

Tenth Circuit Affirms Dismissal of Predatory Pricing Suit Against American Airlines

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On July 3, 2003, a panel of the Tenth U.S. Circuit Court of Appeals affirmed a district court's decision to dismiss a predatory pricing action filed by the United States Department of Justice against AMR Corporation, the parent corporation of American Airlines ("American"). Applying established principles for the evaluation of predation and other exclusionary conduct claims under Section 2 of the Sherman Act, the unanimous panel determined that the government's failure to demonstrate below-cost pricing by American in setting its competitive fares was fatal to the government's predatory pricing claim. *United States v. AMR Corp.*, No. 01-3202, 2003 WL 21513205 (10th Cir. July 3, 2003) (Lucero, J.).

The Department of Justice's antitrust allegations centered on American's conduct in competing with several low-cost carriers ("LCCs") on various airline routes out of American's hub in Dallas/Ft. Worth ("DFW") in the mid to late 1990s. The allegations focused on four routes between American's hub at DFW and each of: Wichita, Kansas; Kansas City, Missouri; Long Beach, California; and Colorado Springs, Colorado. When initiating service on these routes out of DFW, the LCCs charged lower fares than American did. As a result, American lowered its fares to match those of the LCCs. Substantially increased customer demand soon followed these price reductions. American met this customer demand by adding flights to each of the four disputed routes.

By giving air travelers the option of flying a more established carrier at the same price as an upstart LCC, American avoided losing additional market share on each of these routes. Each LCC, as a result, was unable to establish any foothold on these DFW routes, and each substantially diminished its operations or withdrew from the disputed routes.

The Department of Justice challenged American's conduct, arguing that American engaged in predatory conduct through its pricing and capacity additions. It alleged that American's actions in meeting this competition on price violated Section 2 of the Sherman Act as a scheme to monopolize or an attempt to monopolize each of the four routes in question.

Opening Skirmish in the District Court:

American, which was assisted in its defense by Shook, Hardy & Bacon, moved for summary judgment in the U.S. District Court for the District of Kansas. Guided by the Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), American argued that, on each of the four routes in question, American did not price below an appropriate measure of cost and that it would not be able to recoup any losses it suffered through its price-matching by instituting supracompetitive fares on the four routes once the LCCs abandoned service on them. In this instance, American argued that the court should determine American's "appropriate measure of costs" by looking at American's average variable costs on each of the four routes in question.

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American also argued that it was entitled to summary judgment because it never *undercut* the pricing of its LCC competitors, but only *matched* the prices of the carriers. Because of the price-matching, American asked the district court to extend the “meeting competition” defense found in the Robinson-Patman Act to Sherman Act claims involving predatory pricing and find that American’s conduct was permissible.

The district court agreed with American’s arguments and dismissed the case. The Department of Justice had attempted to show that American’s pricing fell below its incremental costs—costs associated with adding flights, or capacity, to each of the four routes in question. The Department even created four different incremental cost tests which it contended showed that American priced below its costs. This was a new approach, one that did not focus on generally accepted tests for predatory pricing. The district court rejected each test—which, the court concluded, “appear to have been created solely for the purpose of rescuing the government’s claims in the present action”—and ruled that American’s pricing did not fall below its average variable costs on its routes. *United States v. AMR Corp.*, 140 F. Supp. 2d 1141, 1200-04 (D. Kan. 2001) (Marten, J.).

The district court also found it unlikely that American would be able to recoup any short-term losses through the employment of supracompetitive pricing. *Id.* at 1208-15. Furthermore, the trial court accepted American’s request to extend the “meeting competition” defense to Sherman Act pricing claims. Because American only “matched” LCC pricing, it did not violate the antitrust laws, “since the evidence establishes that American’s conduct—meeting the competition’s prices—is precisely the sort of activity the antitrust laws are intended to encourage.” *Id.* at 1204-08.

In a pointed conclusion, the district court noted:

The government’s theory - that an established competitor should not, and indeed, cannot deviate from its existing market strategy in the face of aggressive price cutting by a new entrant—represents a whole new mid-game spin on time-honored rules. Here American played by the traditional rules. It competed with the low fare carriers on their own terms. It did not price its fares below cost; it did not undercut the other carriers’ fares. There is no doubt that American may be a difficult, vigorous, even brutal competitor. But here, it engaged only in bare, but not brass, knuckle competition.

Id. at 1218-19.

The Government’s Tenth Circuit Appeal: The Department of Justice appealed the district court’s decision to the Tenth Circuit, arguing that capacity predation was different than price predation and that incremental costs, not variable costs, were the appropriate test for predation.

The decision of the Tenth Circuit panel did not tarry long over the Department’s novel theories. The panel rejected the Department’s arguments and affirmed the decision of the district court. It held that capacity predation must be judged under the same standards as applied to predatory pricing. With respect to the government’s four incremental revenue tests, it held that those tests were:

invalid as a matter of law, fatally flawed in their application, and fundamentally unreliable. Because it is uncontested that American did not price below [average variable cost] for any route as a whole, we agree with the district court’s conclusion that the government has not succeeded in establishing the first element of *Brooke Group*, pricing below an appropriate measure of cost.

2003 WL 21513205, at *8.

As the Tenth Circuit panel ruled that American's pricing did not fall below an appropriate level of cost, it declined to determine whether American had the ability to charge supracompetitive prices after the LLCs abandoned the routes in question, which its above-cost pricing conclusion rendered "unnecessary." *Id.* It did, however, specifically refuse to endorse a "meeting competition" defense for Sherman Act predatory pricing claims because the Sherman Act does not expressly provide such a defense and the Supreme Court of the United States has yet to rule on this issue. *Id.* at *8 n.15. The panel summed up the key principles guiding its decision when it concluded: "Given the exceedingly thin line between vigorous price competition and predatory pricing, the balance the Supreme Court has struck in *Brooke Group*, and the fatally flawed nature of the alternative pricing proxies proffered by the government, we conclude that summary judgment in favor of American was appropriate." *Id.* (citation omitted).

Lessons Learned: The decision is notable for several reasons. First, the *AMR* decision stands in stark contrast to the vast majority of predatory pricing decisions: The Tenth Circuit based its decision on the failure of the plaintiff to show predation, rather than (as in most cases) the plaintiff's failure to show any realistic prospect for recoupment of predatory losses. Indeed, given the state of the airline industry, one would have expected the recoupment issue to have been outcome-determinative. Second, the decision is significant because it recognizes both that flexibility in the cost standard for showing predation is needed to reach instances of true predation and that courts must be careful to scrutinize the plaintiff's proposed cost standard to ensure that legitimate competition is not wrongly condemned. In *AMR*, the Tenth Circuit declined to find predation based on *AMR*'s alleged failure to maximize short-term profits by capacity additions, finding that use of a short-term profit maximization test would "lead to a strangling of competition, as it would condemn nearly all output expansions, and harm to consumers." *Id.* at *7.

