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Barbers, Hippocrates, the FTC, and Innovation

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Nearly ten years ago, the antitrust enforcement agencies promulgated their *Antitrust Guidelines for the Licensing of Intellectual Property*. These guidelines adopted the notion of "innovation markets" and expounded a theory that increased concentration in innovation markets presumptively led to reductions in innovation. *See* U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 3.2.3 & Ex. 3 & 4 (Apr. 6, 1995) (the "Intellectual Property Guidelines"), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132, at 20,738-39, *available at* **http://www.usdoj.gov/atr/public/guidelines/ipguide.htm**.

Shortly thereafter, I wrote a paper that criticized the Intellectual Property Guidelines' adoption of this theory, in light of the conclusion in the FTC's report on its hearings on competition in the high-tech marketplace (FTC Bureau of Competition Staff Report, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace* (May 1996) (the "21st Century Report")) that there was no correlation between concentration and innovation. James R. Eiszner, *Innovation Markets and Automatic Transmissions: A Shift in the Wrong Direction?*, 43 Antitrust Bull. 297 (1998). [My paper is available on SHB's website and can be accessed by **clicking here**.] In that paper, I noted that innovation was too important to consumers for antitrust enforcers to tamper with it, absent some empirical evidence that innovation (and hence consumers) would be harmed by reduction in the number of independent innovators. *E.g.*, *id.* at 330-31, 349. I analogized the antitrust enforcement agencies to the barbers of the seventeenth century who engaged in the bleeding of patients to make them well, even though there was no proof that bleeding patients improved health. *Id.* at 331 n.68. I called for the antitrust agencies to adhere to "their own version of the Hippocratic oath" to "first, do no harm." *Id.* Later, at the annual Spring Meeting of the Antitrust Section of the American Bar Association, a panelist at the annual roundtable with antitrust enforcement officials reinforced my point when he asked all officials present to take that oath—and they all did. *See Roundtable Conference with Enforcement Officials*, 66 Antitrust L. J. 805, 824 (1998).

Although none of the current FTC Commissioners were in office when that oath was taken, it is clear from a recent enforcement decision that three—a majority, but unfortunately not all—of them adhere to the antitrust version of the Hippocratic Oath. The enforcement decision involved a completed acquisition by Genzyme Corporation ("Genzyme") of Novazyme Pharmaceuticals, Inc. ("Novazyme"). The merging companies were the only two companies researching treatments for Pompe's disease, an often fatal genetic disease that afflicts several thousand people and for which there is no current treatment. The FTC staff investigated the consummated merger, apparently on the theory that increased concentration in an innovation market for a treatment for the disease—there was now (post-merger) one company controlling 100% of the innovative work on a treatment for the disease, whereas prior to the acquisition there had been two—would harm the search for an

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effective treatment. On January 13, 2004, after nearly three years of investigation, a divided Commission determined to close the investigation of the acquisition. (The Commission's January 13, 2004, closing letter is available at **http://www.ftc.gov/os/2004/01/040113genzyme.pdf**.)

Three of the five Commissioners issued statements in connection with the decision to close the investigation. Chairman Timothy J. Muris defended his vote in favor of closing the investigation. Commissioner Mozelle W. Thompson dissented from the decision and explained his vote against closing the investigation. The statement of newly appointed Commissioner Pamela Jones Harbour explained that, having joined the FTC late in the debate, she had recused herself but that she nevertheless found the outcome of the vote to be "puzzling."

Chairman Muris' explanation of his vote to close the investigation of the merger rested heavily on the Commission's 1996 21st Century Report that there was no evidence that concentration in innovation markets reduced the incentives to innovate. There had been no changes in economic learning about innovation to alter the conclusion of the report. He therefore declined to adopt any presumption that reductions in the number of innovators would lead to a reduction in innovation. Moreover, there was no evidence that the two companies, prior to the merger, had considered themselves to be in a race to develop a cure (the theory being that innovators in a race to achieve an innovation will slacken efforts to innovate if others in the race disappear). Finally, Chairman Muris believed the evidence showed that the acquisition actually helped speed the research for an effective treatment. [Chairman Muris' statement can be found at **http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf**.]

In contrast, Commissioner Thompson's statement upbraided the majority for ignoring the general presumption (which he extrapolated from the Merger Guidelines and not the Intellectual Property Guidelines) that increased concentration leads to anticompetitive effects—here those effects were, in Commissioner Thompson's view, reduced innovation for treatment of Pompe's disease. Based on this presumption, he "know[s]" that the acquisition "affords Genzyme market power over Pompe innovation." Commissioner Thompson also stated that the exclusivity provisions of the federal Orphan Drug Act —the Act grants "seven years of market exclusivity to the first innovator to obtain U.S. Food and Drug Administration approval" that may be withdrawn if "another innovator . . . develops a superior product"—*had* to create a race to innovate between the two companies prior to the acquisition. Moreover, he would disregard the evidence that the merger actually helped facilitate the search for an effective treatment, because Genzyme may have manipulated the Commission by refraining from cutting back on its innovation efforts while it was being investigated by the FTC, and because Genzyme did not show that any efficiencies achieved by the merger could not have been accomplished without the merger.

For that matter, he would apparently divorce innovation market analysis from any consideration of the likely impact of an asserted concentration of innovation on a relevant goods market, even though, as I pointed out six years ago, innovation is not a marketed commodity but an input in the development of a good. *See* James R. Eiszner, *supra* at 306-14. Notwithstanding the Intellectual Property Guidelines' emphasis on the relationship between concentration in an innovation market and its impact on an identifiable goods market, Commissioner Thompson, in an infamous footnote, asserted: "Although it may be helpful to consider separately the merger's potential impact on a relevant *goods* (as opposed to *innovation*) market, the Commission is not required as part of its analysis of innovation effects to consider the likelihood that the independent R&D programs would have resulted in the development of products for a goods market." (emphasis in original) [Commissioner Thompson's dissenting statement can be found at **http://www.ftc.gov/os/2004/01/thompsongenzymestmt.pdf**.]

Commissioner Harbour's statement explains why the Commission's decision to close the investigation is puzzling to her. She correctly notes that innovation is vital to consumers, and especially to consumers of pharmaceuticals.

Although she notes that she may or may not be willing to presume that a reduction in the number of innovators leads to a reduction in innovation, she *would* apply this presumption in the case where the reduction is to only one innovator. Her citation for economic support for this conclusion, however, is inapt: she cites to evidence that intermediate-size firms generally innovate better than extremely large or small ones when, of course, absolute firm size has nothing to do with market concentration. Like Commissioner Thompson, she would reject any showings that the merger has improved—or likely would improve—the innovative process, absent proof that such benefits could only be achieved by merger. It is clear from her statement that, had she participated in the Commission vote, there would have been two dissents to the Commission's decision.

[Commissioner Harbour's statement can be found at **http://www.ftc.gov/os/2004/01/harbourgenzymestmt.pdf**.]

Sifting the Promising from the Problematic: In some respects, the Commission's decision closing the Genzyme investigation without further action is heartening. Three Commissioners faithfully adhered to their Hippocratic Oath to "do no harm." The patients with Pompe's disease will hopefully benefit—and soon—from the Commission's decision. But the decision is also disturbing. Two Commissioners showed that they do not adhere to the Hippocratic Oath and would bleed the patient. Since there are only five Commissioners, only a slim voting margin of one stands between consumers and the seventeenth century barbers.

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP: Fulfilling Regulatory Duties to Rivals, Refusals to Deal, and the Outer Bounds of Section 2 Liability

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Earlier this year, the United States Supreme Court issued one of its most anticipated antitrust decisions in recent years. With six Justices in the majority and three (Stevens, Souter and Thomas, J.J.) concurring in the judgment, the ruling in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, ___ U.S. ____, 124 S. Ct. 872, 2004-1 Trade Cas. (CCH) ¶ 74,241 (Jan. 13, 2004) (Scalia, J.) (available at **http://www.supremecourtus.gov/opinions/03pdf/02-682.pdf**), touched on two important areas of antitrust law. First, the Court considered the role, if any, violations of duties imposed by a federal statutory scheme have on monopolization claims under Section 2 of the Sherman Act. Second, it revisited the limits of Section 2 liability for refusal to cooperate with a rival and, in more limited fashion, the related notion of "essential facilities."

The Factual Framework and Antitrust Claim at Issue: Trinko was a local telephone service customer in New York City. On the heels of a consent decree between Verizon Communications Inc. ("Verizon"), the incumbent local exchange carrier ("LEC") for New York State, and the Federal Communications Commission (the "FCC") resolving claims that Verizon had failed to provide certain statutorily mandated interconnection services, Trinko filed a purported class action on behalf of a class of similarly situated customers. Trinko's antitrust claim was based on Verizon's alleged failure to meet certain of its duties to its rivals imposed under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections at 47 U.S.C. §§ 35, 151-155, 201-221, 224, 301-329, 401-416, 501-505, and 601-609) (the "1996 Act"), a statute that has

generated significant litigation since its enactment. Under the 1996 Act, Verizon was required to allow its rivals access to certain elements of Verizon's exclusive local telephone network. Such access must be granted on "just, reasonable, and nondiscriminatory" terms. 47 U.S.C. § 251(c)(3). As it was required to do, Verizon signed interconnection agreements with its rivals, including AT&T, under which Verizon would grant access to its network elements. Those agreements were reviewed and approved by New York's Public Service Commission.

