) (Breyer, J.). Faced with "(1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim," the Court concluded that "a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador"—or, on the same reasoning, any other foreign nation—"could not bring a Sherman Act claim based on foreign harm." *Id.* at 2363.

The enactment of the FTAIA was a congressional attempt to limit (or at least clarify) the jurisdictional reach of the Sherman Act, not expand it. *Id.* at 2369. A narrow reading of the FTAIA is true to the legislative intent of the statute and to the principle of prescriptive comity, a rule of construction which encourages courts to construe ambiguous statutes in a manner that avoids unreasonable interference with the sovereign interests of other nations. This principle rests upon the assumption that legislators account for the legitimate interests of foreign sovereigns when drafting U.S. laws. As Justice Stephen Breyer put it, writing for the Court:

> Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.

Id. In addition to supporting prescriptive comity, the Court's interpretation of the FTAIA supports the legislative purpose of the Sherman Act—to provide redress for *domestic* consumers for injuries sustained in *United States* commerce. *See id.* at 2366. The *Empagran* respondents never alleged antitrust injury stemming from the alleged vitamin cartel's anticompetitive effect on U.S. domestic commerce, thus failing to state a claim under the Sherman Act. *See id.* at 2371-72.

The Court's construction of the FTAIA has had an immediate impact, forcing lower courts to re-evaluate subject matter jurisdiction where the alleged anticompetitive conduct or antitrust injury occurred outside the United States. *See, e.g. Sniado v. Bank Austria AG*, 378 F.3d 210, 211-12 (2d Cir. 2004) (per curiam) (vacating its pre-*Empagran* ruling and affirming the district court's dismissal of complaint for lack of subject matter jurisdiction in light of *Empagran*); *BHP New Zealand Ltd. v. UCAR Int'l, Inc.*, 2004-2 Trade Cas. (CCH) ¶ 74,503, at 99,850 (3d Cir. Aug. 9, 2004) (remanding to district court for determination whether "alleged anticompetitive conduct's domestic effects were linked to the alleged foreign harm").

Eighth Circuit Grapples with "Per Se" Versus "Rule of Reason"

By Charles C. Eblen
ceblen@shb.com
and
Scott E. DuPree
sdupree@shb.com

A divided Eighth Circuit panel recently reversed and remanded a $5.9 million jury verdict entered against Ford Motor Company ("Ford") under Section 1 of the Sherman Antitrust Act. *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761 (8th Cir. 2004) (Melloy, J.). In reversing, the court held that Ford's alleged anticompetitive conduct could validly implicate the enforcement and setting of safety standards and should therefore be reviewed under the rule of reason rather that the *per se* rule. *Id.* at 774. The panel's majority thus rejected, over a vigorous dissent, the district court's use of *per se* analysis to evaluate and condemn practices that the district court deemed to amount to an unlawful group boycott. The debate memorialized in the panel's opinions provides a useful primer on the standards for antitrust analysis and their application in the wake of the United States Supreme Court's discussion of the same subject five years ago in *California Dental Association v. FTC*, 526 U.S. 756 (1999) ("*California Dental*").

Background: Craftsmen Limousine, Inc. and JMRL Sales & Service, Inc. (collectively, "Craftsmen") sued several limousine manufacturers and Ford alleging that defendants had conspired to prevent Craftsmen from advertising in the limousine industry's two trade publications and attending trade shows. *Id.* at 763. By the time of this appeal, most defendants had been dismissed or settled out of the case, leaving only Ford and American Custom Coach ("American Coach") as defendants in this litigation. *Id.*

Craftsmen, like virtually all limousine builders, manufactures limousines by cutting a base vehicle in two and adding structured components to the middle to form an extended cabin. *Id*. at 764. Within the relevant timeframe, limousine manufacturers used Ford's Lincoln Town Car as the base car for approximately 60 percent of all limousines constructed. *Id*.

The National Highway Traffic Safety Administration ("NHTSA") regulates the limousine industry. Under its Federal Motor Vehicle Safety Standards, coachbuilders must self-certify through engineering analysis, computer analysis, or other valid documentation that their vehicles comply with federal standards. *Id*. In 1992, the NHTSA investigated Craftsmen's limousines, ultimately recalling several. Craftsmen complied with recall orders and the NHTSA levied no fines against it. *Id*.

Prompted by a horrific, high-publicity limousine wreck, the NHTSA conducted a full-scale investigation of the limousine industry in 1987. *Id*. at 764-65. After this investigation (and at the NHTSA's urging), Ford, General Motors Corp. ("General Motors"), and members of the limousine industry began pooling resources to ensure compliance with federal standards. Ford, for instance, based on its own research, concluded that the commonly-converted 418-Lincoln Town Car could be safely extended to a maximum of 120 inches. *Id*. at 765. This research prompted Ford to initiate its "Quality Vehicle Modifier" ("QVM") certification program. The QVM program instructed manufacturers how to convert Ford vehicles into limousines in a manner that complied with the Federal Motor Vehicle Safety Standards. *Id*. The QVM program also established guidelines for maximum extensions and other standards for the design and construction of limousines. Ford paid QVM participants $2,000 to $3,000 for each 418-Town Car extended in accordance with Ford standards. *Id*.

General Motors followed suit by creating a similar incentive program. *Id*. at 766. Most coachbuilders joined one or both of the incentive programs. Craftsmen, as adduced through trial testimony, opted not to join Ford's QVM program because it already employed the techniques suggested in the QVM manual, already built and sold safe limousines that exceeded QVM's length restrictions, and could not afford to abandon its market niche for longer limousines. Craftsmen also did not want to purchase insurance naming Ford as an insured. *Id*. Craftsmen argued that Ford's QVM program was structured merely to increase Ford's profits by exerting control over the limousine industry, rather than to promote the construction of safer limousines. In support of this contention, Craftsmen presented evidence that Ford reduced the gauge of metal required of coachbuilders participating in the QVM program. Further, an industry insider and member of the QVM program testified that, during a seven-year period, Ford did nothing to monitor her compliance with the safety requirements of the QVM program. *Id*.

To further streamline safety efforts, the NHTSA, Ford and General Motors encouraged the formation of the limousine industry manufacturer's organization ("LIMO"). *Id*. at 767. LIMO purportedly sought to increase the resources available for testing, and it sought to promote awareness of technical information as well as changes in legislation. *Id*. Evidence at trial suggested that Ford adamantly opposed extending membership in LIMO to non-QVM limousine builders. Craftsmen alleged at trial that Ford and various members of LIMO pressured the publishers of *Limousine & Chauffeured Magazine* and *Limousine Digest* (the only trade publications in the industry) to exclude Craftsmen, as a non-QVM participant, from advertising in their publications and from participating in their trade shows. *Id*.