State Farm v. Campbell and Antitrust Remedies

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Federal and state courts have begun interpreting and applying the U.S. Supreme Court's April 7, 2003 decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003) (Kennedy, J.) ("*State Farm*"), in setting the amount of punitive damage awards. Because federal and most state antitrust laws provide treble damage remedies in lieu of punitive damages, the *State Farm* decision may not have direct applicability in antitrust cases. Recently, however, the addition of new theories of recovery and the increase in multi-party litigation has significantly increased the potential punishment for antitrust defendants. This increased risk may spur defendants to use the principles articulated in *State Farm* to argue that antitrust remedies imposed in certain cases violate due process.

A multiplicity of potentially duplicative remedies exists for a potential antitrust violation. The government may seek criminal fines equal to double the gain or double the loss emanating from the alleged violation. Class action plaintiffs may seek treble damages on behalf of direct

purchasers. Classes of indirect purchasers may also seek treble damages under state law. The government—in the form of the Federal Trade Commission ("FTC") and state attorneys general—may also enter the fray on the civil side, seeking disgorgement, restitution or damages on behalf of consumers. Finally, foreign governments may also seek remedies for any wrongs they claim to have suffered, either by seeking treble damages under U.S. law in U.S. courts or by pursuing remedies available under their own competition laws in their own courts.

This "piling-on" phenomenon is well documented. One prominent critic, Judge Richard Posner of the Seventh Circuit, used the term "cluster-bomb effect" to describe "the tendency of antitrust litigation to create multiple lawsuits out of a single dispute." Richard A. Posner, "Antitrust in the New Economy," 68 Antitrust L.J. 925, 940 (2001). If anything, the potential "cluster bombs" awaiting antitrust defendants have increased in magnitude in recent years.

Multiple Liability in the Vitamins Cases: The full force of potential punishment for antitrust violations is demonstrated in the recent Vitamins Cases. See Spencer Weber Waller, “The Incoherence of Punishment in Antitrust,” 78 Chi.-Kent L. Rev. 207 (2003). Like a rugby scrum, the Vitamins defendants were hit with wave after punishing wave of sanctions for alleged antitrust violations:

- The U.S. Department of Justice investigated and prosecuted bulk vitamin manufacturers in the late 1990s. All of the corporate defendants pleaded guilty to criminal price-fixing charges, and total U.S. criminal fines on all the defendants exceeded \$1 billion.
- Private classes of direct purchasers sued the defendants in lawsuits that were consolidated in a multidistrict class action in the District of Columbia. Several of the defendants entered into a settlement in which they agreed to pay over \$1 billion in damages and class counsel fees. *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 255 (D.D.C. 2002). Even that did not bring complete peace to defendants, as several hundred direct purchasers opted out of the class settlement to pursue remedies on their own.
- The defendants were also sued by classes of indirect purchasers based on the same allegations that underlay the federal actions. For the most part, these were filed in state courts and based on state laws that allow indirect purchaser claims. (Although some state antitrust laws providing for indirect purchaser recovery direct courts to avoid duplicative recovery, those directives often have been interpreted in such a way as not to afford any real protection for defendants nor any real restraint on courts or plaintiffs.) State attorneys general also filed suit, and defendants entered into proposed settlement agreements totaling \$340 million with the attorneys general of 22 states, Puerto Rico, and the District of Columbia. The settlement funds are intended to compensate individuals and businesses in those states, as well as state governments.
- Finally, these same defendants were subject to government litigation outside the United States. In Europe alone, the defendants were fined nearly one billion euros (about US\$870 million at current exchange rates). Even after the government fines and private settlements have been paid, these defendants continue to face litigation by opt-outs and non-settling plaintiffs.

Although the exact amount of damages in this series of cases is unknown, it is safe to conclude that these defendants will pay more than treble damages in private settlements, not counting government fines. The fact that these amounts were paid by settlement suggests that defendants faced even greater potential liability in litigation.

“Piling-On” in a Purely Civil Matter—The Mylan Experience: It could be argued that the Vitamins Cases, because of the defendants’ criminal guilty pleas, are not representative of potential liability for antitrust defendants in purely civil actions. Recent cases suggest, however, that the “piling-on” phenomenon, by both private and government litigants, occurs even when criminal charges are not brought. A good example is the recent litigation against Mylan Laboratories, Inc. (“Mylan”).

Mylan and other defendants were sued by multiple plaintiffs alleging that Mylan monopolized the production of two prescription drugs by obtaining exclusive rights over supply of their key ingredients, and then raising the price of each drug by as much as 1,900 percent. Plaintiffs included the Federal Trade Commission, 32 states, the District of Columbia, and a number of private direct and indirect purchaser classes.

Perhaps the most significant aspect of the *Mylan* case was the FTC’s decision to seek equitable relief on behalf of consumers in the form of disgorgement in an amount exceeding \$120 million. While the FTC’s authority to seek such relief has been questioned, it was upheld by the district court. See *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 35-37 (D.D.C. 1999) (holding that the FTC could maintain an action for a permanent injunction and disgorgement under Section 13(b) of the FTC Act). The district court later held that most of the state attorneys general who had joined the case also possess

the authority to seek such equitable relief by reason of their states' "Baby FTC Acts." See *FTC v. Mylan Labs., Inc.*, 99 F. Supp. 2d 1 (D.D.C. 1999). Mylan then entered into a settlement agreement with the FTC which included all 50 states and the District of Columbia (on behalf of consumers and state agencies), and classes of other indirect purchasers comprising third-party payers such as insurance companies, under which Mylan agreed to pay \$147 million to settle the suits. See *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369 (D.D.C. 2002) (approving settlement).

This settlement, however, did not end the litigation for Mylan and its co-defendants. Additional private actions were filed in federal and state courts around the country asserting the same claims as those in the FTC and state actions. See *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1 (D.D.C. 2002). The most significant group of plaintiffs comprised classes of direct purchasers seeking treble damages under the Clayton Act. Defendants, who had already paid to settle the FTC and states' claims for disgorgement, moved to dismiss the direct purchaser actions on the grounds that the direct purchaser plaintiffs lacked standing. Defendants urged the court to find an exception to the direct purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In this case, defendants argued, where the FTC commenced an action for disgorgement under Section 13(b) of the FTC Act, the purchasers for whose benefit the FTC brought its Section 13(b) action should also be regarded as "injured parties" for purposes of seeking potential treble damages under Section 4 of the Clayton Act. *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 19 (D.D.C. 2001). The district court, while recognizing the risk of duplicative recovery because the FTC had sought, and would recover through settlement, the same alleged overcharge underlying the private direct purchaser actions, held that such risk was insufficient to defeat standing for the direct purchaser plaintiffs. *Id.* at 20.