The trade-off for doing so was that Verizon could take advantage of provisions of the 1996 Act allowing it (and other LECs) to compete, for the first time, in the long-distance market. To do so, Verizon was required to satisfy a multi-point checklist of statutory requirements. *See* 47 U.S.C. § 271(c)(2)(B). Among other things, the checklist required Verizon to comply with the 1996 Act's network-sharing requirements. Verizon's participation in New York's long-distance market was and is overseen and approved by the FCC.

Under the relevant interconnection agreements, Verizon had to provide its rivals with access to operations support systems ("OSS"), the systems Verizon uses to provide services to customers and ensure quality. To utilize Verizon's OSS, rivals submitted electronic requests for service to Verizon on behalf of their customers. Access to the OSS was critical to Verizon's rivals—without it, rivals could not fill their customers' orders. That access was the focal point of the claims before the Court.

In essence, Trinko complained that Verizon's conduct deterred customers from switching to Verizon's rivals. Trinko, an AT&T local telephone service customer, claimed Verizon filled its rivals' OSS orders on a discriminatory basis as part of an anticompetitive scheme. That discrimination allegedly impeded rivals' ability to enter and compete in the market for local telephone service, presumably because rivals would be perceived as providing lower quality or slower service than Verizon. The district court dismissed Trinko's Sherman Act Section 2 claim, *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 123 F. Supp. 2d 738 (S.D.N.Y. 2000) (Stein, J.), but a court of appeals panel unanimously reinstated it, *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002) (Katzmann, J.).

The 1996 Act Neither Creates State Action Immunity Nor Imposes Additional Antitrust Liability: The Supreme Court's first task was to determine "what effect (if any) the 1996 Act has upon the application of traditional antitrust principles." 124 S. Ct. at 877. The Court highlighted the various duties imposed on LECs by the 1996 Act, such as allowing "collocation" of equipment on an LEC's premises and allowing rivals to interconnect their own facilities with the LEC's facilities. This detailed framework of duties and regulatory enforcement might have given LECs implied antitrust immunity under the state action exemption but for Congress' provision that nothing in the 1996 Act could be construed to "modify, impair, or supersede the applicability of any of the antitrust laws." *See* 47 U.S.C. § 152 note. That clause barred a finding of implied antitrust immunity. 124 S. Ct. at 878.

Importantly, relying on the same clause, the Court also concluded that "just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards." *Id*. To hold otherwise would be inconsistent with "the saving clause's mandate that nothing in the Act 'modify, impair, or supersede the applicability' of the antitrust laws." *Id*. The question for the Court then became whether Verizon's conduct violated traditional antitrust standards.

Applying Section 2 Analysis: The Court observed that Trinko's antitrust claim had to come under Section 2 if it had a chance of surviving. *Id*. Proof of Section 2 violations requires proof of monopoly power in a relevant market and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id*. at 878-79 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). The Court acknowledged precedents in which it and lower appellate courts had identified the requisite willful acquisition or maintenance of monopoly power in the context of a refusal to cooperate with rivals. At the same time, the Court emphasized the countervailing, well-established rule that firms should not be forced to share the source of their business advantage—the so-called right to refuse to deal—as to which "[w]e have been very cautious in recognizing . . . exceptions" partly due to "the uncertain virtue of forced sharing." *Id*. at 879.

Ultimately, the Court held that the facts before it did not justify finding an exception to the right to refuse to deal and dismissed Trinko's claim for failure to state a cause of action under Section 2. To reach its conclusion, the Court distinguished *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985), the leading case supporting Section 2 liability based on refusal to cooperate with a rival. Unlike *Aspen Skiing*, in which the defendant ceased previous cooperative dealing with a rival, there had been no showing that Verizon had or would have voluntarily dealt with rivals such as AT&T prior to the framework imposed by the 1996 Act. Similarly, the Court found nothing enlightening in Verizon's hesitation to allow its rivals to interconnect with Verizon's local networks at Verizon's cost, as mandated by the 1996 Act. Such reluctance told the Court "nothing about [Verizon's] dreams of monopoly." *Id*. at 880. By contrast, according to the Court, evidence of anticompetitive malice had been more striking in *Aspen Skiing*, where the defendant refused to continue selling access to its rival at the defendant's retail prices, foregoing revenue for no apparent reason other than to attain or maintain monopoly and to pursue the promise of more lucrative monopoly rents. Indeed, the Court suggested that the unusual facts of *Aspen Skiing* may have been its salvation from disrepute as a mere aberration of the law, noting that the decision lies "at or near the outer boundary of § 2 liability." *Id*. at 879.

"Essential Facilities" Live to Fight Another Day: The Court mentioned the "essential facilities" doctrine sparingly and somewhat grudgingly—apparently because the appellate court had invoked the doctrine—but suggested that its Section 2 analysis would not be affected even if the doctrine had merit. Its discussion of the doctrine was brief—a mere one paragraph in a 16-page opinion—even though the parties' papers and those of various *amici curiae* had identified *Trinko* as a vehicle for the Court to shed light on the controversial doctrine. *See, e.g*., Brief for Petitioner Verizon Communications Inc. at 40-43 (available at **http://www.abanet.org/publiced/preview/briefs/pdfs_03/VerizonPet.pdf**); Brief for Respondent Law Offices of Curtis V. Trinko, LLP at 29-38 (available at **http://www.abanet.org/publiced/preview/briefs/pdfs_03/682VerizonResp.pdf**); Reply Brief for Petitioner at 1-5 (available at **http://www.abanet.org/publiced/preview/briefs/pdfs_03/VerizonReply.pdf**); Brief for the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioner at 20-25 (available at **http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0682.mer.ami.pdf**); Brief of United Parcel Service, Inc., Honeywell International Inc., Visa U.S.A. Inc., and Eastman Kodak Company as *Amici Curiae* in Support of Petitioner at 16-29, 2003 WL 21254257, at *16-29 (May 23, 2003). Somewhat flirtatiously, the Court noted it had "never recognize[ed] such a doctrine" but also found no need "either to recognize it or to repudiate it here." *Id*. at 881. Instead, the Court easily sidestepped any detailed discussion by concluding that a necessary element of the doctrine—unavailability of access to an essential facility—was missing because both state and federal agencies had power under the 1996 Act to compel Verizon to share its local network and were, in fact, doing so. *Id*.

Little Marginal Benefit From Judicial Intervention: Finally, the Court held that imposing an additional layer of antitrust enforcement on top of the 1996 Act would create more detriment than benefit. The 1996 Act's comprehensiveness and its built-in mechanisms for deterring and remedying anticompetitive harm made it "an effective steward of the antitrust function." *Id*. at 882. Any additional antitrust intervention, with the concomitant inherent uncertainty of Section 2 analysis and potential for false positives, would risk chilling conduct the antitrust laws are designed to protect. Moreover, judicial antitrust policing of the 1996 Act's duties and requirements would be difficult and likely lead to "a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs." *Id*. at 883. For similar reasons, the Court was unwilling to consider injunctive enforcement of the 1996 Act's sharing obligations because doing so would require the Court, in effect, to assume the day-to-day responsibilities of a regulatory agency. *See id*.

Summary: The *Trinko* decision is important on several fronts. It signifies the Supreme Court's deference to Congress' express effort to create and monitor competitiveness in the telecommunications industry through the vehicle of the 1996 Act. In the process, the Court declined to create a new or special set of antitrust standards to govern highly regulated industries. The decision also affirms the Court's restraint in applying and stretching Section 2 and its inherently amorphous standards unnecessarily, and emphasizes the Court's skepticism of efforts by antitrust plaintiffs to concoct a general duty to cooperate with competitors the "violation" of which might be enforced by treble damages, new theories of liability and unending consent decree oversight. Finally, despite its cursory and non-committal treatment of the "essential facilities" doctrine, a holistic view of the Court's opinion suggests that the Court may have been persuaded by the Solicitor General's urging that the doctrine does not provide stand-alone antitrust duties, but instead must bow to and operate within established Section 2 requirements. See Brief for the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioner at 20-25 (existence of essential facilities "elements" is neither necessary nor sufficient to state a Section 2 claim; "exclusionary" or "predatory" conduct is the benchmark).