At trial, testimony and written evidence were introduced to show that Ford and LIMO had pressured the two trade publications not to accept advertising from non-QVM members. *Id*. at 768. Ford argued that Craftsmen presented no evidence supporting a Ford-led conspiracy to exclude Craftsmen from advertising or trade shows. Even if LIMO's policies were a concerted attempt to boycott Craftsmen, Ford never ratified or helped make such policies. *Id*. at 769. The jury rejected Ford's argument, finding that Ford indeed had conspired with others to boycott Craftsmen and that Craftsmen suffered approximately $2.1 million in damages. After trebling, the court entered a final damage verdict of a little more than $5.9 million. *Id*. at 763.

Eighth Circuit Reverses and Remands: On appeal, a panel of the Eighth Circuit reversed and remanded for a new trial. The decisive issue on appeal revolved around the appropriate antitrust standard to be employed in evaluating Craftsmen's claims. The district court had

cursorily concluded that, by virtue of "its action and influence with the QVM manufacturers," Ford had, in effect, become a horizontal competitor of Craftsmen and had conspired with other horizontal competitors to restrain competition by non-QVM manufacturers like Craftsmen. "Without further analysis, the district court held that the *per se* rule was applicable." *Id.* at 773. However, Ford argued on appeal that it does not manufacture limousines, and it does not compete with Craftsmen. Rather, as a distributor, it sells limousines to Craftsmen. As such, the anticompetitive behavior that Craftsmen had alleged was properly analyzed as a vertical restraint on trade, rather than a horizontal one. *Id.* at 773-74. This distinction is significant, since vertical restraints are subject to the rule of reason standard rather than the *per se* rule. See *id.* at 774 & n.14 (noting that the question "whether Ford is a horizontal competitor of the coach-builders" is "a fundamental question that must precede application of the *per se* analysis").

In considering Ford's challenge to the district court's invocation of the *per se* rule, the panel majority began by surveying the three standards of review that courts have developed "for analyzing the reasonableness of a restraint on trade"—namely, "rule of reason," "*per se*" and "quick look" analysis. The rule of reason is the "prevailing standard" for determining a restraint's effect on competition in a relevant market, and there is a presumption in favor of the rule of reason standard. *Id.* at 772 (citing *Continental T.V., Inc v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977), and *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988)); accord 363 F.3d at 778 (Lay, J., dissenting). Where a judge or jury employs the rule of reason standard, it must consider information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history and effect, to determine whether the questioned practice unreasonably restrains competition. *Id.* at 772-73.

By contrast, courts subject restraints having an "immediately discernable" negative impact on competition with "no redeeming virtue" to *per se* analysis. *Id.* at 773. Typically, restraints analyzed under the *per se* standard are those which historical experience permits courts confidently to conclude the rule of reason would condemn. Judicial experience with the restraint is a critical prerequisite and safeguard to invoking *per se* analysis, because when applied, the *per se* rule dispenses with the competitive analysis and balancing normally used to evaluate a restraint; "the *per se* mode of analysis applies a 'conclusive presumption' of illegality" and "does not allow inquiry into the intent behind the restraint, its procompetitive justifications, or its actual effect on competition." *Id.* (citations and internal quotations omitted). Price-fixing, division of markets, and group boycotts historically fall within the *per se* category. *Id.*

Finally, courts sometimes employ an intermediate, more truncated, "quick look" review of a restraint's output or price effects, "where the repercussions of a suspicious restraint are unclear." *Id.* "This 'quick look' approach is 'reserved for circumstances in which the restraint is sufficiently threatening to place it presumptively in the *per se* class, but lack of judicial experience requires at least some consideration of proffered defenses or justifications." *Id.* (internal citations omitted). After a quick look at a defendant's proffered justifications for the restraint, courts may: (1) reject defendant's justifications and condemn the restraint as *per se* unlawful; (2) find defendant's justifications unconvincing in part but nonetheless take a quick look at market power; or (3) find defendant's evidence plausible and conduct a full rule of reason analysis. *Id.*

Without addressing Ford's vertical restraint argument—and even assuming that Ford, American Coach and Craftsmen could qualify as direct, horizontal competitors—the panel majority concluded that the district court's use of *per se* analysis was improper. *Id.* at 774. Rather, "[t]he question is whether Ford's insistence on QVM compliance was arguably rooted in safety concerns, and if so, whether this should remove the alleged agreement from the *per se* rule's realm. We believe it does." *Id.* The majority analogized the conduct before it to joint standard-setting activities, which are normally analyzed under the rule of reason because of their potential for producing competition-enhancing effects. *Id.* Although Craftsmen's limousines had not been shown to fail federal safety standards and Ford could have had profit-making motives for establishing the QVM program and for allegedly pressuring trade publications to exclude non-QVM products, the majority was impressed by the fact that Ford had responded to the NHTSA's call for concerted action by limousine and automobile manufacturers to ensure compliance with federal safety standards by

investing significantly in researching and developing base vehicles and limousine conversion standards and procedures and disseminating this information on a non-discriminatory basis. *See id.* at 775 & n.15. Moreover, according to the majority, the fact that the trade publications did not exclude all non-QVM products but permitted advertisements by non-QVM manufacturers that could establish the safety of their products supported the conclusion "that safety concerns were arguably a motivating factor" behind the alleged conduct. *Id.* at 775. "Because the economic impact of safety standards is not immediately discernable, something more than a cursory *per se* analysis is required to determine whether the restraint was unreasonable." *Id.* at 774. On the other hand, "when determining whether to apply the rule of reason analysis to non-price advertising restrictions related to product safety, the issue is not whether the restrictions *were* procompetitive, but whether they *could be*." *Id.* at 776 (emphasis in original). Because the majority found that the alleged restraints were at least partly motivated by "safety concerns" and "may have had some procompetitive effects," it concluded that the district court had improperly applied a *per se* analysis when it should have employed a rule of reason analysis. *Id.* As a result, the panel vacated the district court's damages award and remanded the case for a new trial on the Sherman Act claims. *Id.* at 777.

The Dissent: Senior Judge Donald P. Lay dissented from the majority and would have affirmed the verdict entered in the district court. *See id.* at 777-81 (Lay, J., dissenting). Judge Lay argued that it would be difficult to hypothesize a more clearly expressed boycott than the one alleged in *Craftsmen*. *Id.* Similarly, he contended it would be difficult to imagine "a restraint with a more pernicious anticompetitive effect" than this alleged group boycott, which had the effect of forcing Craftsmen to either comply with the QVM program or forego advertising its products. *Id.* at 777 (Lay, J., dissenting).