The State Farm Rejoinder to Cumulating Antitrust Remedies:

The Vitamins and Mylan cases demonstrate that the current array of available remedies exposes antitrust defendants to judgments well in excess of three times actual damages. While not "punitive damages" in the traditional sense, there is no doubt that this remedy scheme can be punitive in nature, even when criminal penalties do not apply. This may open the door for an antitrust defendant in the right case to make a due process challenge similar to that made in the *State Farm* case.

In its six-to-three decision, the Supreme Court in *State Farm* avoided setting any bright-line rules for courts evaluating punitive damage awards against due process standards. In the underlying case, the trial court had reduced the damages awarded by the jury to \$1 million in compensatory damages and \$25 million in punitive damages. On appeal, the Utah Supreme Court reinstated the jury's \$145 million punitive damages award. While the U.S. Supreme Court held that the punitive damages award was excessive and violated the Due Process Clause of the Fourteenth Amendment, it declined to set a bright-line limit for the ratio of punitive-to-actual damages. Nevertheless, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 123 S. Ct. at 1524. The Court further stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

Whether this dicta in the *State Farm* opinion will provide an antitrust defendant with an argument that a damage award in a particular case violates due process standards remains to be seen. Ironically, the very phenomenon that would give rise to such a challenge—the high risk of duplicative recovery—also serves to force many defendants into settlement, thus making such a challenge impossible. At a minimum, the *State Farm* opinion may provide additional ammunition for those advocating reform of the current system of overlapping antitrust remedies. It may also provide some form of leverage to antitrust defendants in negotiating the dollar value of settlements in litigation that, if taken to judgment, might otherwise be susceptible to a *State Farm* challenge.

Application of the FTC's Economic Analyses of Coordinated Effects From a Merger to Economic Proof of Collusion in Price-Fixing Litigation

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Existence of a combination or conspiracy among competitors in price-fixing litigation may be proved by either direct or circumstantial evidence sufficient to support a "finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Often, there is no direct evidence of collusion. In cases where there is no direct evidence of an agreement to fix prices, plaintiffs must rely on circumstantial evidence of collusion, such as empirical analyses of market conditions.

In a recent presentation on "Empirical Analyses of Potential Coordinated Effects from a Merger," Mary T. Coleman, Deputy Director for Antitrust of the Bureau of Economics at the U.S. Federal Trade Commission ("FTC"), identified several analytical tools that the FTC uses to evaluate the likelihood of collusion—i.e., coordinated interaction—in an industry in which a merger is occurring or proposed. (For more information on Ms. Coleman's presentation, see <http://www.ftc.gov/be/seminardocs/gmucoleman.pdf>.) Much of the presentation is relevant to issues concerning economic proof of collusion in the context of price-fixing, and the economic analyses described in the presentation may provide guidance on how to show or refute collusion in price-fixing litigation.

The FTC considers several broad categories of economic information when testing for coordinated interaction in its merger analysis: (1) pricing across customers; (2) price movement across competitors; (3) output, capacity and customer shares; (4) new product introductions; and (5) market transparency and simplicity. These five categories, along with related analytical methods for evaluating the likelihood of collusion—in merger analysis as well as price-

fixing litigation—are discussed below. An understanding of these categories and methods is important because, as the current leadership of the FTC's Bureau of Economics has emphasized, "the potential for coordinated effects" is the subject of a "renewed focus" and "is currently regaining importance at the antitrust agencies." The FTC in particular seems to have identified as a priority the remedying of a perceived retardation of "progress...in developing implementable empirical analyses relevant to assessing whether coordinated effects are likely to be created or enhanced as a result of" analyzed conduct, as compared to some other theories of antitrust economics. See David T. Scheffman & Mary T. Coleman, *Current Economic Issues at the FTC*, at 6-7 (2003), at <http://www.ftc.gov/be/hilites/riofinal.pdf>.

Pricing Across Customers

An analysis of pricing across customers centers on price variability among customers at a single point in time and over time. For instance, in a recent investigation involving an industrial products industry, the FTC sorted one competitor's customers into two groups by size (top 10 and top 25) for each end-use segment. For each group, the FTC then calculated the difference between the high average cost and low average cost and expressed that difference as a percentage of the weighted average price within the group. Based on that analysis, the FTC concluded that substantial price variation existed even among customers of similar size and end-use.

Even where price variation exists, a determination of whether the variability is “systematic” may have an impact on economic proof of collusion. For instance, a party may want to identify an event such as a list price change and compare the change in prices paid by each customer from the announcement to three months after the announcement. Non-systematic changes across customers during the three-month period may be evidence of non-coordinated, non-collusive behavior.

Price Movement Across Competitors

An economic analysis of price movement across competitors is another method of evaluating alleged collusion among competitors. In the context of merger analysis, the FTC considers whether price movements are common among competitors. It also looks for stable relative pricing among competitors. For example, in its analysis of competition in the cruise line industry, the FTC considered the prices paid by passengers, the cabin they sailed in, and when they booked passage relative to the voyage for competing ships sailing from the same port in the same week and with similar itineraries. The results of that analysis were used to evaluate competitors’ prices for comparable goods at specific points in time and over a period of time. See, e.g., Mary T. Coleman, David W. Meyer & David T. Scheffman, *Empirical Analyses of Potential Competitive Effects of a Horizontal Merger: The FTC’s Cruise Ships Mergers Investigation*, at 19-27 (2003), at <http://www.ftc.gov/be/riocruise0703.pdf>.

Transaction level data also may be used to compare a competitor’s list price to the actual prices paid by its customers. Whether competitors are systematically following list prices or instead are negotiating lower than list prices on a transaction-by-transaction basis is relevant to an evaluation of the likelihood of collusion. Moreover, where list prices continue to rise but actual transaction prices do not, facts that first appear to provide evidence of collusion (*i.e.*, rising list prices), may—after economic analysis—actually refute allegations of collusion (*i.e.*, flat actual prices).

Testing for systematic relationships between early and late transaction prices is another method to detect price differences across competitors. Again, the FTC’s analysis of coordinated effects in the cruise line industry provides

an illustration of this analytical technique. There, the FTC determined for each sailing the percentage difference in average prices paid for cabins on a particular cruise before and after 120 days to sailing. The distribution of these percentages was then compared to the distribution for other, similar sailings to test for any systematic relationship between early and late prices across competing cruise lines. See, e.g., *id.* at 26-27.

Output, Capacity and Customer Share Trends

Output, capacity and customer share trends may also provide evidence supporting or refuting collusion. Stability in competitors’ respective production capacity and output shares may indicate output agreements. Similarly, low customer turnover—low incidence of switching between competing producers—may provide circumstantial evidence tending to support characterization of an agreement as a market division agreement.