High Court Poised to Decide the Jurisdictional Reach of U.S. Antitrust Laws

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In their petition for a writ of certiorari, the petitioners framed the question presented as one of conceptual importance: "Whether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce." Petition for a Writ of Certiorari at i, *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 124 S. Ct. 966 (2003) (03-724), available at 2003 WL 22762741. The Supreme Court agreed to hear the case, and it now must wade through the ambiguous language of the Foreign Trade Antitrust Improvements Act ("FTAIA") to answer the question.

In 1982, Congress passed the FTAIA to clarify the jurisdictional reach of the antitrust statutes. The relevant language of the FTAIA provides that the Sherman Act "shall not apply to conduct" that involves trade or commerce with foreign nations unless (1) "such conduct has a direct, substantial, and reasonably foreseeable effect" on trade or commerce in the United States, and (2) "such effect gives rise to a claim" under the provisions of the Sherman Act. 15 U.S.C. § 6a. The language "gives rise to a claim" has prompted divergent interpretations. Specifically, does it mean that a plaintiff alleging an antitrust claim need only show that someone, but not necessarily the plaintiff bringing the claim, was injured by a foreign antitrust conspiracy's domestic effects? Or must a plaintiff show that its claim arises specifically from the antitrust conspiracy's domestic effects? In other words, did Congress intend "a" in the clause "gives rise to a claim" to mean "any" or "the"? The Courts of Appeal for the Fifth, Second, and District of Columbia Circuits are split on this issue. The Supreme Court's resolution of this circuit split will clarify when the United States antitrust laws apply to foreign conduct.

The Fifth Circuit's Restrictive View Of The FTAIA

On first impression, the Fifth Circuit read the FTAIA narrowly. In *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, a Norwegian oil company that conducted business exclusively in the North Sea filed antitrust claims against the providers of heavy-lift barge services. 241 F.3d 420 (5th Cir. 2001). The plaintiff averred that the defendants had agreed to fix prices and allocate the market for heavy-lift services. As a result, not only did purchasers of heavy-lift services in the Gulf of Mexico allegedly pay higher prices for lift services, but American consumers allegedly were forced to pay supra-competitive prices for oil. The plaintiff contended that, as a result of the defendants' conspiracy, it paid inflated prices

for heavy-lift services in the North Sea. *Id*. at 422. The district court dismissed the case, holding that the plaintiff had not met the FTAIA's requirements: its allegations failed to establish both that the conspiracy substantially affected the domestic market and that its cause of action arose from the conspiracy's anticompetitive domestic effect. *Id*. at 423.

On appeal, the Fifth Circuit held that the plaintiff had sufficiently alleged the domestic effect of the conspiracy, but that the claim before the court did not arise from the conspiracy's anticompetitive domestic effect. *Id*. at 426-27. In other words, anticompetitive conduct that occurs in a foreign market and "has a direct, substantial, and reasonably foreseeable effect" on commerce in the United States does not create a cause of action unless the anticompetitive effect within the United States gives rise to the claim of the plaintiff. The Fifth Circuit, therefore, reads "a claim" to mean "the claim."

The Second Circuit's Expansive View Of The FTAIA

In contrast, the Second Circuit interpreted "a claim" to mean "any claim." The court pointed out that Congress used the indefinite article "a" instead of the definite article "the"; therefore, "[t]he 'effect' on domestic commerce need not be the basis for a plaintiff's injury, it only must violate the substantive provisions of the Sherman Act." *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 400 (2d Cir. 2002). In *Kruman*, buyers and sellers at foreign auctions filed suit against the two largest auction houses in the world, Christie's and Sotheby's. The plaintiffs alleged that the auction houses had conspired to fix prices in the United States and abroad for the premiums and commissions charged for their services. *Id*. at 390-91. The Second Circuit noted that the FTAIA amends the Sherman Act rather than the Clayton Act. Therefore, the FTAIA focuses on the anticompetitive conduct at issue rather than the requisite injury to bring suit. *Id*. at 396-98. Thus, the phrase "gives rise to a claim" requires only "that the domestic effect violate the substantive provisions of the Sherman Act," rather than "that the domestic effect give rise to an injury that would serve as a basis for a Clayton Act action." *Id*. at 400. Put another way, once a jurisdictional nexus exists, the FTAIA does not limit the type of plaintiff who may seek relief.

Third Time's Not A Charm—D.C. Circuit Ruling To Go Before The Supreme Court

The District of Columbia Circuit cast a second vote for an expansive reading of the FTAIA in *Empagran S.A. v. F. Hoffman-LaRoche, Ltd*., 315 F.3d 338 (D.C. Cir.), *cert. granted*, 124 S. Ct. 966 (2003). In *Empagran*, foreign purchasers of vitamins sued foreign producers of vitamins and vitamin products, alleging that the defendants had conspired, on a global level, to fix prices in nearly every market in which the defendants operated. The plaintiffs further alleged that the defendants' unlawful conduct had adverse effects in the United States and elsewhere that caused injury to the plaintiffs in connection with vitamin purchases abroad. The district court granted the defendants' motion to dismiss for lack of subject matter jurisdiction under the FTAIA. The court of appeals reversed.

The District of Columbia Circuit faced the same issue as the Fifth and Second Circuits: does § 6a(2) of the FTAIA require foreign plaintiffs to show that the domestic effects of the anticompetitive activity that confer jurisdiction are also the basis of the plaintiffs' claim, or need foreign plaintiffs prove only that the defendant's conduct gives rise to a claim cognizable under the Sherman Act and not "the" claim that the foreign plaintiffs assert? The court held that "where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce." *Id*. at 350. The anticompetitive conduct must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to "a claim" by someone, not necessarily the plaintiff before the court. *Id*. The court found that both the legislative history of the FTAIA and the deterrence goals articulated in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), supported its reading of the FTAIA. "Allowing suits by those injured solely in foreign commerce, where the anticompetitive conduct also harmed U.S. commerce, forces the conspirator to internalize the full costs of his anticompetitive conduct." 315 F.3d at 356.

In response to this ruling, the appellees successfully petitioned the Supreme Court for a writ of certiorari.

"A" Is For Ambiguity

As the language of the FTAIA demonstrates, inattentive drafting transfers work from the legislature to the courts. Neither the plain language of the FTAIA nor its legislative history specify whether "a claim" means "the claim" or "any claim."

The Department of Justice, the Federal Trade Commission, and the Chamber of Commerce of the United States, as well as numerous foreign nations, have filed *amicus curiae* briefs in the Supreme Court, arguing in favor of the narrow reading of the FTAIA. Fearing forum shoppers allured by treble damages, these *amici* argue that an expansive reading of the FTAIA threatens to flood the United States courts with claims not anticipated by the statute's drafters. Both scholars and the foreign *amici* also claim that welcoming forum shoppers in United States courts will disrupt multinational comity by invading the province of foreign competition policy. Scholars also contend that jurisdictional expansion will expose defendants to duplicative liability by allowing plaintiffs two forums for recovery: their home state and the United States. The Supreme Court will hear argument in *Empagran* on April 26, 2004, and issue its decision later this term.

Changes to the European Community Merger Regime

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Changes are in store this spring for European merger review procedures and practices. Beginning in May, the Merger Regulation of the European Community will be replaced with a new regulation that will impact both the premerger notification rules for mergers impacting European nations and the standards applied by European regulators in evaluating proposed mergers and acquisitions.

Background: Regulation of Mergers in the European Community: The European Community ("EC") has rules to ensure free competition in the European single market. The European Commission (the "Commission") is responsible for applying these rules throughout the EC, working closely with national governments. The EC competition rules are set out in Articles 81 and 82 of the Treaty of Rome. Article 81 prohibits anti-competitive agreements which may have an appreciable effect on trade between member states and which prevent, restrict or distort competition in the EC single market. The Commission can grant individual or group exemptions from this prohibition if there are overriding countervailing benefits, such as an improvement in efficiency or the promotion of research and development. Article 82 prohibits the abuse of a dominant position in so far as it may affect trade between member states. There is no possibility of an exemption.

Regulation 17, known as the EC Merger Regulation ("ECMR"), implements Articles 81 and 82. It provides that a merger that creates a dominant position as a result of which effective competition would be significantly impeded in the common market or in substantial part of it shall be declared incompatible with the common market. The ECMR applies to all mergers with "community dimension," defined by reference to the "turnover" of the participating entities. The Commission has exclusive competence over such mergers, although there are provisions for member states to take action in special circumstances.

With effect from May 1, 2004, the ECMR is being revised and replaced with a new regulation. The changes that will be ushered in by the new regulation are outlined below. Where a proposed merger may adversely affect competition, the practice is to notify the proposed merger to the relevant competition authorities to obtain either clearance for the merger or a ruling from the relevant authorities as to what changes must be made to the terms of the merger for clearance to be obtained. Many of the changes brought in by the new ECMR relate to the notification process and the basis on which the competition authorities will judge the effects of the merger.