Moreover, Judge Lay argued that the facts of *Craftsmen* fell squarely within the precedent of *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), a case in which the Supreme Court evaluated a group boycott under the *per se* standard. Judge Lay found unpersuasive Ford's proffered "safety concerns" and believed they did not remove *Craftsmen* from the purview of the *per se* rule. 363 F.3d at 779 (Lay, J., dissenting). Unlike the cases the majority cited, the trial record reflected no evidence that *Craftsmen* limousines were unsafe or did not comply with federal standards. Finally, Judge Lay suggested that the test formulated by the majority for determining when to use the rule of reason to evaluate non-price restraints reflected a misunderstanding of the Supreme Court's holding in *California Dental*:

> It is not sufficient under *California Dental* to recognize, as the majority does, only that "safety concerns were arguably a motivating factor behind Ford's actions." Instead, a court must determine whether it is "plausible" that the procompetitive effects of the restraint outweigh, or at least equal, the anticompetitive effects. . . . In other words, application of the rule of reason is not warranted simply because the restraint "could be" procompetitive, based on the Defendants' "arguable" motivations. . . . Instead, the procompetitive effects of a restraint must plausibly outweigh, or at least equal, the anticompetitive effects in order to move the case to rule of reason review. . . . [T]he majority's proposed application of the rule of reason to any restraint that arguably "could be" procompetitive is a misinterpretation of *California Dental*, and an expansion of the rule of reason analysis.

Id. at 780, 781 (Lay, J., dissenting). He concluded: "The anticompetitive effects of this restriction are so clear and pernicious, and the procompetitve effects of the restriction are so questionable and attenuated, that I submit the *per se* rule is the appropriate method of analysis in this case." *Id.* at 781 (Lay, J., dissenting).

Aftermath: The Eighth Circuit recently denied Craftsmen's petition for a rehearing and a rehearing *en banc*. This decision was not unanimous either, as Judge Kermit E. Bye noted that he would grant the petition for rehearing *en banc*. To date, there is no indication that any party has appealed or intends to appeal this decision further.

Indirect Purchaser Scorecard

Ohio Supreme Court Soon to Decide Indirect Purchaser Standing Under the Valentine Act; New York Trial Court Rejects Donnelly Act Claims of "Too Indirect" Purchaser

By Scott E. DuPree
sdupree@shb.com

Ohio: The Ohio Supreme Court is poised to decide, apparently for the first time, whether indirect purchasers have standing to assert damage claims under Ohio's antitrust statute, the Valentine Act. The court announced on May 27, 2004, that it had narrowly decided, by a vote of four to three, to hear the appeal by an aspiring class representative from an appellate court decision that had affirmed the dismissal of the appellant's state antitrust and consumer protection claims against Microsoft Corporation ("Microsoft"), based on the indirect purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *See 05/27/2004 Case Announcements*, 2004-Ohio-2673, *available at* **http://www.sconet.state.oh.us/rod/newpdf/0/2004/2004-ohio-2673.pdf**. The decision followed an opinion by a divided appellate court panel on plaintiff's motion for reconsideration in which the majority "urge[d] the Ohio Supreme Court to take up this matter" and determine whether *Illinois Brick* should be used to interpret the Valentine Act. *Johnson v. Microsoft Corp.*, 805 N.E.2d 179, 182 (Ohio Ct. App. 2004) (Gorman, J.) ("*Johnson II*"). The supreme court directed the parties to brief the case for argument. *05/27/2004 Case Announcements*, 2004-Ohio-2673. As of this writing, it is not clear that any date has been set for oral argument, and no decision on the appeal has been rendered by the Ohio Supreme Court.

The appeal arises out of one of the numerous indirect purchaser actions filed against Microsoft in the wake of federal and state antitrust enforcement actions against the software company. Plaintiff, a retail purchaser of a personal computer ("PC") on which Microsoft's Windows 98 operating system had been pre-installed, brought suit on behalf of "a putative class consisting of all those who had purchased a license to use any version of the Windows operating system within four years of her filing the complaint" asserting that Microsoft had monopolized an alleged PC operating systems market, had abused its alleged market power to control prices and charge monopoly prices, and had erected barriers to competition and thereby unfairly controlled competition. *Johnson v. Microsoft Corp.*, 802 N.E.2d 712, 713-14 (Ohio Ct. App. 2003) (Gorman, J.) ("*Johnson I*"). Plaintiff asserted a common-law claim for restitution and damage claims based on alleged violations of the Valentine Act, Ohio Rev. Code Ann. § 1331.01, and the Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. §§ 1345.02-.03. *Id.* at 713. The trial court dismissed plaintiff's complaint for failure to state a claim, apparently finding that the indirect purchaser rule of *Illinois Brick* applied to claims under the Valentine Act and that plaintiff, as an indirect purchaser, therefore lacked standing to bring suit. *Id.* at 713, 714.

On appeal, a panel of Ohio's First District Court of Appeals affirmed the dismissal in a 2-1 decision. The appellate panel's majority concluded that "the weight of authority in this state is that the Valentine Act be interpreted consistently with federal antitrust law," including *Illinois Brick*; that Ohio had not enacted an *Illinois Brick* repealer statute; and that a majority of other state courts in states that had not enacted repealer amendments had interpreted those states' antitrust laws consistently with federal decisions and adopted *Illinois Brick*'s indirect purchaser rule. *Id.* at 714, 716; *see also Johnson II*, 805 N.E.2d at 180-81.