To test customer turnover, the FTC, in the context of merger analysis, may analyze the amount of sales volume gained or lost with particular customers, and to whom or from whom the sales volume was lost or gained. This analytical tool also may be relevant to an evaluation of the likelihood of collusion in price-fixing litigation.

Quantifying the volatility of capacity changes may also indicate the existence or absence of collusion. Such an analysis requires an examination of the subject industry’s growth and each competitor’s growth for a given period. The share of overall industry capacity growth for each competitor can then be compared, including the timing and size of each competitor’s expansion.

New Product Introductions

While not always susceptible to concrete empirical analysis, the FTC will consider new product introductions to the market when testing for coordinated interaction in its merger analysis. Frequent new product introductions that impact competitors’ sales revenue are indicators of healthy competition and the absence of collusion among competitors. This technique may also help refute allegations of collusion in the context of price-fixing claims.

Market Transparency and Simplicity

The FTC also considers the transparency and simplicity of the subject market in its analysis of possible coordinated interaction among competitors in the context of merger analysis, and this type of analysis may be equally applicable to an examination of allegations of collusion in price-fixing litigation. Competitors' ability to coordinate, detect each others' variation from any agreement, and punish such variations are enhanced when market transparency exists—*i.e.*, competitors can easily detect each others' prices, output and capacity, and identify which competitor is servicing a particular customer.

Price transparency analysis includes comparing actual price levels with competitors' estimates of those price levels. For instance, did competitor X over- or under-estimate the prices competitors Y or Z charged common customers? If so, how often and by what percentage did competitor X over- or under-estimate those prices? Pricing variability across customers may also yield information about the transparency of a particular market's prices.

Volume transparency is tested by similar methods. A company's in-house estimates may be compared to actual values of competitors' volume of business with common customers. Under this analysis, one can then examine whether competitor X correctly estimated which

customers were supplied by competitors Y and Z and whether competitor X correctly estimated the volume of business Y and Z supplied to particular customers.

As noted, coordinated interaction, or collusion, also may be a function of the simplicity of the market. Product variation in the market and systematic price relationships among those products indicate the level of simplicity or complexity. Simplicity can also be gauged by the degree of variability in demand or cost conditions in the market and the role of new product introductions.

As this summary demonstrates, while Ms. Coleman's presentation focuses on analytical methods and empirical analyses used by the FTC to evaluate the likelihood of coordinated interaction in an industry where a merger is occurring, the empirical methods that are discussed also provide guidance on establishing or refuting collusion in price-fixing cases. Given the FTC's interest in developing this area of economic analysis, presentations such as this may only be the beginning of a robust debate in both the economic literature and the courts as the enforcement agencies continue to devote resources to this relatively underdeveloped area of analysis. As that process continues, it may not be long before this analysis and debate transcend merger review to other areas of antitrust analysis.

Third Circuit *En Banc* Affirms Antitrust Liability for Allegedly Exclusionary But Economically Rational Behavior

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"[O]nly in the rarest of circumstances'...should [an appellate court] countenance the drain on judicial resources, the expense and delay for the litigants, and the high risk of a multiplicity of opinions offering no authoritative guidance, that full circuit rehearing of a freshly-decided case entails." *Air Line Pilots Ass'n, Int'l v. Eastern Air Lines, Inc.*, 863 F.2d 891, 925 (D.C. Cir. 1988) (Ruth Bader Ginsburg, J., concurring). The Third Circuit found that an appeal of a monopolization claim against Minnesota Mining and Manufacturing Company ("3M") by a leading

manufacturer of "second-tier" or "private label" transparent tape, LePage's Incorporated ("LePage's"), presented just such a circumstance. On March 25, 2003, in a 7 to 3 decision, the Third Circuit, sitting *en banc*, vacated a divided panel decision that had dismissed a jury verdict in favor of LePage's on its monopolization claims, and reinstated a \$68,486,697 judgment against 3M on those claims. *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (*en banc*) (Sloviter, J.).

The decision is important for more than the size of the judgment awarded by the court. In affirming that judgment, the *en banc* majority held that conduct (specifically, certain rebate, discount and related programs) by 3M that the court found to be exclusionary and without business justification was sufficient to demonstrate the willful acquisition or maintenance of monopoly power that is condemned by Section 2 of the Sherman Act, despite the fact that 3M never priced its monopoly product (transparent tape) below any measure of its costs. In so holding, the court departed sharply from judicial precedent that strongly suggested that above-cost pricing behavior could not form the basis of an antitrust claim. The court's decision also ignored scholarly criticism of the use of above-cost pricing as a basis for antitrust liability, including the suggestion that liability predicated on above-cost pricing merely punishes competition on the merits, places too much importance on intent rather than cost in evaluating aggressively competitive behavior, and thus promotes bad antitrust policy. If left undisturbed, the effect of the majority's decision may be magnified by the fact that monopolization law is arguably less developed than other areas of antitrust law—as the court itself acknowledged, Section 2 “may have received less judicial and scholarly attention than several of the other more frequently invoked antitrust provisions.” For all of these reasons, the Third Circuit's *en banc* decision demands the attention of any company with market power that uses programs such as rebates or market share discounts to retain customer loyalty.

The Alleged Exclusionary Practices at Issue:

At the heart of the dispute were rebate programs instituted by 3M after LePage's entry into the transparent tape market. Some of these programs tied (or “bundled”) rebates for a variety of unrelated 3M products to rebates received with respect to sales of 3M's transparent tape products, while some of the 3M rebate or discount programs were alleged to have the effect of excluding LePage's from doing business with large distributors that received 3M rebates.

The 3M rebate programs—originally, its “Executive Growth Fund,” later renamed the “Partnership Growth Fund”—provided qualifying participating customers rebates or discounts that the court found to be “substantial” (for major retail chain stores such as K-Mart, Wal-Mart, Sam's Club and Target, the annual rebates totaled anywhere from slightly less than a half million dollars to more than \$1.5 million), the size of which depended upon the extent to which 3M's customers met target growth rates set by 3M for six different 3M product lines (Health Care Products, Home Care Products, Home Improvement Products, Stationery Products, Retail Auto Products and Leisure Time). The court noted that “[t]he size of the rebate was linked to the number of product lines in which targets were met, and the number of targets met by the buyer determined the rebate it would receive on all of its purchases,” thus “creat[ing] a substantial incentive for each customer to meet the targets across all product lines to maximize its rebates.”