Jurisdiction: The ECMR has long allowed a "one stop shop," whereby one notification can be made to the Commission rather than separately notifying the competition authorities in each of the 15 member states (or 25 member states from May 2004) under each member state's unique merger notification rules. Although the largest mergers and acquisitions meet ECMR thresholds and therefore need only to be notified to the Commission in Brussels, there have been a significant number of European transactions that did not meet ECMR thresholds and therefore required notification in each relevant member state, creating additional costs and obstacles to these proposed transactions.

Under the new ECMR, pre-notification requests that the Commission or a uniquely affected member state take jurisdiction over a transaction will be allowed. The parties can make a pre-notification request to the Commission to take over the matter from national competition authorities where notification would otherwise have been required in at least three member states. If no relevant member state opposes this application within 15 working days, the Commission will have exclusive jurisdiction. Conversely, the parties may also make a pre-notification request that the matter should be examined by a national competition authority rather than the Commission. If the member state does not object and the Commission agrees within 25 working days that a distinct market exists in that member state and that competition in that market may be significantly affected by the merger, the Commission may refer the case to that national competition authority, and that member state's national law will apply.

New Test for Deciding Whether a Merger Should be Blocked: The current test applied by the ECMR is based on whether there will be a "creation or strengthening of dominant market position as a result of which effective competition would be significantly impeded." This test may be contrasted with the "substantial lessening of competition" test generally applied in the United States and other national markets, such as within the United Kingdom since June 2003. The new ECMR modifies the test so that regulators will need to evaluate whether a concentration of businesses would "significantly impede effective competition, in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position." In essence, the new test only considers dominance as one possible cause of significant impediment to effective competition and may catch other situations, focusing on competition itself rather than the structure of the markets.

Procedure: The new ECMR makes various changes to existing procedures for notification and negotiations, in particular:

- The possibility of notification on the basis of a "good faith intention" to enter into an agreement rather than only after signature of a binding agreement, as allowed at present. For example, under the new regulation, parties may file notification on the signing of a non-binding letter of intent (a practice long permitted in the United States under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended). While the requirement to notify within one week of signature of a binding agreement is removed, the parties will not be allowed to implement a transaction before receiving clearance.

- Deadlines are to be calculated in working days rather than weeks.

- Where remedies are offered by the participants during the initial phase 1 investigation, phase 1 will be extended from 25 working days to 35 working days (rather than the current six weeks). The phase 2 investigation will normally last 90 working days but will be extended to 105 working days if the parties offer remedies on or after working day 55 following the start of phase 2.

- Phase 2 may have a further extension of up to 20 working days if either of the parties makes a request to that effect within 15 working days of the start of phase 2, or if the Commission proposes an extension and the parties agree.

This means there is a maximum duration of 160 working days from notification to decision, which should assist in complex cases.

Horizontal Merger Guidelines: A set of guidelines on horizontal mergers has been published by the Commission to reflect the new ECMR. These guidelines set out the factors that the Commission will take into account when analyzing mergers, including:

- the likelihood that the merger would have anti-competitive effects on the relevant markets, in the absence of countervailing factors;
- the likelihood that buyer power would act as a countervailing force to an increase in economic power as a result of the merger;
- the likelihood that entry by new businesses would maintain effective competition in the relevant markets; and
- the likelihood that efficiencies would result from the merger.

The Road Ahead: In summary, the new ECMR will introduce fairly complex new rules on case allocation between the Commission and competition authorities in member states which may increase time scales and uncertainty but may also increase efficiency. Notification will now be possible before a formal, binding agreement is concluded. There will be a new test to decide whether a transaction should be blocked—is there a "significant impediment to effective competition?" This test is likely to be wider in scope than the current "dominance" test, although this may have little practical effect in many cases. There will be a more flexible timetable, with more time before decisions are taken. However, longer periods for analysis, assessment of undertakings, and negotiation among regulators and the merging parties should reduce the risk of an unexpected outcome. The "turnover" thresholds for notification remain unchanged, but the Commission may have exclusive jurisdiction if the national competition rules in three member states require notification and all member states agree to the transfer of jurisdiction to the Commission.

FTC's Policy on Monetary Equitable Remedies in Antitrust Cases

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The authority of the Federal Trade Commission ("Commission") to seek disgorgement or other monetary relief in competition cases has been the subject of much discussion and debate in recent years. The Commission has sought and received monetary disgorgement in two recent cases, the first involving alleged illegal anticompetitive conduct by a pharmaceutical firm (*FTC v. Mylan Labs., Inc*.) and the second involving alleged Hart-Scott-Rodino ("HSR") Act violations (*FTC v. The Hearst Trust*). On July 25, 2003, after requesting comments on the use of disgorgement or restitution as a remedy for violations of the HSR Act, the FTC Act, and the Clayton Act, the Commission unanimously approved its "Policy Statement on Monetary Equitable Remedies in Competition Cases." (Its text can be found on the Commission's web site at **www.ftc.gov/os/2003/07/disgorgementfrn.htm**.)

Notably, in requesting public comments, the Commission advised that it would not be re-examining its statutory authority to seek disgorgement or other monetary relief in competition cases. The Commission's policy statement instead sets out "general observations" on the factors it will consider in determining whether to seek disgorgement or restitution. While the Commission's apparent position is that its statutory authority to seek such remedies is a settled matter, a review of the statutes and applicable case law suggests otherwise. If statutory authority exists, the factors identified in the policy statement that the Commission says it will consider in determining whether to seek disgorgement or restitution may help alleviate some concern that the Commission's use of such power could result in duplicative litigation and damages, but it remains to be seen how the Commission will apply these factors.

Despite the Commission's disinterest in receiving comments on its statutory authority to seek disgorgement or restitution, the question of the Commission's authority in this regard is unsettled.

Virtually all of the federal antitrust statutes provide for monetary remedies. Treble damages are available under the Clayton Act to private parties under § 4, to state enforcement authorities as parens patriae under § 4c, and to the Justice Department for injuries to the federal government under § 4a. In addition, the Commission may impose civil penalties for violations of cease-and-desist orders under the FTC Act and the Clayton Act (*see* 15 U.S.C. §§ 21(*l*), 45(*l*)), and the Justice Department may impose fines in a criminal prosecution under the Sherman Act (*see* 15 U.S.C. §§ 1-2). In addition, most state antitrust statutes provide for monetary remedies, and many of those allow recovery by indirect purchasers, even after full recovery of treble damages by direct purchasers.

Considering the full panoply of rights and remedies available to the Commission, the Justice Department, state enforcement authorities, and private parties under this country's competition laws, one can reasonably question the appropriateness of and need for monetary equitable remedies. Moreover, the Commission's authority to seek monetary equitable relief under the FTC Act rests on shaky legal footing.

The argument that the Commission has authority to seek equitable monetary relief is based on a reading and interpretation of § 13(b) of the FTC Act, which provides that the Commission may ask a court to issue an "injunction" or "enjoin" violations of statutes the Commission enforces. Despite the fact that § 13(b) only refers to an "injunction," courts have found that it also can be used by the Commission in consumer protection cases to seek other kinds of equitable remedies, including those that involve monetary relief. In part, this interpretation of § 13(b) developed from an expansive reading of two Supreme Court opinions, *Porter v. Warner Holding Co*., 328 U.S. 395 (1946) and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). Neither case involved an interpretation of antitrust statutes, but rather interpreted language in other statutes to conclude that government agencies could seek monetary relief when the statutes allowed the agencies to obtain an "injunction" or "other order" (in the case of *Porter*) or to seek a court order to "restrain violations" (in *Mitchell*).

Despite differences in the applicable statutory schemes and other distinguishing features, including the fact that the language of § 13(b) is specifically limited to injunctions, courts of appeal subsequently used the *Porter* and *Mitchell* opinions to expand the relief available in consumer protection cases under § 13(b) to include monetary equitable relief in the form of rescission, restitution, or disgorgement. More recently, the Commission has sought to extend its right to demand disgorgement to competition cases on the basis that § 13(b) applies equally to both consumer protection and antitrust statutes. While at least one court has agreed with this argument *(see FTC v. Mylan Labs., Inc*., 62 F. Supp. 2d 25 (D.D.C. 1999)), the Commission itself is divided on the issue of the propriety of the disgorgement remedy (*see* Statement of Commissioner Thomas B. Leary, found at **www.ftc.gov/os/2000/11/mylanleary statment.htm**).

Thus, while the Commission has developed a policy statement to address *when* it will seek monetary equitable remedies, the question of *whether* it has authority to do so remains open.

Assuming that the Commission has statutory authority to seek disgorgement and restitution, the Commission's policy statement identifies and explains three factors that it will consider in determining whether to seek such remedies. First, the Commission will ordinarily seek monetary relief only when the underlying violation is clear. Second, there must be a reasonable basis for calculating the amount of remedial payment. Third, the Commission will consider the value of seeking monetary relief in light of other remedies available in the matter, including private actions and criminal proceedings. A strong showing in one area "may tip the decision whether to seek monetary remedies."