Key to the appellate court's decision was—and likely to be central to the state supreme court's decision is—a 1980 opinion in which a unanimous Ohio Supreme Court looked to federal law to apply a rule of reason and ancillary restraints analysis to a covenant in a shopping center

lease restricting liquor sales by the lessee. In the course of that decision, then-Chief Justice Frank D. Celebrezze, writing for the court, found that the Valentine Act was "patterned after the Sherman Antitrust Act, and as a consequence this court has interpreted the statutory language in light of federal judicial construction of the Sherman Act." *C.K. & J.K., Inc. v. Fairview Shopping Ctr. Corp.*, 407 N.E.2d 507, 509 (Ohio 1980). The appellate majority read this statement as "indicat[ing] that violations of the Valentine Act were to be judged on the same basis as violations of the Sherman Act—in other words, on the basis that what was prohibited under the one was prohibited under the other." *Johnson I*, 802 N.E.2d at 714-15. It also noted that it had previously applied a similar principle of construction in an unpublished decision almost a decade before in which, relying on the same Ohio Supreme Court decision, it looked to federal decisions to import an antitrust injury requirement into the Valentine Act. *Acme Wrecking Co., Inc. v. O'Rourke Constr. Co.*, No. C-930856, 1995 WL 84188, at *2 (Ohio Ct. App. Mar. 1, 1995). For both reasons, the court felt constrained by principles of *stare decisis* to adopt "an ongoing parallel federal-state construction of the Valentine Act" and apply the indirect purchaser rule of *Illinois Brick* to plaintiff's state antitrust claims. *Johnson I*, 802 N.E.2d at 715, 717; *see also Johnson II*, 805 N.E.2d at 181-82. As the panel subsequently noted in its decision on plaintiff's motion for reconsideration: "This being so, only one conclusion can be reached, unless one is willing to distort the meaning of a 'pattern' to include an entire set of plaintiffs who are deemed to suffer no injury and have no standing under federal law." *Johnson II*, 805 N.E.2d at 181.

However, even as it denied plaintiff's motion for reconsideration, the panel's majority expressed sympathy with the argument that consumers should be able to recover damages under the Valentine Act, noting that "it seems largely unfair for consumers, who suffer the brunt of monopolistic pricing and who unlike retailers cannot 'pass-on' its consequences, not to be able to sue for redress." *Id.* at 182. According to the majority, the indirect purchaser rule of *Illinois Brick* rested on "broad assumptions concerning the reliability of pass-on theories, their propensity to complicate damage calculations, and the disincentive of plaintiffs to sue for diluted recoveries" which "could prove to be false in the light of modern economic and damage theories," and a "class action of the type brought by Johnson is . . . the perfect vehicle to ensure that there is incentive enough to pursue such claims." *Id.* Although it had suggested in its original opinion that the decision whether to permit indirect purchaser standing to assert state antitrust claims "is one involving public policy and thus should be made by the legislative rather than the judicial branch," *Johnson I*, 802 N.E.2d at 717, on reconsideration, citing "the important economic and public policy issues raised by this appeal," the appellate majority "urge[d] the Ohio Supreme Court to take up this matter and revisit its decision in *C.K.* to determine whether it wishes to modify its view that Ohio's Valentine Act is patterned on federal antitrust law and should be interpreted in light of federal judicial construction with respect to the direct-purchaser requirement of *Illinois Brick*," *Johnson II*, 805 N.E.2d at 182. Accepting the appellate court's invitation, a sharply divided Ohio Supreme Court narrowly voted to allow plaintiff to appeal from the appellate court's decision.

New York: An unpublished decision earlier this year by a New York state trial court reminds readers that, even in states that recognize indirect purchaser claims, some alleged purchasers are "too indirect" to possess standing to assert antitrust claims. In *Ho v. Visa U.S.A. Inc.*, New York Supreme Court Justice Bernard J. Fried dismissed a putative class action filed by three consumers on behalf of themselves and "all similarly situated consumers" that asserted claims against credit card companies Visa U.S.A. Inc. ("Visa") and Mastercard International, Inc. ("Mastercard") for alleged violations of New York's antitrust statute, the Donnelly Act, N.Y. Gen. Bus. Law § 340, and of New York's deceptive practices statute, N.Y. Gen. Bus. Law § 349. *Ho*, 2004-1 Trade Cas. (CCH) ¶ 74,384, at 99,018, 99,021 (N.Y. Sup. Ct. Apr. 26, 2004). (Plaintiffs later offered to abandon their class action claims under the Donnelly Act, while retaining their individual claims, when confronted with case law interpreting N.Y. C.P.L.R. § 901(b) to prohibit class actions under the Donnelly Act. *Id.* at 99,019.) Plaintiffs had alleged that Visa and Mastercard required merchants to accept their debit cards as a condition to being permitted to participate as accepting merchants of Visa and Mastercard credit cards; that Visa and Mastercard charged merchants higher transaction fees on purchases effected with their debit cards than with their credit cards; and that retailers then passed on the higher debit card rates to consumers in the form of higher prices on all products sold by those stores. *Id.* at 99,018-19.

The court noted that the consumer plaintiffs' claims were "clearly derivative of the stores' claims against those companies" and that therefore their "alleged injuries are indirect." *Id.* at 99,019. It further acknowledged that the New York legislature had enacted an *Illinois Brick* repealer amendment to the Donnelly Act in 1999. *Id.* Nevertheless, the court found that—as the court paraphrased defendants' argument—"plantiffs' injuries are too remote to qualify them as 'indirect purchasers' under the Donnelly Act amendment." *Id.*

The problem with plaintiffs' claims was that they never alleged that they had "use[d] defendants' credit or debit card services in any way." *Id.* Instead, they merely argued that the "stores where they shop raise their prices on all products in order to absorb the extra fees charged by Visa and Mastercard," and that as a result they, as consumers, were forced to pay higher prices (resulting, in effect, from passed-on debit card overcharges) when they bought any goods from any merchants that accepted Visa or Mastercard products, regardless of whether plaintiffs used Visa or Mastercard products to make these purchases. *Id.* at 99,019-20.

Faced with such tenuous claims, the court looked to the "proximate cause analysis" propounded in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45 (1983), to dispose of plaintiffs' antitrust claims. The court distilled this analysis to five factors: (1) "The nature of plaintiff's claimed injury"; (2) "The directness of the injury"; (3) "The specific intent of the alleged defendants"; (4) "The character of the alleged damages, including the risk of duplicative recovery, the complexity of apportionment and their speculative nature"; and (5) "The existence of other, more appropriate plaintiffs." 2004-1 Trade Cas. (CCH) at 99,019. Applying these factors, the court found that plaintiffs claimed to be injured as consumers generally rather than by virtue of any dealings with Visa or Mastercard and that plaintiffs alleged highly indirect injuries from defendants' alleged conduct; that the record did not support an allegation that Visa or Mastercard "intended that the prices of all consumer goods in those stores [that accepted Visa and Mastercard] would be increased"; that plaintiffs' claims, which "appear[] to cover all of the purchases that they made as individual consumers at any retail store that accepts Visa and Mastercard," were "overwhelming" in their complexity and speculativeness; and that, given the fact that retailers had already settled similar claims against Visa and Mastercard in federal litigation, any award to the consumer plaintiffs would likely result in duplicative recovery on these claims. *Id.* at 99,019-20 (emphasis in original). The court easily found "plaintiffs' alleged injury" to be "far too remote to provide antitrust standing under the Donnelly Act." *Id.* at 99,020. Using a similar analysis, the court similarly rejected plaintiffs' deceptive practices claims based on the same factual allegations. *Id.* at 99,021.