In addition, the court found that 3M used its rebate and discount programs to create exclusive dealing arrangements with the large retail-store customers for which 3M and LePage's competed to distribute their transparent tape products. LePage's had alleged that 3M had offered large lump-sum cash payments, promotional allowances and cash incentives as an inducement to woo them away from LePage's and to enter into exclusive dealing arrangements with 3M. Although 3M disputed the allegation that its discount programs mandated exclusive dealing by its customers, arguing that only its agreements with small market players Venture and Pamida expressly “conditioned discounts on exclusivity,” the Third Circuit majority appeared to accept LePage's argument that the rebates that 3M offered to certain large retail chains “were designed to induce them to award business to 3M to the exclusion of LePage's” and that some of the rebate programs offered “all-or-nothing” discounts to participants. The rich financial rewards to customers that were able to meet their quotas across the various 3M product lines encouraged exclusive dealing by offering both a carrot (maximizing the substantial discounts available to participating customers) and a stick (the fear of “being severely penalized financially for failing to meet their quota in a single product line”) to the large retail distributors.

The Narrowing of the Issues on Appeal:

LePage's originally filed suit in the U.S. District Court for the Eastern District of Pennsylvania, alleging violations of Sections 1 and 2 of the Sherman Act (for allegedly unlawful agreements in restraint of trade and for monopolization and attempted monopolization, respectively) and Section 3 of the Clayton Act (alleging unlawful exclusive dealing). A jury rejected LePage's Section 1 and Clayton Act claims, but awarded LePage's almost \$23 million in actual damages on its monopolization and attempted monopolization claims, which (even after granting 3M's motion for judgment as a matter of law dismissing LePage's "attempted maintenance of monopoly power" claim) the district court trebled for an award of \$68,486,697, plus interest. On appeal, a Third Circuit panel reversed the district court's judgment on LePage's monopolization claims in a 2-to-1 decision.

When LePage's Section 2 claims reached the full Third Circuit bench for rehearing *en banc*, a number of issues that normally occupy courts in monopolization cases had been removed from the case by stipulation. Among other things, the parties had agreed on the relevant product and geographic markets (the United States market for transparent tape), 3M had conceded that it possessed monopoly power in this market (by virtue of its approximately 90 percent market share), 3M acknowledged that it offered bundled rebates through its rebate and discount programs and that it had entered into some expressly exclusive contracts with a few retail-store customers, and 3M had apparently conceded from the time of trial that any lost profits incurred as a result of its rebate programs could later be recouped in the event that private-label competition ceased to exist. In addition, LePage's did not challenge 3M's assertion that, under any methodology for calculating costs, 3M had never priced its transparent tape products below cost.

With these issues conceded, the court's focus was sharpened to what would become the most important issue decided in the case. In the court's words, that issue was whether 3M took steps willfully to maintain its monopoly power in the U.S. transparent tape market in violation of Section 2 of the Sherman Act. *See generally United States v. Grinnell Corp.*, 384 U.S. 563,

570-71 (1966) (stating that a violation of Sherman Act Section 2 requires a showing of (1) possession of monopoly power in a relevant market and (2) willful acquisition or maintenance of that power). As 3M framed it, the issue centered on whether conduct by a monopolist that prices and sells its product above cost can ever amount to monopolization in violation of Section 2 as a matter of law.

The Third Circuit's De-Coupling of Below-Cost Pricing from Unlawful Exclusionary Conduct:

A decade ago, the U.S. Supreme Court held that a successful predatory pricing claim under Section 2 of the Sherman Act required a showing both that (1) a rival's low prices that are alleged to cause competitive injury "are below an appropriate measure of its rival's costs" and (2) "the competitor had a reasonable prospect . . . of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993). The Court noted that it had previously rejected "the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws." *Id.* at 223.

Striking a similar chord, the U.S. Department of Justice and the Federal Trade Commission have recently observed that the "decisions of a seller, even a monopolist, regarding to whom it will sell, on what terms, and under what sort of quality and purchaser-satisfaction measures, generally reflect its own assessment of how to compete and provide goods most effectively in the marketplace," and suggested that when a monopolist's conduct "make[s] business sense apart from exclusionary consequences, antitrust law should avoid interfering with such business choices." Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, Case No. 02-682 (filed May 27, 2003).

Courts and commentators have explained why above-cost pricing does not provide a basis for antitrust liability, suggesting (among other things) that any effect of above-cost pricing on competitors likely derives from the monopolist's lower cost structure and thus represents competition on the merits that benefits consumers

rather than predatory conduct that threatens competition. *Brooke Group*, 509 U.S. at 223. “[T]he judicial decisions acknowledging the possibility of unlawful prices that are above average total cost err in placing undue reliance on intent rather than cost,” with the result that they consistently “limit” unreasonably the ability of dominant, efficient firms to compete aggressively.” III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 737a, at 394 (2d ed. 2002). Moreover, as a practical matter, “the exclusionary effect of prices above a relevant measure of cost...is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.” *Brooke Group*, 509 U.S. at 223.

Relying heavily on *Brooke Group*, 3M maintained that above-cost pricing can never form the basis for antitrust liability as a matter of law. The *en banc* majority disagreed. Moving from the panel’s lone dissenter to the author of the *en banc* court’s majority opinion, Judge Sloviter concluded from a review of Supreme Court monopolization decisions that “a monopolist’s liability under § 2” is to be “evaluated . . . by examining its exclusionary, i.e., predatory, conduct,” apparently irrespective of cost. “[N]othing that the Supreme Court has written since *Brooke Group* dilutes the Court’s consistent holdings that a monopolist will be found to violate § 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification.”

According to Judge Sloviter, *Brooke Group* did not suggest that above-cost pricing could never support an antitrust violation, but even if it did, the decision was distinguishable because it dealt with conduct in an oligopolistic market in which the conduct and pricing decisions of any oligop-

olist were constrained by the actions of others in that market. By contrast, “3M is a monopolist” possessing “unconstrained market power,” and “a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take.” Moreover, LePage’s did not press a predatory pricing claim of the type at issue in *Brooke Group*, and in any event *Brooke Group* was really a Robinson-Patman Act decision more than a Section 2 decision, the majority intimated. At bottom, because 3M possessed market power in the relevant market, the court appeared willing to apply a stricter standard than seemed to be suggested by *Brooke Group*: monopoly power plus exclusionary conduct without business justification equals monopolization, without regard to economic reality.

Postscript: 3M immediately announced plans to appeal. It won an uncontested stay of the decision until May 16, 2003, and posted an amended \$82 million supersedeas bond in early April 2003, so that it could appeal the *en banc* decision. 3M filed a petition for writ of certiorari with the U.S. Supreme Court on June 20, 2003 (petition no. 02-1865), and the Court set a July 28, 2003, deadline for submission of LePage’s response. At least one interest group, The Center for the Advancement of Capitalism, announced plans to file an *amicus* brief in support of 3M’s petition and, if the petition is granted, possibly also in support of 3M’s appeal, arguing that “LePage’s entire case is an attempt to deflect blame for their own competitive failure” and that “LePage’s never even attempted to match 3M’s price discounts, instead protesting they couldn’t possibly compete and immediately filing an antitrust lawsuit.” As a 3M press release acknowledges, the Supreme Court likely will not take up its petition until this fall.