In determining whether a violation is "clear," as stated in the first factor, the Commission will measure the conduct *ex ante*, at the time that conduct occurs, and not *ex post facto*, with the benefit of hindsight. The Commission notes that this assessment should be made by means of an objective rather than subjective standard, but that the category of "clear" violations goes beyond traditional per se violations. The

Commission cites the *Hearst and Mylan* cases as examples of "easily condemned conduct that would not necessarily be described as a per se violation." On the other hand, the Commission cites one of the first Hatch-Waxman cases involving an agreement between brand and generic pharmaceutical manufacturers (*Abbott Laboratories and Geneva Pharmaceuticals, Inc.*, File No. 981-0395 (March 16, 2000)) as the type of case falling outside the "clear violation" category because the conduct alleged occurred in a complex regulatory context and because it was the first government antitrust enforcement action in this area.

Commenting on the second factor, the Commission states that while calculation of the monetary remedy "does not require undue precision," the Commission will not seek a monetary equitable remedy unless there is a reasonable basis for calculating the amount of the disgorgement or restitution to be ordered.

The third factor identified in the policy statement is the most interesting and perhaps the most difficult one to assess. The Commission states it will consider monetary remedies only when it anticipates that other remedies are unlikely to result in complete relief, in other words, only when there is some "value added" by the Commission's monetary remedy. The Commission acknowledges that "[w]hen other remedies are brought to bear and are likely to result in complete relief, a Commission action for monetary equitable relief might well be an unnecessary and unwise expenditure of limited agency resources."

It is ironic that in the one case in which a court concluded that § 13(b) vests the Commission with authority to seek disgorgement for antitrust violations (*Mylan*), the Commission should never have sought such a remedy if it had applied objectively the factors identified in the current policy statement. While application of the first two factors may have argued in favor of the Commission seeking disgorgement against Mylan, application of the third factor—value added by the Commission—would have counseled against the Commission jumping into the fray.

In *Mylan*, the Commission was one of a number of plaintiffs bringing suit, including a number of private direct and indirect purchaser classes and state attorneys general. The settlement agreement that Mylan eventually entered into included all fifty states and the District of Columbia (on behalf of consumers and state agencies), and classes of other indirect purchasers comprising insurers and HMOs. Mylan agreed to pay approximately $147 million to settle these suits. This settlement, however, did not end the litigation for Mylan and its co-defendants. Additional private actions were filed in federal and state courts asserting the same claims as those brought by the Commission. The most significant group of plaintiffs were classes of direct purchasers seeking treble damages under the Clayton Act. The district court allowed these cases to proceed, even while recognizing the risk of duplicative recovery because the Commission had sought, and would recover through settlement, the same alleged overcharge underlying the private direct purchaser actions.

The number of state governments and private plaintiffs asserting monetary claims in *Mylan* meant that the Commission's disgorgement claim added little or no value. While the Commission's policy statement notes that the Commission "is sensitive to . . . duplicative recoveries by injured persons or 'excessive' multiple payments by defendants for the same injury," the decision to seek disgorgement in *Mylan* may have contributed to that very result.

The potential for duplicative remedies for each potential antitrust violation has increased in recent years. The Commission's policy statement on monetary equitable remedies may offer some reassurance that the Commission will seek disgorgement in only the most egregious cases. On the other hand, the policy statement serves to reinforce the message that the Commission considers the question of its authority to seek disgorgement in antitrust cases to be settled, when in fact it is not. Finally, it remains to be seen how the Commission will implement the policy and whether there will be cases in the future like *Mylan* where the Commission seeks disgorgement even though private damage actions are likely to result in complete relief.

Here Comes the Sun

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Justice Brandeis once wrote that sunlight is the best disinfectant. He could have been advising directors about cartels. This is because cartels thrive most when directors are least vigilant. They can spring up at any level of a company, and can saddle the company with devastating liabilities—everything from civil penalties to treble antitrust damages to jail time for participants to black marks on the company's stock price, public image and (for public companies) SEC reporting. And because prosecutors also apparently believe in bringing cartel activity into the harsh light of day - the U.S. Department of Justice last year reported that it had convened more than 60 grand juries to investigate alleged domestic cartel activity and another 40 grand juries to investigate suspected international cartels - we know that there is a lot of potentially "risky business" that may be occurring beyond the notice of even the most watchful directors.

What to do? At a minimum, directors should consider a proactive four-pronged response—not a "one-size-fits-all" approach, but a strategy tailored to the peculiarities of their company, their industry, and their marketplace conditions that channels that background knowledge into the following prophylactic tools:

- *First*, every company should adopt understandable, "plain English" **antitrust codes of conduct** for employees, and conduct **regular employee training** that not only educates employees on what the code means and how the code is enforced, but also emphasizes to employees that the company takes these guidelines and their violation seriously.

- *Second*, directors should consider whether **antitrust compliance audits** may be helpful in rooting out problematic behavior. Antitrust audits can help identify a previously undetected cartel and its perpetrators, can help the company mitigate liability under the government's amnesty program and federal sentencing guidelines, and can facilitate corporate compliance with Sarbanes-Oxley. However, an audit may not help, and could create new problems, for a company that is already the subject of a government investigation, a defendant in related litigation, or the target of a whistleblower.

- *Third*, if potentially unlawful activity is identified, directors need to consider the potential benefits to the company of voluntarily disclosing the activity to the government under the **federal leniency program** (which may depend upon how far along the activity and any government investigation of the activity are at the time of decision), and regardless of whether the company determines to participate in the amnesty program, directors will need to begin planning the company's legal and business strategy for dealing with the whirlwind of publicity and litigation that is likely to follow.

- *Fourth*, whatever steps the directors ultimately decide to take to protect against cartel liability, they should act in close consultation with **competent antitrust counsel**. This is not a sales pitch for the antitrust bar; it is a recognition of the difficulties that may hinder or obscure the identification of potentially problematic behavior and the importance of protecting the company's privileges and maximizing the company's options in this complex and high-stakes area of the law.

Is New York About to Get Bitten by the Class Action Bug?

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A bill making its way through the New York Legislature would authorize, for the first time, indirect purchasers to initiate and maintain private class action lawsuits for treble damages under New York's antitrust statute, the Donnelly Act. Assembly Bill No. 5158 would add a new, one-sentence subsection 7 to Section 340 of the New York General Business Law, the operative provision of New York state antitrust law, stating simply: "Any damages recoverable pursuant to this section may be recovered in any action which a court may authorize to be brought as a class action pursuant Article Nine of the Civil Practice Law and Rules." If enacted, the amendment would take effect immediately. Assembly Bill No. 5158, § 2. [Assembly Bill No. 5158 may be viewed at **http://assembly.state.ny.us/leg/?bn=A05158&sh=t**.]

The proposed amendment would further extend and broaden the options available to indirect purchasers to assert claims under New York antitrust law, a movement that began some five and a half years ago. Previously, on December 23, 1998, the New York Legislature enacted a new subsection 6 to Section 340 declaring that "the fact that the state, or any political subdivision or public authority of the state, or any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery," but mandating that courts take precautions to guard against duplicative recoveries by direct and indirect purchasers. The new provision also expressly recognized a "pass-on" defense for antitrust defendants. N.Y. Gen. Bus. Law § 340(6). Prior to the 1998 amendment, New York law did not provide a right of action for antitrust claims by indirect purchasers. *See, e.g.*, *Lennon v. Philip Morris Cos., Inc.*, 734 N.Y.S.2d 374, 378, 382 (N.Y. Sup. Ct. 2001).

Although the 1998 amendment effectively "repealed" the impact that the U.S. Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), would otherwise have had on New York antitrust law, it failed to answer the question whether the right of action it created would be exercisable only in an individual action or whether indirect purchaser claims could be asserted in representative actions. This silence of the 1998 amendment placed its scope squarely in issue because under New York's class action rules, "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action," N.Y. C.P.L.R. § 901(b), and because New York courts had already long since read the Donnelly Act together with these rules as not permitting class actions for alleged Donnelly Act violations. *Russo & Dubin v. Allied Maint. Corp.*, 407 N.Y.S.2d 617, 620-21 (N.Y. Sup. Ct. 1978); *Blumenthal v. American Soc'y of Travel Agents, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,530, at 72,106-07 (N.Y. Sup. Ct. July 5, 1977). Cases decided by New York trial and intermediate appellate courts in the wake of the 1998 amendment have found that the 1998 legislation did not alter the holdings of these prior decisions. *Cox v. Microsoft Corp.*, 737 N.Y.S.2d 1, 2 (N.Y. App. Div. 2002); *Asher v. Abbott Labs.*, 737 N.Y.S.2d 4, 4-5 (N.Y. App. Div. 2002); *Lennon*, 734 N.Y.S.2d at 380-81; *Rubin v. Nine West Group, Inc.*, 1999-2 Trade Cas. (CCH) ¶ 72,714, at 86,291-93 (N.Y. Sup. Ct. Nov. 3, 1999). As a bill summary accompanying Assembly Bill No. 5158 sums up the situation, "A class action . . . cannot now be maintained in private suits brought pursuant to the state antitrust law . . ."