Although the facts in *Ho* presented an easy case for denying standing, the trial court decision is a reminder that, even in jurisdictions that reject the indirect purchaser rule articulated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), it is not sufficient for a plaintiff merely to allege injury as an indirect purchaser to recover damages for alleged antitrust violations. Even putative "indirect" antitrust plaintiffs continue to be subject to requirements for proximate cause, and plaintiffs that cannot satisfy those standards may assert claims that are "too remote" to qualify them as "indirect purchasers" within the meaning of state antitrust laws.

Washington Update

By Scott E. DuPree
sdupree@shb.com

Following is an executive summary of significant recent developments at the U.S. Federal Trade Commission ("FTC"), the U.S. Department of Justice ("DOJ") and in Congress:

I. Personnel Moves

New Commissioners Sworn in at FTC: On August 16, 2004, **Deborah Platt Majoras** was sworn in as FTC chairman, replacing **Timothy J. Muris**, who returned to George Mason University's School of Law after three years as chairman. Majoras joins the Commission after a brief stint as an antitrust partner at the Washington, D.C. office of Jones Day, where she had worked for a few short months after ending nearly three years of service as a deputy assistant attorney general at DOJ. She is perhaps best known for her work at DOJ in helping to formulate the settlement of its monopolization claims against Microsoft Corporation and for having argued before the D.C. Circuit DOJ's successful defense of the consent decree embodying that settlement in the face of a challenge by the Commonwealth of Massachusetts. *See Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004). [The FTC's press release announcing Majoras' swearing-in can be found at **http://www.ftc.gov/opa/2004/08/majoras.htm**.] A little over two weeks after Majoras joined the Commission, **Jonathan D. Leibowitz** was sworn in on September 3, 2004 to fill the vacancy created by the departure of Commissioner **Mozelle W. Thompson** on August 31, 2004. Leibowitz joins the Commission after serving four to five years as vice president for congressional affairs at the Motion Picture Association of America and, before that, another three to four years as Democratic chief counsel and staff director for the Antitrust Subcommittee of the U.S. Senate Judiciary Committee. [The FTC's press release announcing Leibowitz's swearing-in can be found at **http://www.ftc.gov/opa/2004/09/leibowitz.htm**; Commissioner Thompson's resignation announcement can be found at **http://www.ftc.gov/opa/2004/08/thompsonstmt.htm**.]

Leibowitz had been nominated by the White House on April 8, 2004, and Majoras on May 11, 2004 (the same day Muris originally announced his intention to leave the Commission), but the nominations were tied up in the Commerce Committee of the United States Senate after Sen. Ron Wyden (D-Ore.) placed a hold on Majoras' nomination and used procedural maneuvers to prevent committee consideration of the nominations. Wyden objected to Majoras' nomination ostensibly due to Majoras' "inability to present concrete initiatives to change the FTC's long history of inaction on anti-competitive practices in the oil industry and in oil and gasoline markets" and to alleged conflicts presented by Majoras' representation in private practice of ChevronTexaco. [Sen. Wyden's June 10, 2004 and July 30, 2004 statements concerning Majoras' nomination and appointment can be found, respectively, at **http://wyden.senate.gov/media/2004/06102004_gas.html** and **http://wyden.senate.gov/media/speeches/2004/07302004_majoras.html**.] As a result, Muris extended his tenure as chairman several more months, and **President Bush** ultimately appointed Majoras and Leibowitz to the Commission by recess appointment on July 30, 2004. [Muris' May 11, 2004 and August 2, 2004 statements announcing his departure can be found, respectively, at **http://www.ftc.gov/opa/2004/05/muris.htm** and **http://www.ftc.gov/opa/2004/08/040802murisstmnt.htm**. The July 30, 2004 White House personnel announcement announcing these recess appointments can be found at **http://www.whitehouse.gov/news/releases/2004/07/print/20040730-6.html**.] Because Majoras and Leibowitz took office by recess appointment rather than Senate confirmation, their terms would not have extended the full seven years normally enjoyed by FTC commissioners, but would have expired at the end of 2005. However, on Sunday, November 21, 2004, the United States Senate unanimously confirmed the Majoras and Leibowitz nominations. As a result, Majoras will serve the remainder of Muris' unexpired seven-year term, which commenced on September 21, 2001, and Leibowitz will serve the balance of a seven-year term that began on

September 26, 2003 following the expiration of Commissioner Thompson's tenure with the Commission. The FTC's press release announcing Senate confirmation can be found at **http://www.ftc.gov/opa/2004/11/dpmconf.htm**.

FTC Consumer Protection Bureau Director Resigns: The Director of the FTC's Bureau of Consumer Protection ("BCP"), **J. Howard Beales, III**, resigned from the FTC, effective August 6, 2004, to become Associate Professor of Strategic Management and Public Policy at George Washington University. Beales had served as BCP Director since his appointment in June 2001. **Lydia B. Parnes**, who has served as Deputy Director of BCP since 1992, was appointed to succeed Beales as Acting Director of the Bureau. Prior to her tenure as a deputy director, Parnes had acted as an attorney advisor to former FTC Chairman James C. Miller, III, as Assistant Director of the FTC's Division of Policy and Evaluation, and as Associate Director of the FTC's Division of Marketing Practices. The press release announcing Mr. Beales' departure can be found at **http://www.ftc.gov/opa/2004/07/beales.htm**.

DOJ Premerger Office Move: Effective September 27, 2004, the Director of Operations of DOJ's Antitrust Division, which coordinates the Antitrust Division's investigative and litigation activities and includes DOJ's Premerger Notification Unit, has moved to the main Justice Department building. The premerger unit's new address for mailing and deliveries is now: Department of Justice, Antitrust Division, Office of Operations, Premerger Notification Unit, 950 Pennsylvania Avenue, NW, Room 3335, Washington, D.C. U.S. mail should be sent to this address using 20530 as the zip code; to avoid delays, Hart-Scott-Rodino filings delivered to DOJ by means other than U.S. mail should use 20004 as the zip code with the foregoing address. Telephone numbers for DOJ's pre-merger unit remain unchanged. To view DOJ's press release announcing the office move, *see* **http://www.usdoj.gov/atr/public/press_releases/2004/205569.htm**.