FTC's "Pickle Merger" Challenge: The "Cellophane Fallacy," or a Revolution in Relevant Market Analysis?

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Most conduct under the antitrust laws is evaluated by applying a "rule of reason" that balances the procompetitive benefits of the challenged conduct against its anticompetitive effects. Traditional analysis of market power issues for purposes of applying the rule of reason to conduct or for evaluating a merger always depends on proper market definition. In connection with definition of relevant markets, it is often stated that, with respect to any particular restraint or merger, a properly defined product market will capture all of the products that provide sources of price constraints on the parties to the restraint or the merger. In other words, according to this wisdom, when a market is properly defined, there should be no products *outside* the market that significantly constrain the prices of products of the parties that are sold in the market.

In the last year, however, the Federal Trade Commission ("FTC" or "Commission") challenged a merger and alleged that products outside the relevant product market did provide significant constraints on the pricing of products inside the relevant market. *FTC v. Hicks, Muse, Tate & Furst Equity Fund V, L.P., et al.*, Civ. Action No. 1:02-cv-02070-RWR (D.D.C. complaint filed Oct. 23, 2003) ("*Hicks Muse*"). As a result of this novel allegation, some have called into question whether the FTC is properly applying traditional market definition principles. Such criticism may be too hasty, however, because several plausible bases for this enforcement theory that are arguably consistent with traditional market analysis may support the Commission's action.

The full impact of the FTC's action is difficult to evaluate at this time because the parties to the proposed merger abandoned the transaction after the Commission voted to challenge it, thereby mooted the FTC's enforcement action, and the Commission thereafter filed a notice of voluntary dismissal of its complaint on October 31, 2002. See *Prepared Statement of the Federal Trade Commission Before the*

Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies of the Committee on Appropriations, United States House of Representatives, at 15 & n.70 (Apr. 9, 2003), at

<http://www3.ftc.gov/os/2003/04/030409testimony.htm>. However, "[t]he FTC follows certain key

principles in setting out the agenda for its antitrust mission" when it decides to bring enforcement actions such as this, including consideration of "whether the matter presents a legal issue that might benefit from further study and illumination," and the Commission's decision to assert these complaint allegations ultimately may need to be evaluated in light of these principles and policies. Former FTC Bureau of Competition Director Joseph J. Simons, *Report from the Bureau of Competition*, Remarks before the 51st Annual ABA Antitrust Section Spring Meeting (Apr. 4, 2003), at

<http://www3.ftc.gov/speeches/other/030404simonsaba.htm>. In short, the *Hicks Muse* complaint may simply be the opening salvo in a possible shift in enforcement policy, and at the very least invites ongoing scrutiny of subsequent actions and decisions of the current Commission to see what, if any, fruit this newly planted seed may bear.

Understanding the FTC's Complaint: On October 22, 2000, a unanimous Commission voted to file a complaint in the U.S. District Court for the District of Columbia, seeking to enjoin a proposed asset acquisition involving two refrigerated pickle manufacturers, Vlastic Pickle Company (the acquiring company) and Claussen Pickle Company (the target). According to the FTC's complaint, the relevant market for analyzing the acquisition was refrigerated pickles, in which the two merging parties were the largest players. See FTC Complaint ¶¶ 11-12, 15. (The FTC's Complaint is available on the FTC's Web site at <http://www3.ftc.gov/os/2002/10/hickscmp.pdf>.)

The Commission asserted that the merger would unduly increase concentration in the market (a traditional coordinated effects approach), *id.* ¶ 15(b), and remove the acquired company's refrigerated pickles as the most significant constraint on the pricing of the acquirer's refrigerated pickles (a unilateral effects theory), *id.* ¶¶ 11-12. All of these allegations are consistent with the traditional wisdom that a relevant market includes all the significant forces that constrain the prices of the parties' products in the relevant market. But the Commission threw in a complication: "Vlasic is the leading seller of premium shelf-stable pickles, and *although its shelf-stable pickles are not in the same market as the Claussen refrigerated products*, there is sufficient substitution that Vlasic's shelf-stable pickles also operate as a competitive constraint on Claussen." *Id.* ¶ 13 (emphasis added).

This allegation of the FTC's complaint may seem clearly at odds with traditional notions of relevant market definition. But that does not mean that the FTC has abandoned proper market definition principles. First, the allegation that forces outside the relevant market constrain prices of products in the market may simply reflect that the "*Cellophane Fallacy*" is at work. The "*Cellophane Fallacy*"—which takes its name from a critique of the market power analysis in the Supreme Court's so-called *Cellophane Case* (*United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956))—provides the one exception to the general rule that product markets capture all significant price constraints. It holds that it is improper to define a relevant market by looking at the competitive constraints on a *monopolist* because a monopolist will always raise its prices until it reaches the point at which products outside the relevant market begin to take away the monopolist's sales. According to the FTC's complaint, Claussen had an 85 percent share of the relevant market. FTC Complaint ¶ 15(b). This market share was large enough to create a presumption of monopoly power. The FTC may very well have believed that Claussen might be a monopolist who raised its prices in the refrigerated pickle market until those prices were constrained by the Vlasic shelf-stable pickles that were outside the relevant market. If so, the FTC's unique allegation would be consistent with traditional market definition principles.

The FTC could also have made this rather unique allegation as a way to resolve a practical litigation problem. Relevant markets can often be described in simple terms—for example, "all automobiles" or "all operating software for personal computers." Typically, as a proposed relevant market gets more complicated in its description, the opponents of that market definition are more likely to succeed in establishing that the relevant market has not been properly defined. It is possible that the FTC in the *Hicks Muse* case really believed that the relevant market included not only refrigerated pickles but some shelf-stable pickles as well, but decided to avoid a complicated description of the relevant market and simply argue that Vlasic's shelf-stable pickles constrained the price of Claussen's refrigerated product. Alternatively, the FTC may have made its unique allegation in anticipation that the defendant companies would seek to broaden the market to include shelf-stable pickles as part of their defense. If so, the allegation that Vlasic's shelf-stable pickles constrain Claussen's refrigerated pickles would have reminded the court that broadening the alleged relevant market might not defeat the FTC's challenge to the acquisition.

Only time will tell whether the FTC's allegation signals a change in how the antitrust enforcement agencies define relevant markets. Given the existence of plausible alternative rationales for alleging that products outside a relevant market constrain the prices of products inside the relevant market, one cannot jump to the conclusion that the FTC has abandoned or misapplied traditional market definition principles. Nevertheless, the enforcement agencies' approach to market definition issues will bear watching in the months and years ahead.