Always a Bridesmaid . . . ? Assembly Bill No. 5158 was introduced on February 25, 2003, by Assemblyman Audrey I. Pheffer, a Democrat representing the 23rd District in Queens and the chairperson of the Assembly's Consumer Affairs and Protection Committee. The bill was approved by the Democrat-controlled Assembly and delivered to the state Senate on June 4, 2003, but it died in the Republican-dominated Senate on January 7, 2004. After its return to the Assembly, the proposed amendment easily won approval again on February 23, 2004, garnering only two "no" votes and a handful of abstentions. It was delivered once again to the state senate the same day, where, as of this writing, it currently sits in the senate's Consumer Protection Committee awaiting further action. However, the legislative calendar is quickly running its course. In the state senate, the April 12, 2004, deadline for motions to petition a bill out of committee has passed, and bills are scheduled to be reported out of senate standing committees (such as the Consumer Protection Committee) to the senate Rules Committee by May 21, 2004. The Legislature will recess a month later, on June 22, 2004, and the current session will adjourn in early January 2005.

Dentsply and *Visa*: DOJ Bats .500 in the Exclusive Dealing Ballpark

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In a decision that must have surprised the management of the U.S. Department of Justice ("DOJ"), a district court in Delaware ruled last fall that an extraordinarily dominant player in the artificial teeth market did not violate the Sherman or Clayton Acts by requiring dealers not to sell competitive brands under penalty of losing their franchises. It arrived at this decision despite holdings that the purpose of these restraints was to foreclose competitors from access to these distributors, the restraints were enforced, and the company's justifications for them were pretextual. *United States v. Dentsply Int'l, Inc*., 277 F. Supp. 2d 387 (D. Del. 2003) (Robinson, C.J.), *appeal docketed*, No. 03-4097 (3d Cir. Oct. 21, 2003). DOJ is appealing this decision; on January 16, 2004, it filed its appeal brief in the Third Circuit—the same court whose *en banc* monopolization decision earlier last year in *Le Page's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc) (Sloviter, J.) is the subject of a petition for writ of certiorari (no. 02-1865) that is currently pending conference in the U.S. Supreme Court (*see* **http://www.supremecourtus.gov/docket/02-1865.htm**). (A redacted public version of DOJ's proof brief can be found at **http://www.usdoj.gov/atr/cases/f202100/202141.htm**.)

A month after the Delaware district court's decision, DOJ scored a victory when a panel of the Second Circuit affirmed a decision holding that Visa and MasterCard impermissibly engaged in exclusive dealing by prohibiting member banks from working with American Express and Discover in the credit card market. The Second Circuit panel reached this result despite finding that neither American Express nor Discover were foreclosed from selling credit cards to consumers nor from obtaining merchant accounts. *United States v. Visa U.S.A., Inc*., 344 F.3d 229 (2d Cir. 2003) (Leval, J.).

In a period in which an unusual number of high-profile monopolization decisions emanated from federal courts across the country, DOJ's inconsistent track record at the end of last year stands out. This short note compares and contrasts highlights of these two decisions.

Background: Relevant Markets, Market Shares, Market Characteristics, and the Restraints Under Review

Dentsply: In a relevant product market for prefabricated artificial teeth, defendant Dentsply International, Inc. ("Dentsply") maintained a stable, roughly 80 percent market share. 277 F. Supp. 2d at 423-24. The largest of its

competitors had only a five-percent share. *Id*. at 423. Defendant sold exclusively through independently owned dealers which, in turn, serviced labs where dentists placed orders for product. Dentsply dealers had no formal distribution contracts, so that these dealers could resign at will; other dealers were available to sell competitive lines. Dealers had no assigned territories and serviced accounts nationwide. Competitors could sell directly to labs and bypass the dealer distribution level completely. Defendant managed its mature business on a "cash cow" basis, but could not exact supracompetitive prices from the market or foreclose new entries. It was viewed as a product innovator possessing superior sales and marketing abilities.

Visa/MasterCard: In a relevant product and services market for general purpose payment cards, defendants Visa U.S.A., Inc. ("Visa") and MasterCard International, Inc. ("MasterCard")—organized as joint ventures composed of thousands of member banks—are two of four major network systems. The other two are American Express and Discover. All four card networks compete against each other both in issuing cards and in servicing accounts. By written rules, banks belonging to the Visa network could also be members of the MasterCard network and vice versa, but Visa/MasterCard member banks could not then issue American Express or Discover cards. 344 F.3d at 234-36.

The Second Circuit described the contours of the "payment card industry" in which the scrutinized rule restrictions operated: No bank ever resigned from the bank networks to handle non-bank cards; American Express and Discover are vertically integrated at the wholesale level—bank card transactions pass from merchants through acquiring banks to issuing banks, *id*. at 236; consumers regard general purpose cards as a separate market from store cards or checks; merchants feel they must accept defendants' bank cards and pay required fees or risk losing customers; and American Express and Discover cannot offer U.S. consumers certain innovative services linked to cardholder bank accounts without institutional access.

Oh Brother, Where Art Thou: Where Did the Decisions Part Company?

Dentsply: Given the relatively small size of the market—defendant's annual product net revenues were just $40.4 million—DOJ probably was persuaded to prosecute its ultimately unsuccessful action on the basis of rather strong evidence purporting to show that Dentsply, the market leader, had cajoled or coerced its dealer network not to sell other brands. Nevertheless, the following factors contributed to a defense judgment:

- In the context of a loosely organized distribution system in which, among other things, wholesalers engaged in consistent intra-brand competition, the court was convinced that tooth suppliers could compete by selling directly to labs. Federal Express turned the tide from local inventory management to one warehouse overnight delivery anywhere. In fact, the court was impressed that the market leader favored this "go direct" approach, but did not execute only because many other of its products were sold through the dealer channel and it feared retaliation if it went direct with artificial teeth.

- The dental labs, the dealers' customers, did not feel precluded from dealing with wholesalers who did not carry the market leader's line. There was no proven foreclosure to the labs that made the decisions as to which brand of tooth to use when filling orders from dentists.

- The court was convinced that defendant's competitors were not gaining market share because they were poor at what they did: They employed European style molds in an American style market, concentrated on other products in their lines, and had inferior sales and marketing teams.

- While DOJ stressed Dentsply's high market share, defendant effectively countered with evidence that it could not control prices—its profit margin was no higher than other premium producers—and other international players had entered the U.S. market. The court found there was no power to control price or exclude competition and no exclusionary conduct to maintain monopoly power, even assuming it existed.

- Trial teams received low marks in two other respects: First, the defense did a poor (and, as it turned out, irrelevant) job in defending the dealer restraints with pro-competitive business rationales. The court discarded the explanations, but did not need to reach them. (This, however, is not something that can be relied on in other contexts—companies should prepare written rationales supporting their exclusive distribution policies in policy documents so that institutional memory is preserved.) Second, the expert economic evidence offered by DOJ to prove market conditions proved to be inadequate. The weaknesses in DOJ's economic evidence no doubt reinforced the court's conclusion that the dealer restraints challenged by DOJ were not likely to seriously threaten competition.

Visa/MasterCard: A number of factors unique to this case - notably, the explicitness of the restraints, their effectiveness in the geographic market, the dollar volume of transactions involved, and the willingness of foreign banks to issue American Express and Discover cards - probably influenced DOJ's decision to prosecute this action. The following factors contributed to its successful prosecution:

- In defining the relevant market in terms of the four networks, defendants' market power was evident by: Merchant testimony that Visa and MasterCard could raise prices at will because they had to accept those cards; the defendants controlled 77 percent of the dollar volume of credit card and charge card transactions; and American Express could not persuade one U.S. bank from dropping defendants to trade with it.

- In concluding there was harm to competition, not just harm to competitors (in the familiar canon of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 488 (1977)), the court found the exclusionary rules reduced overall card output and available card features, decreased network service output, and stunted price competition. Evidence from the foreign markets supported these conclusions.

- While defendants sought to analogize their practices to exclusive distributorship arrangements and to assert that both American Express and Discover could reach the ultimate consumer card holder and accounts through alternate channels; the court was not persuaded. In the court's view, defendants represented, in effect, 20,000 bank competitors bound by a horizontal restraint that has been totally effective in stopping the other two networks from marketing product to these member institutions.

- Defendants' pro-competitive justifications for their policies were held to be unreasonable. Defendants' network "cohesion" argument—that, as characterized by the Second Circuit panel, "the exclusionary rules . . . promote 'cohesion' within the MasterCard and Visa U.S.A. networks, so that those networks may compete effectively in the marketplace"—was belied by the ability of banks to purchase both Visa and MasterCard services here and the failure to show lack of "cohesion" in their foreign networks ("where, in the absence of exclusionary rules, [American Express] has contracted with Visa and MasterCard member banks to issue [American Express]-branded payment cards"). 344 F.3d at 243.