II. Policy and Legal Developments

DOJ Issues Intellectual Property Task Force Report with Recommendations for Improving Antitrust Enforcement as to Intellectual Property Rights: Culminating six months of effort, DOJ issued a "Report of the Department of Justice's Task Force on Intellectual Property" on October 12, 2004. Formed in March 2004 to recommend actions to address the growing problem of intellectual property theft, the task force was charged with "examin[ing] all of the Department of Justice's intellectual property enforcement efforts"—including DOJ criminal enforcement, international cooperation, civil and antitrust enforcement, and preventive efforts—"and to explore methods for the Justice Department to strengthen its protection of the nation's valuable intellectual resources." The report offers three principal "recommendations to help ensure that the antitrust laws are appropriately applied to intellectual property in a way that does not chill the exercise of legitimate intellectual property rights": (1) "Support the rights of intellectual property owners to decide independently whether to license their technology to others," and conversely oppose efforts by some "to promote the notion that an independent decision not to license technology is an antitrust violation" or "to force owners of intellectual property rights to share 'essential' technology with others"; (2) encourage organizations that promulgate standards aimed at preventing intellectual property theft to use DOJ's business review letter process to obtain guidance for avoiding antitrust enforcement issues that such standard-setting activities might present; and (3) promote international cooperation and agreement "on the proper application of antitrust law[s] to intellectual property rights" to avoid risks of inconsistent applications of antitrust laws. DOJ's press release announcing the report can be found at **http://www.usdoj.gov/opa/pr/2004/October/04_ag_693.htm**. The task force report can be viewed at **http://www.usdoj.gov/ag/speeches/2004/ip_task_force_report.pdf**.

DOJ Criticizes European Commission Sanctions Against Microsoft: Following a five-year investigation, the European Commission ("EC") announced in March 2004 that it was ordering Microsoft Corporation ("Microsoft") to offer a version of its Windows operating system software that omits its Windows Media Player, to share certain information with competitors, and to pay a fine of approximately $613 million. While stressing "the overall strong and positive relationship between the U.S. and the EC on matters of competition policy," R. Hewitt Pate, Assistant Attorney General for Antitrust, expressed "deep concern about the apparent basis" for the EC decision "and [its] serious

potential divergence" from U.S. antitrust policy, in a statement issued on March 24, 2004 and in remarks presented on April 2, 2004. Pate noted that, unlike the final judgment in DOJ's enforcement action in U.S. federal court, which prohibited certain actions deemed anticompetitive and ordered Microsoft to provide information that would permit competitors to make their products "interoperable" with Microsoft's, the EC had mandated a "'code removal' remedy"—similar to a remedy rejected by the U.S. district court in the DOJ lawsuit—which could result in "hindering successful competitors or imposing burdens on third parties" and, by "imposing antitrust liability on the basis of product enhancements," could "risk[] protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers who benefit from it." Pate also lamented that the EC's substantial fine—"the largest antitrust fine ever levied"—would be assessed against "unilateral competitive conduct, the most ambiguous and controversial area of antitrust enforcement," while more egregious cases of price-fixing had been subjected to less extreme penalties, potentially sending the wrong signal as to appropriate enforcement priorities. Noting that the final judgment in DOJ's Sherman Act Section 2 case against Microsoft would cover the media player at issue in the EC action, Pate suggested that principles of international comity and deference should have counseled against the EC approach. He suggested that the EC decision could ultimately lead to a form of forum-shopping by market competitors that could adversely impact markets around the world: "In a system of multiple enforcers, the alternative [to comity and deference] inevitably leads parties who can benefit from regulatory assistance to seek out the most restrictive regulator, and with respect to global products the effects of that regulator's actions may have effects in all markets." To view Mr. Pate's March 24, 2004 statement, see **http://www.usdoj.gov/atr/public/press_releases/2004/202976.htm**; to view Mr. Pate's April 2, 2004 remarks, see **http://www.usdoj.gov/atr/public/speeches/203088.htm**.

Record Price-Fixing Fine: As part of an ongoing investigation into alleged price-fixing relating to dynamic random access memory ("DRAM") products, a prevalent semiconductor memory product used in a broad range of electronics and computerized products, DOJ announced on September 15, 2004, that a German DRAM manufacturer, Infineon Technologies AG ("Infineon"), had agreed to plead guilty to participating in an international price-fixing conspiracy and to cooperate in DOJ's ongoing investigation. As part of its guilty plea, Infineon agreed to pay a $160 million criminal fine, reportedly the largest such fine obtained in a DOJ case in the last three years and the third largest criminal fine in the Antitrust Division's history. Infineon is the first corporate target to plead guilty in DOJ's DRAM price-fixing investigation. For more information, *see* **http://www.usdoj.gov/atr/public/press_releases/2004/205437.htm**.

HSR "Gun-Jumping" Civil Penalties: On May 3, 2004, DOJ and FTC announced proposed settlements totaling nearly $2 million with two different acquiring persons for allegedly consummating acquisitions without complying with the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR"). Manulife Financial Corporation ("Manulife"), a Canadian insurance and financial services corporation, agreed to pay $1 million to resolve allegations that it had acquired more than $50 million worth of the common stock of John Hancock Financial Services, Inc. ("John Hancock") in March 2003 and additional shares thereafter bringing the value of its holdings to approximately $150 million, all without having complied with the HSR filing and waiting period requirements. Although its holdings apparently never exceeded 1.5 percent of John Hancock's common stock, DOJ maintained that Manulife did not qualify for HSR's investment exemption because at the time of the acquisitions Manulife allegedly was considering a possible merger with John Hancock (a transaction which the parties would subsequently announce in September 2003 and consummate in April 2004). DOJ's press release announcing the penalty against Manulife can be found at **http://www.usdoj.gov/atr/public/press_releases/2004/203532.htm**.

Meanwhile, William H. Gates III agreed to pay $800,000 to settle FTC and DOJ charges that Gates had acquired more than $50 million worth of voting securities in ICOS Corporation ("ICOS"), a Washington-based pharmaceutical company, without complying with HSR premerger reporting requirements. The agencies main-

tained that Gates failed to qualify for HSR's investment exemption because he intended to participate in business decisions affecting ICOS, in part through his ongoing participation on the company's board of directors. The FTC further argued that Gates was on notice of the need to have an effective HSR compliance program in place after failing to file, also in reliance on the HSR investment exemption, for an allegedly reportable transaction six months previously—an omission that Gates had corrected without penalty. The DOJ and FTC press releases can be found at **http://www.usdoj.gov/atr/public/press_releases/2004/203530.htm** and **http://www.ftc.gov/opa/2004/05/gates.htm**, respectively.