Postscript: While FTC commissioners traditionally speak about significant cases, Commissioner Thomas Leary recently departed from that prose tradition by offering a tongue-in-cheek poem about the *Hicks Muse* case. His verse suggests that the Commission made some of its allegations because it discovered evidence of post-merger price-hikes. Fans of antitrust-related literature can find Commissioner Leary's remarks, entitled "The Spell of the Gherkin," at <http://www3.ftc.gov/speeches/leary/spellofthegherkin.htm>.

Multidistrict Litigation Judges to Keep Cases Through Trial?

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If an amendment introduced in the U.S. House of Representatives gains momentum in the Congress, multidistrict litigation (“MDL”) could be in store for a substantial change—at least as to the requirements for remand and the selection of the appropriate trial court following the completion of pretrial proceedings. Under current law, cases consolidated in an MDL proceeding must be transferred back to the district courts from which those constituent cases originated once pretrial proceedings are completed. But “in the interest of justice and for the convenience of the parties and witnesses,” the MDL court may soon have the option of keeping the case all the way through trial and judgment.

Just five years ago, the U.S. Supreme Court, in a unanimous decision, brought to an end a practice that appeared to be gaining popularity in federal district courts by holding that an MDL court could not use the federal venue statutes to “transfer” a case to itself for trial after all pretrial proceedings ended, a process that was sometimes referred to as “self-referral” or “self-transfer.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (Souter, J.). The federal MDL statute (28 U.S.C. § 1407) expressly provides only two options for an MDL judge—either termination of the litigation or remand of the constituent cases back to the originating courts after the close of pretrial proceedings. As the Court interpreted this provision, these two options defined the limits of the MDL court’s discretion. As a result, if an MDL court assigned the constituent cases to itself for trial, the clear meaning of the statute would be defeated. As one judge stated, and the Supreme Court seemed to endorse, any effort to try the constituent cases in the MDL transferee court would be a “remarkable power grab by federal judges.”

Insisting that the statute was never meant to interfere with the plaintiff’s ability to choose the forum, the Court emphasized the mandatory nature of the remand language. Section 1407 was designed to allow a single court to negotiate the discovery demands in complex litigation. Without that consolidation, a tremendous burden would be placed on the federal court system.

With consolidation, an MDL court can avoid conflicting and duplicative discovery that would naturally arise in separate proceedings, thereby promoting greater judicial efficiency. But once that discovery task has been completed, and assuming that the MDL court has not terminated the action, the constituent cases must be remanded.

House Bill 1768, entitled the “Multidistrict Litigation Restoration Act of 2003,” proposes to amend Section 1407 and effectively to overrule *Lexecon*. The bill, introduced on April 11, 2003, by Rep. F. James Sensenbrenner, Jr. (R-Wis.), would allow the MDL court to see the case through to trial if doing so would serve “the interest of justice and...the convenience of the parties and witnesses.” The MDL court would be authorized to retain the case for trial “notwithstanding any other provision of this section,” presumably particularly including the remand provision.

The amendment may be an indication that, having witnessed the explosion of large and complex MDL cases, some in Congress may be ready to place efficiency concerns ahead of the plaintiff’s right to choose the forum. Rather than requiring the remand of multiple cases to many different district judges, and forcing them to get up to speed on cases that may have been in the MDL court for years and generated voluminous discovery on myriad complex or novel issues, the amendment would allow the judge most familiar with the case to sit as trial judge. If enacted, the amendment could affect the dynamics, the strategy and the tone of multidistrict proceedings. To cite just one example, litigants who find themselves on the wrong side of a string of adverse pretrial decisions probably look forward to the day when they can address their arguments to a new forum. Under H.R. 1768, they would lose this option any time the MDL court considered it convenient to the parties and witnesses and in the interests of justice to deny them that option. At the same time, the amendment could affect the incentives and coercive powers available to MDL courts to move large and complex multidistrict cases to resolution by settlement.

To date, the House bill has attracted two additional Republican co-sponsors. Having been referred to the House Judiciary Committee's Subcommittee on Courts, the Internet, and

Intellectual Property, the bill was the subject of a subcommittee hearing and mark-up session on July 22, 2003, and referred to the full committee that same day for further action—the first step on the long road to enactment.

Fifth Amendment Invocations and the Valentine Act: A Sea Change

By James R. Eiszner
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It is counterintuitive that an amendment to a state antitrust statute would have an impact on antitrust lawyers nationwide. The proposition is even more counterintuitive when that amendment pertains to the applicable statute of limitations under state law. But antitrust is full of surprises, and one of the latest is that a recent amendment to the statute of limitations provision of the Valentine Act, Ohio's state antitrust law (Ohio Rev. Stat. § 1331.12(B)), has important consequences in civil conspiracy antitrust cases across the country. Because of the amendment, witnesses in civil conspiracy cases that could be prosecuted under Ohio law—for example, any nationwide or regional conspiracy as to which the State of Ohio could prosecute the witness—will be deprived of an important basis to invoke their constitutional privilege against self-incrimination, namely the threat of Valentine Act prosecution.

Until 2002, the Valentine Act had a four-year statute of limitations for civil antitrust actions, but there was no statute of limitations for criminal prosecutions under the Act. The lack of a criminal statute of limitations often served to frustrate discovery in civil price-fixing cases because the Valentine Act provided a basis for witnesses to invoke their Fifth Amendment privilege to refuse to testify about the alleged conspiracy. In particular, fear of Valentine Act prosecution provided a basis for assertion of the self-incrimination privilege to (i) witnesses who had been immunized by the U.S. Department of Justice for prosecution under federal antitrust laws, (ii) witnesses who had been convicted of price-fixing under federal antitrust laws, and (iii) witnesses who no longer could be prosecuted by the Department of Justice because the five-year statute of limitations applicable to Sherman Act

prosecutions had long expired. In other words, potential witnesses who no longer had a reason to withhold potentially probative testimony by virtue of their *de facto* or *de jure* immunity from punitive consequences could continue to thwart their testimony from being heard by resort to an artful combination of the unlimited threat of Valentine Act criminal prosecution and the Fifth Amendment right against self-incrimination.