***Trend Line*:** **Staying the Course**

Although antitrust cases are fact-specific and results driven by market factors in each industry, these decisions are in accord with recent case law in this area. While some courts have considered that an anticompetitive purpose or intent will be enough to violate the Sherman Act, *Dentsply* and *Visa/MasterCard* fall in line with more recent decisions in private litigation to the effect that an anticompetitive market effect must be present for a restraint to be adjudged illegal. In *Dentsply*, the Court said there was no such effect because, among other things, everyone could sell directly to labs by bypassing dealer middlemen; in *Visa/MasterCard*, the court found an anticompetitive effect, since everyone wanted to use the member banks but only the bank card networks could do so.

In filing its appellate brief in *Dentsply*, DOJ took issue with the decision as consistent with precedent only as to its Section 2 claims. Relying heavily on the District of Columbia Circuit's decision in *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam), DOJ argued that Dentsply's exclusionary conduct maintained its monopoly by preventing rivals from posing a real threat to Dentsply's ability to control prices and exclude competitors. Competition was harmed by preventing "the efficient use of common dealers." Since the district court found that Dentsply did not have the power to control prices or exclude competitors, it will be interesting to see if the Third Circuit agrees with the government and takes the unusual step of forcing a company to share its distribution channel with competitors.

Conclusion

The *Dentsply* and *Visa/MasterCard* decisions remind us that restraints of trade come in different varieties: Some, like conspiracies, are oftentimes difficult to prove, as there is usually no written agreement among competing firms to, for example, set prices or divide markets. Others, such as distribution channel management restraints, are more routinely found in black-and-white—for example, in contracts or policy manuals. In either case, any proven restraint must still be seen as unreasonably affecting competition—not merely the ability of a competitor to trade for a profit. At day's end, evidence as to whether there might be better products or services available in the marketplace —yes for credit card services; no for false teeth— ultimately ruled.

Washington Update

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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 FTC Commissioner: According to published reports, **Jon Liebowitz**, legislative counsel to the Motion Picture Association of America ("MPAA") in Washington, D.C., is expected to replace FTC Commissioner **Mozelle Thompson**, whose term expired in late 2003. Mr. Liebowitz has been with the MPAA since 2000 and before that was Democratic counsel for the Antitrust Subcommittee of the Senate Judiciary Committee. His confirmation remains pending.

Resignations at the FTC: Ann Malester, Deputy Director of the Bureau of Competition, has announced her resignation from the FTC. Ms. Malester was with the FTC for 26 years and most recently, before becoming a deputy director, served as the Assistant Director of Mergers I from 1991 to 2003. After a brief stint at Clifford Chance LLP, Ms. Malester has joined Weil, Gotshal & Manges LLP. **M. Sean Royall**, another Deputy Director of the Bureau of Competition, left the FTC in late 2003 to return to private practice at Gibson, Dunn & Crutcher LLP. Most recently, he was actively involved in the Rambus case. Mr. Royall was replaced by **D. Bruce Hoffman**, who had served for two years as the Bureau of Competition's Associate Director for Regional Litigation. Prior to joining the FTC, Mr. Hoffman was a partner at Hunton & Williams LLP. For more information, *see* **http://www.ftc.gov/opa/2004/01/malesterdeparture.htm** and **http://www.ftc.gov/opa/2003/10/royall.htm**.

New Deputies in DOJ's Antitrust Division: DOJ has named two new Deputy Assistant Attorneys General in its Antitrust Division within the last few weeks. **Thomas O. Barnett** was appointed Deputy Assistant Attorney General in charge of the division's civil enforcement activities, in which capacity he will supervise three of the Antitrust Division's civil sections. Barnett joins DOJ from the Washington, D.C. office of Covington & Burling, where he has been a partner since 1997. By contrast, **David A. Higbee** returns to DOJ from a stint as Special Assistant to the President, a position he held

since 2003. Higbee has assumed the newly created position of Chief of Staff and Deputy Assistant Attorney General for DOJ's Antitrust Division. Before his brief tenure in the White House, Higbee served as Deputy Associate Attorney General from 2001 to 2003. DOJ's press releases announcing these appointments can be found, respectively, at **http://www.usdoj.gov/atr/public/press_releases/2004/203059.htm** and **http://www.usdoj.gov/atr/public/press_releases/2004/203070.htm**.

Antitrust Modernization Commission: President Bush has nominated the final four members of a new, statutorily-created Antitrust Modernization Commission. As part of the Antitrust Modernization Commission Act of 2002 (Public Law 107-273, Subtitle D), the Commission has been tasked with examining "whether the need exists to modernize the antitrust laws." *See* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11053, 116 Stat. 1758, 1856 (2002) (codified at 15 U.S.C. § 1 note). The Commission may hold hearings, take testimony, and receive evidence. *Id*. § 11057, 116 Stat. at 1858. Within three years after its first meeting, the Commission will submit a report to Congress and the President detailing its findings and conclusions and any recommendations for legislative or administrative action considered to be appropriate. *Id*. § 11058, 116 Stat. at 1859. **Deborah A. Garza**, a partner resident in the Washington, D.C. office of Fried, Frank, Harris, Shriver & Jacobson LLP, has been named chair-designate of the Commission. For more information, *see* **http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ273.107.pdf**.

II. Policy and Legal Developments

ALJ Dismisses Rambus Complaint: FTC Chief Administrative Law Judge ("ALJ") Stephen J. McGuire has dismissed the FTC staff's administrative complaint against Rambus Inc. ("Rambus"), finding that complaint counsel failed to prove the violations alleged. The complaint alleged that Rambus failed to disclose that it held certain patent rights at the heart of the standards adopted by an industry-wide standard-setting organization. *See*, *e.g*., FTC Complaint ¶¶ 70-80, *Rambus Inc*., FTC Docket No. 9302 (issued June 18, 2002) ("FTC Complaint"), *at* **http://www.ftc.gov/os/adjpro/d9302/020618admincmp.pdf**. According to complaint counsel, the failure to disclose the patents allowed Rambus to assert patent rights over the relevant standards, and to obtain substantial royalties from memory manufacturers abiding by those standards. *See*, *e.g*., FTC Complaint ¶¶ 91-109. Among several reasons, the ALJ determined that: Rambus did not violate a voluntary policy of disclosure by the standard-setting organization; Rambus did not have patent rights at a time when it would have been obligated to disclose them; Rambus offered legitimate business justifications, and the conduct therefore was not exclusionary; there were no anticompetitive effects, as there were no viable alternatives to the Rambus technology; and Rambus' conduct did not amount to deception. For a copy of the ALJ's initial decision, see **http://www.ftc.gov/os/adjpro/d9302/040223initialdecision.pdf**. On March 1, 2004, complaint counsel filed a notice of appeal of the ALJ's initial decision (other than those "portions relating to commerce, the relevant market and monopoly power") and order, and "certain related procedural and evidentiary rulings," to the full Commission. *See* **http://www.ftc.gov/os/adjpro/d9302/040301noticeofappeal.pdf**.

FTC Closes Its Investigation Into Caremark Rx's Acquisition of Advance PCS: By a unanimous vote, the FTC closed its antitrust investigation into Caremark Rx, Inc.'s proposed acquisition of Advance PCS. Both companies provide prescription benefit management ("PBM") services. According to a statement from the Commissioners outlining the reasons for closing the investigation, the Commissioners felt that large employers would not encounter anticompetitive effects, as there would be continued competition from multiple sources, including "the remaining independent, full-service PBMs with national scope" and "several health plans and several retail pharmacy chains offering PBM services." In addition, the Commissioners found that the transaction did not confer monopsony or oligopsony power, as "[a]t most, the acquisition is likely to increase the bargaining power of the merged PBM." For a copy of the FTC's statement, *see* **http://www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf**.

Pharmaceutical Agreement Notification Filing Requirements: In accordance with the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, beginning on January 7, 2004, agreements between brand-name and generic pharmaceutical companies regarding the manufacture, marketing and sale of generic versions of brand-name drug products are required to be filed with the FTC and DOJ. Certain agreements among generic drug manufacturers with Abbreviated New Drug Applications ("ANDAs") containing so-called "Paragraph IV" patent certifications—that is, certifications required to be filed with ANDAs for proposed generic versions of drugs that are covered by outstanding patents, *see* 21 U.S.C. § 355(j)—must also be filed. Generally, only those agreements executed on or after January 7, 2004, must be filed. For more information, *see* **http://www.ftc.gov/opa/2004/01/fyi0403.htm** and **http://www.ftc.gov/os/2004/01/040106pharmrules.pdf**.