More recently, on November 10, 2004, DOJ announced that Smithfield Foods Inc. ("Smithfield"), the largest hog producer and pork packer in the United States, had agreed to pay a civil penalty of $2 million for having twice failed to comply with HSR filing and waiting period requirements when it acquired voting stock of the then-second-largest pork packer, IBP, Inc. ("IBP"), in 1998 and 1999. As with Manulife, DOJ maintained that Smithfield did not qualify for the HSR investment exemption, which Smithfield had attempted to claim, because it was actively considering a merger with IBP when it acquired the IBP stock—even though Smithfield never consummated such a merger. Deputy Assistant Attorney General J. Bruce McDonald reportedly stated: "Acquisition of stock in a firm that is also being considered as a takeover target or merger partner is not 'solely for the purpose of investment' under the HSR Act and is not exempt from the filing requirements." DOJ's press release can be viewed at **http://www.usdoj.gov/atr/public/press_releases/2004/206229.htm**.

These actions continue a trend in significant civil penalties for "gun-jumping"—consummating HSR reportable transactions without observing the HSR filing and waiting period requirements—and other violations of the premerger reporting requirements in recent years, including:

- *United States v. Mahle GmbH*, *Mahle, Inc.*, *Mabeg, E.V.*, *Metal Leve, S.A. and Metal Leve, Inc.*, Cv. No. 97-1404 (D.D.C. complaint filed June 19, 1997) (allegedly intentional failure to file; $5.6 million);

- *United States v. Figgie Int'l Inc. and Harry E. Figgie, Jr.*, Cv. No. 1:97CV00302 (D.D.C. complaint filed Feb. 13, 1997) (failure to file; $150,000);

- *United States v. Loewen Group, Inc. and Loewen Group Int'l, Inc.*, Cv. No. 1:98CV00815 (D.D.C. complaint filed Mar. 31, 1998) (failure to file; $500,000);

- *United States v. Blackstone Capital Partners II Merchant Banking Fund L.P. and Howard Andrew Lipson*, C.V. No. 99 0795 (D.D.C. complaint filed Mar. 30, 1999) (failure to provide "4(c)" document; $2.785 million against the fund plus $50,000 against the certifying officer of the HSR form);

- *United States v. Input/Output, Inc. and Laitrim Corp.*, C.V. No. 99 0912 (D.D.C. complaint filed Apr. 12, 1999) (failure to observe HSR waiting period; $225,000);

- *United States v. Computer Assocs. Int'l, Inc. and Platinum Tech. Int'l, Inc.*, Civ. No. 01-02062 (D.D.C. complaint filed Sept. 28, 2001) (failure to observe HSR waiting period, and interim agreement with seller to limit discounts and terms with customers pending expiration of HSR waiting period; $638,000);

- *United States v. The Hearst Trust and The Hearst Corp.*, Civ. No. 1:01CV02119 (D.D.C. complaint filed Oct. 11, 2001) (failure to provide "4(c)" documents; $4 million); and

- *United States v. Gemstar-TV Guide Int'l, Inc. and TV Guide, Inc.*, No. 1:03CV00198 (D.D.C. complaint filed Feb. 6, 2003) (failure to observe HSR waiting period, and interim agreement to allocate customers and markets; $5.67 million).

FTC/DOJ Issue HSR Annual Report: FTC and DOJ recently issued their 26th annual report to Congress concerning the agencies' Hart-Scott-Rodino premerger notification program. The report notes that 1,014 premerger reports were filed with the agencies in fiscal year 2003, representing a decline of 173, or approximately 15 percent, from the previous fiscal year and of 3,912, or 79 percent, from fiscal year 2000, the last full fiscal year under the lower HSR reporting thresholds that existed before the HSR Act was amended. The report provides a summary of

and historical background to the HSR Act, a brief overview of significant developments in the premerger program during FY 2003, lengthy descriptions of merger enforcement activities by FTC and DOJ during FY 2003, and statistical appendices providing data on transactions reported, second requests and early terminations of the HSR waiting period for fiscal years 1994 through 2003 and detailed breakdowns of similar data by transaction size and affected industry. The FTC's press release announcing the report can be found at **http://www.ftc.gov/opa/2004/09/fyi0452.htm**, and the FTC/DOJ report can be found at **http://www.ftc.gov/os/2004/09/040903hsrrpt03.pdf**.

DOJ Publishes Guidance on Merger Remedies: On October 21, 2004, DOJ's Antitrust Division issued an "Antitrust Division Policy Guide to Merger Remedies." This internal "policy document" sets forth "the policy considerations that should guide Division attorneys and economists when fashioning remedies for anticompetitive mergers" and is intended to provide "a framework for fashioning and implementing appropriate relief short of a full-stop injunction in merger cases." After enumerating general "guiding principles" for developing merger relief in DOJ cases—such as that the remedy must be supported by sound legal and economic principles applied to the particular facts of the case, that restoration of competition (and not promoting or preferring particular competitors) should be the only appropriate goal of any merger remedy, and that any proposed remedy must be enforceable—the guide outlines policies for crafting, implementing, supervising compliance with, and enforcing merger remedies. Among other things, the guide notes that structural remedies, aimed at divestiture of all assets (including critical intangible assets) necessary to permit the buyer to become an effective long-term competitor, are preferred and that conduct relief will be appropriate only in limited circumstances; full divestiture of an existing business with a competitive track record will normally be preferred over partial divestitures of assets forming less than an entire existing business entity; a "fix-it-first" remedy proposed by the merging parties may be acceptable where no continuing obligations are required to resolve the competitive concerns alleged by DOJ, where DOJ concludes following an investigation of the merger and proposed remedy that the remedy "eliminates the competitive harm otherwise arising from the proposed merger," and where the proposed remedy is implemented before the merger is consummated; and that certain elements (such as hold separate provisions, speedy divestiture, and DOJ approval of buyers in a divestiture) will be necessary elements of DOJ merger remedies while other considerations will either be immaterial to the effectiveness of a remedy (*e.g.*, the potential purchase price for divested assets) or will be disfavored in a proposed divestiture (*e.g.*, restraints on resale of divested assets, "crown jewel" provisions, and seller financing of divested assets). DOJ's remedies guide and its accompanying press release may be found, respectively, at **http://www.usdoj.gov/atr/public/guidelines/205108.htm** and **http://www.usdoj.gov/atr/public/press_releases/2004/205912.htm**.