Interlocking Directorate Threshold: The FTC has announced the annual change in the two threshold figures that define when it is unlawful for an individual to serve as an officer or director of two or more competing corporations. These thresholds are modified annually to match percentage changes in the U.S. Gross National Product. Under the new thresholds, effective immediately, Section 8 of the Clayton Act (15 U.S.C. § 19) will apply to such arrangements (with certain exceptions) if each of two companies has capital, surplus and undivided profits in excess of $20,090,000, and the competitive sales of each corporation exceed $2,009,000. Interlocking directorates above these thresholds will be challenged as illegal. For the text of the FTC's *Federal Register* notice, *see* **http://www.ftc.gov/os/2004/01/040116frnclaytonact.pdf**.

Criminal Enforcement Recap: The DOJ's Antitrust Division has just issued its recap of its criminal enforcement efforts. Interesting points are the increasing penalties, increasing cooperation with foreign authorities, and a new practice of using Interpol to harass indicted individuals who stay outside the United States. For more information, *see* **http://www.usdoj.gov/atr/public/guidelines/202531.htm**.

DOJ/FTC Merger Challenge Report and Workshop: DOJ and FTC recently issued a joint report summarizing merger challenges data for fiscal years 1999 to 2003. The report contains tabulated market share and concentration levels associated with the decisions to challenge mergers in a wide range of product markets. The agencies followed the issuance of this report with a joint workshop on merger enforcement issues in Washington, D.C., on February 17-19, 2004. The agencies solicited advance input "based on economic theory, empirical analysis, business perspectives, and especially experience from actual mergers or merger investigations" on a number of issues that typically arise in horizontal merger investigations, specifically including: the "application of the hypothetical monopolist test for market definition"; "concentration, market share, and other screens"; uncommitted entry; coordinated interaction; unilateral effects; "dynamic competitive analysis"; "creation of market power on the buying side of the market"; "efficiencies issues, including non-standard efficiencies"; "non-price competition, including analysis of innovation effects"; and implementation of the Merger Guidelines' "many steps in an integrated manner." For a copy of the report and more information on the workshop, *see* **http://www.usdoj.gov/atr/public/201898.htm** and **http://www.ftc.gov/opa/2003/12/mwa.pdf**.

FTC Issues Horizontal Merger Investigation Data: The FTC has released a staff analysis of horizontal merger investigations for fiscal years 1996 to 2003. The merger data released contain tabulated market share and concentration levels associated with the FTC's investigations in more than 780 markets over the last eight years. The data tabulations use the two market share concentration statistics described in the FTC/DOJ Horizontal Merger Guidelines—the post-merger Herfindahl-Hirschman Index ("HHI") and the change in the HHI (see U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* §§ 1.5, 1.51 (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,573-5 to 20,573-6, *available at* **http://www.ftc.gov/bc/docs/horizmer.htm**)—and reflect 151 horizontal merger investigations in total. To view the FTC report, *see* **http://www.ftc.gov/os/2004/02/040202horizmergereffects.pdf**.

DOJ Perspectives on International Antitrust Enforcement: In a speech late last year on DOJ perspectives on international antitrust enforcement, Deputy Assistant Attorney General Makan Delrahim took aim at situations where foreign plaintiffs seek recovery for damages that they have suffered outside of the flow of U.S. commerce. It is clear from the speech that the DOJ position will remain that plaintiffs' claims in antitrust suits in the United States should arise from domestic effects. DOJ is concerned over the possibility of an influx of lawsuits from foreign plaintiffs who claim antitrust injury from conduct outside the United States. Mr. Delrahim suggests that these suits could affect principles of comity and undercut U.S. criminal enforcement. For more information, *see* **http://www.usdoj.gov/atr/public/speeches/201509.htm**.

Indirect Purchaser Scorecard

Nebraska Supreme Court Reverses Direction, Narrowly Affirms Indirect Purchaser Standing Under State Antitrust Law

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The Nebraska Supreme Court, by a narrow voting plurality, recently interpreted language in Nebraska's antitrust statute that parallels and was based on the federal Sherman Act to permit lawsuits by indirect purchasers, notwithstanding the statute's mandate that it be interpreted consistently with federal interpretations of similar federal laws. According to the court plurality, the provision of Nebraska's Consumer Protection Act that creates a private right of action to recover actual damages for alleged antitrust violations (Neb. Rev. Stat. § 59-1609) "permits indirect purchasers to bring a civil action under the terms of the Act," even though its language parallels that of the federal Clayton Act that the U.S. Supreme Court has construed not to permit antitrust recovery by indirect purchasers, and even though the Nebraska statute at the time of suit contained no provision expressly "repealing" the federal indirect purchaser rule by explicitly granting indirect purchasers a right of action under the state statute. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (Neb. 2004) (Wright, J.).

The March 19, 2004 decision arose in one of the many state class actions filed against Microsoft Corporation ("Microsoft") in the wake of the federal monopolization case prosecuted by the U.S. Department of Justice. As has been common in these cases, two plaintiffs—one that claimed it purchased a personal computer on which Microsoft's Windows operating system software had been pre-installed and another claiming to have purchased Windows software from a retail vendor—filed a monopolization action against Microsoft under state law on behalf of a purported class of "end-user licensees of Windows 98 residing in" the state. 676 N.W.2d at 32. The district court sustained Microsoft's demurrer based on a combination of the state antitrust statute's harmonization provision and the U.S. Supreme Court decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In *Illinois Brick*, the Supreme Court interpreted the language of Section 4 of the Clayton Act, which authorizes a private antitrust cause of action by a person "injured in his business or property," to convey a right of action only on persons purchasing directly from the antitrust defendant and not from others further removed in the chain of manufacture or distribution. The Nebraska district court applied this indirect purchaser rule to dismiss plaintiffs' end-payer claims under state antitrust law. On appeal, an evenly divided Nebraska Supreme Court affirmed the dismissal in a June 25, 2003 memorandum opinion, but thereafter granted plaintiffs' motion for rehearing. The court's March 2004 decision followed this rehearing.

Writing for the four-judge plurality, Associate Justice John F. Wright noted the similarity of Nebraska's monopolization section (Neb. Rev. Stat. § 59-1604) and private right of action provision (Neb. Rev. Stat. § 59-1609) to their federal counterparts in Section 2 of the Sherman Act (15 U.S.C. § 2) and Section 4 of the Clayton Act (15 U.S.C. § 15), respectively; the mandate of Neb. Rev. Stat. § 59-829 that "[w]hen . . . any provision of" Nebraska's antitrust statute, the Consumer Protection Act, "is the same as or similar to the language of a federal antitrust law, the courts of this state in construing" any such provision "shall follow the construction given to the federal law by the federal courts"; and the rule that appellate courts construing statutory language are to give such language "its plain and ordinary meaning." 676 N.W.2d at 33, 35. The plurality then declined to apply the plain and ordinary meaning of the harmonization provision because it concluded "that if this court were to construe the provisions of the Act such that only direct purchasers are injured parties, then the purposes of the Act would be defeated," a result, in the judgment of the plurality, not mandated by the harmonization provision. *Id*. at 35. Rather than be guided by the plain language adopted by the Nebraska Legislature or principles of statutory construction normally applied by Nebraska courts, the plurality embraced reasoning of the Iowa Supreme Court, interpreting very different language in Iowa's antitrust statute, to conclude that the statutory harmonization mandate only required that the *conduct* proscribed by state antitrust law—not the class of authorized litigants—be consistent with federal law. *Id*. at 36-38 (citing *Comes v. Microsoft Corp*., 646 N.W.2d 440 (Iowa 2002)); *compare id*. at 39-40, 41 (Stephan, J., dissenting).

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 **http://www.shb.com** or by clicking on the link accompanying the citation to the article below:

James R. Eiszner, *Antitrust is Not "Crumbs,"* in *Inside the Minds: Winning Antitrust Strategies—Leading Attorneys on Mastering the Laws that Regulate, Promote & Protect Competition* 81 (Michaela Falls ed., 2004). **[click here]**

Scott C. Nehrbass and Matthew C. Miller, *The Availability of the "Full Consideration" Remedy to Indirect Purchasers Under the Kansas Restraint of Trade Act*, KADC Legal Letter (Kan. Ass'n of Defense Counsel, Topeka, Kan.), Winter 2004, at 11, 11-13. **[click here]**

Joseph M. Rebein and Cary Silverman, *Derail the "Runaway Jury" By Promoting Jury Service Within Corporate America: Employers Should Support Jury Service—Here Is How*, The Metropolitan Corporate Counsel, Nov. 2003, at 46. **[click here]**

Joseph G. Matye, *Exclusive Dealing With Distributors—United States v. Dentsply Int'l, Inc.* (published on ABA Antitrust Section, Sherman Act Section 1 Committee listserv Oct. 8, 2003). **[click here]**

Joseph M. Rebein and Laurie A. Novion, *Effective Use of Experts: From Class Issues to Damages,* in *D&O and E&O Liability: The New Environment* (Defense Research Inst. June 19-20, 2003). **[click here]**

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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.

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