FTC Issues Report on Petroleum Industry Mergers: The FTC issued a staff report from its Bureau of Economics in August 2004 concerning "The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement," the third report on petroleum industry merger activity published by the FTC since 1980. The report, which surveys structural changes in the petroleum industry and FTC enforcement activity with respect to petroleum company mergers, supports five central themes or conclusions: (1) "Mergers of private oil companies have not significantly affected worldwide concentration in crude oil," prices for which comprise the most significant determinant of gasoline prices; (2) although increasing somewhat over time, "concentration for most levels of the petroleum industry has remained low to moderate"; (3) FTC merger investigation and enforcement have inhibited any trend toward petroleum industry concentration and helped "avoid potentially anticompetitive problems and higher prices for consumers"; (4) economies of scale play an increasingly important role "in shaping the petroleum industry"; and (5) developments in the petroleum industry "have lessened the incentive to be vertically integrated throughout all or most levels of production, distribution and marketing." The nine-chapter report includes an overview of FTC petroleum-related merger enforcement over the last 20 years and an analysis of oil company merger activity between 1985 and 2001 and some of the efficiencies alleged to result from these mergers, as well as detailed examinations of trends

affecting crude oil production and reserves, bulk transport and refining activities, production, pricing, capital spending and rates of return for various sectors of the petroleum industry. To view the FTC's press release announcing the report, *see* **http://www.ftc.gov/opa/2004/08/oilmergersrpt.htm**. The FTC's report can be found at **http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf**.

FTC/DOJ Issue Joint Report on Healthcare Competition: In the wake of the 2003 FTC/DOJ Joint Hearings on Health Care and Competition Law and Policy and a September 2002 FTC workshop, FTC and DOJ released a joint report on health care competition issues, entitled "Improving Health Care: A Dose of Competition," on July 23, 2004. The report explores the role of competition in health care, how it can be enhanced to improve consumer welfare, and how antitrust enforcement can promote competition in the health care marketplace; identifies factors that further effective competition for health care; sets out recommendations for improving the operation of the health care services market; and provides FTC and DOJ views on various healthcare antitrust enforcement issues. It recommends, among other things, that: (1) states reduce entry barriers to health care provider markets by reexamining their certificate of need programs (which FTC and DOJ generally criticize as presenting anticompetitive risks that normally outweigh their asserted economic benefits), broadening membership on state licensure boards, and promulgating uniform licensing standards or implementing reciprocity compacts that facilitate competition by out-of-state providers and "telemedicine"; (2) governments generally (a) refrain from enacting legislation authorizing physician collective bargaining and (b) evaluate the impact of subsidies and government-mandated benefits in light of inefficiencies, anticompetitive effects and unintended consequences they may impose on health care competition and consumer welfare; and (3) private payors, governments and providers "continue experiments to improve incentives for providers to lower costs and enhance quality and for consumers to seek lower prices and better quality" using a variety of methods. The FTC and DOJ press releases announcing the report can be found, respectively, at **http://www.ftc.gov/opa/2004/07/healthcarerpt.htm** and **http://www.usdoj.gov/atr/public/press_releases/2004/204711.htm**. The 361-page report is available at **http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf**, and a 29-page executive summary of the report is available at **http://www.ftc.gov/reports/healthcare/healthcarerptexecsum.pdf**.

Model HSR Second Requests: On April 28, 2004, FTC's Bureaus of Competition and Economics published a model Request for Additional Information and Documentary Material—so-called "second requests"—under the HSR Act that FTC will use in preparing second requests for acquisitions involving retail entities as to which FTC has competitive concerns. FTC intends to issue additional model second requests targeted to acquisitions involving other industries "over the next several months." FTC's model second request for retail industry transactions and its accompanying press release may be found, respectively, at **http://www.ftc.gov/os/2004/04/040428modelrequest.pdf** and **http://www.ftc.gov/opa/2004/04/fyi0429.htm**.

Recent Publications from Shook, Hardy & Bacon's Antitrust Practice Group

Lawyers in SHB's Antitrust Practice Group have recently published the following articles, which may be found, along with other publications from SHB's antitrust and other practice groups, on SHB's website **(www.shb.com)** or by clicking on the link accompanying the citation to the article below:

Craig L. Evans and James R. Eiszner, *Developing a Flexible and Reliable Crisis Management Plan—Part II*, The Metropolitan Corporate Counsel, Nov. 2004, at 29. **[click here]**

Craig L. Evans and James R. Eiszner, *Developing a Flexible and Reliable Crisis Management Plan—Part I*, The Metropolitan Corporate Counsel, Oct. 2004, at 28. **[click here]**

Charles C. Eblen, *Defining the Geographic Market in Modern Commerce: The Effect of Globalization and E-Commerce on Tampa Electric and Its Progeny*, 56 Baylor L. Rev. 49 (2004). **[click here]**

Peter D. Bernstein and Scott DuPree, *Confronting Cartels Proactively*, Counsel to Counsel, May 2004, at 2, 3. **[click here]**

Susan A. Berson, *Grand Jury Practice for In-House Counsel*, Insights, Feb. 2004, at 25-31. **[click here]**

Mark A. Behrens and Edward O. Gramling, *Improving the Jury System in Kansas: A Call for Jury Patriotism Legislation*, 13 Kan. J.L. & Pub. Pol'y 1, 1-12 (Winter 2003-04). **[click here]**

Antitrust Practice Group

The Antitrust Practice Group of Shook, Hardy & Bacon L.L.P., with lawyers in Kansas City, Washington D.C., Houston, Overland Park, and Miami, specializes in all aspects of antitrust litigation and counseling under U.S. law. If you wish to discuss any of the articles with us or find out more about our antitrust practice, please call us.

Kansas City

Jim Eiszner	(816) 559-2140
Bill Sampson	(816) 559-2482
Joe Matye	(816) 559-2147
Joe Rebein	(816) 559-2227
Mike Koon	(816) 559-2285
Scott DuPree	(816) 559-2217
John Dods	(816) 559-2203
Laurie Novion	(816) 559-2352
Ed Gramling	(816) 559-2178
John Monica	(816) 474-6550
Lisa Burke	(816) 559-2420
Charles Eblen	(816) 559-2139
Kristen Page	(816) 559-2511

Washington, D.C.

Paul Schleifman	(202) 639-5611

Overland Park

Dave Rameden	(913) 663-8935
Jerrod Westfahl	(913) 451-6060
Matt Wiltanger	(913) 663-8962

Miami

Steven Naclerio	(305) 960-6959
Darrell Payne	(305) 960-6991
Richard Smith	(305) 960-6924

Special thanks to Christina Moore for artistic and production assistance.

This newsletter is provided as an informtional service to our clients and friends. Our objective is to provide information and stimulate thought, not to provide legal advice. Nothing in this newsletter should be construed as imparting legal advice.