Many civil price-fixing cases commence because of prior Justice Department indictments, prosecutions or grand jury investigations, which may signal private plaintiffs' attorneys that an action against a respondent may be successful and lucrative and which may also be a source of evidence for private litigants. Even after the Justice Department completes its prosecution (or terminates its investigation), the parties to the follow-on civil cases often have found themselves unable to obtain the testimony of the individual defendants or grand jury targets because these individuals have had the ability to invoke the Fifth Amendment right against self-incrimination based on a fear of Valentine Act prosecution. This result was particularly frustrating because criminal prosecutions for violations of the Valentine Act have not been common. And it was especially frustrating for corporate defendants whose employees asserted a self-incrimination privilege based on fear of Valentine Act prosecution because the mere assertion of the Fifth Amendment privilege could be used as an inference of liability against the corporate defendant. (Consider the fairness of the inference in situations where the "crime" alleged is price-fixing to a single customer but the civil complaint accuses the corporate defendants of fixing prices to *all* customers.)

The Ohio legislature removed this obstruction to civil discovery by amending the Valentine Act to provide that, for any prosecution brought after April 2002, the prosecution must be brought within four years of the alleged crime. As a result, discovery in civil price-fixing cases should

be more productive, which should help lead to more accurate and just outcomes. In this way, this ostensibly minor procedural amendment to a single state's antitrust law can therefore be expected to have major consequences for antitrust lawyers everywhere.

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:

Personnel Changes

Resignation and Replacement of FTC Commissioner—Commissioner **Sheila F. Anthony**, whose term expired on September 25, 2002, and who has continued to serve pending confirmation of her successor, announced her resignation from the FTC effective August 1, 2003. See <http://www.ftc.gov/speeches/anthony/letterresignation.htm>. Her successor, **Pamela Jones Harbour**, an Independent, was unanimously confirmed by the United States Senate on July 23, 2003, and assumed office on August 4, 2003, after her swearing-in by FTC Chairman Timothy Muris. Prior to joining the Commission, Ms. Harbour was a litigation partner with Kaye Scholer LLP and previously worked as a Deputy Attorney General under New York State Attorney General Eliot Spitzer, serving as Chief of the Public Advocacy Division. See <http://www.ftc.gov/opa/2003/08/harbour.htm>.

Additional Commission Changes to Watch For—The term of another Clinton Administration appointee, **FTC Commissioner Mozelle Thompson**, expires September 25, 2003. According to published reports, the White House is considering **Jon Leibowitz**, a Democrat and former member of the Senate Judiciary Committee staff, to succeed Commissioner Thompson. Leibowitz is currently employed by the Motion Picture Association of America. See *FTC:Watch*, July 28, 2003.

Recent Resignations of FTC Bureau Directors—Both **Joseph J. Simons**, Director of the FTC's Bureau of Competition, and **David Scheffman**, Director of the Bureau of Economics, have announced their resignations from the FTC. Mr. Simons will be replaced by his deputy, **Susan Creighton**. Ms. Creighton has served the past two years as Deputy Director of the Bureau of Competition and previously was a partner with Wilson, Sonsini, Goodrich & Rosati. **Barry Nigro**, a partner with the law firm of Fried, Frank, Harris, Shriver and Jacobson, will replace Ms. Creighton as a Deputy Director. **Luke Froeb**, Associate Professor of Entrepreneurship and Free Enterprise at the Owen Graduate School of Management at Vanderbilt University, and a former economist with DOJ's Antitrust Division, will replace Dr. Scheffman. Dr. Scheffman is expected to return to his teaching position at Vanderbilt and resume his consulting practice with the Law & Economics Consulting Group, Inc. ("LECG"). For more information see <http://www.ftc.gov/opa/2003/07/simons.htm>; and <http://www.ftc.gov/opa/2003/07/froeb.htm>.

As part of the re-shuffling in the Bureau of Competition, **Ann Malester**, who has served as Assistant Director of the Bureau's Mergers I shop since 1991 and is a 26-year veteran with the agency, has also been appointed to become one of the Bureau's Deputy Directors. Her former deputy in the mergers shop, **Steven K. Bernstein**, succeeds Malester as Assistant Director for Mergers I. Both appointments became effective August 11, 2003. The Mergers I shop is one of three merger review groups at the FTC and is responsible for investigating proposed mergers involving pharmaceutical, biotechnology, medical device, defense and aerospace companies. See <http://www.ftc.gov/opa/2003/08/bcdirectors.htm>.

New Intellectual Property Attorneys at the

FTC—The FTC has added two attorneys to its intellectual property (“IP”) group, increasing to four the number of FTC attorneys with intellectual property backgrounds. **Armando Irizarry** and **Thomas Mays** are expected to join the Bureau of Competition in the next few months. With a background in chemical engineering and computer and information science, Mr. Irizarry currently teaches IP law at Michigan State University and previously practiced patent litigation at the IP boutique firm of Fish & Neave. Mr. Mays comes to the FTC from private practice, where he has specialized in the procurement and licensing of intellectual property. He previously served as a patent examiner and, drawing on his background in microbiology, later served as the Director of the Office of Technology Development at the National Institutes of Health’s National Cancer Institute. For more information see <http://www.ftc.gov/opa/2003/07/intellectual.htm>.

New Deputy Assistant Attorney General for International, Policy and Appellate Matters—

Makan Delrahim, formerly Staff Director and Chief Counsel of the Senate Judiciary Committee, has been appointed Deputy Assistant Attorney General responsible for international, policy and appellate matters at DOJ’s Antitrust Division. He has a background in international law, intellectual property, and biotechnology. For more information see http://www.usdoj.gov/atr/public/press_releases/2003/201189.htm.

Pate Confirmed—**R. Hewitt Pate** was confirmed by the United States Senate on June 16, 2003, to be the Assistant Attorney General for Antitrust. He had served as Acting Assistant Attorney General since November 23, 2002.

New Deputy Assistant Attorney General for Regulatory Matters—

Former Baker Botts LLP partner **J. Bruce McDonald** has been appointed Deputy Assistant Attorney General for Regulatory Matters at DOJ’s Antitrust Division. He has experience dealing with regulated industries, including aviation, transportation, energy, oil, health care, chemical, and telecommunications. For more information see http://www.usdoj.gov/atr/public/press_releases/2003/201071.pdf.

Policy and Legal Developments**Muris Testimony on Consumer Access to Generic Drugs—**

FTC Chairman Timothy J. Muris recently testified before the Senate Judiciary Committee concerning consumer access to generic pharmaceuticals. He presented results from the FTC’s industry-wide study examining generic entry prior to patent expirations. Among other things, Chairman Muris testified that: (i) brand-name companies initiated patent infringement lawsuits against the first generic applicant for 72 percent of the drug products examined; (ii) in 70 percent of these cases, either the court rendered a decision or the parties agreed to a final settlement without a decision on the merits of the patent infringement suit; (iii) in the other 30 percent of the cases, a district court had not ruled as of June 1, 2002; and (iv) of all patent infringement cases in which the court had ruled, the study found that generic applicants had prevailed in 73 percent of the cases. Where the brand-name company and the first generic applicant settled, the study alleged that 14 of these settlement agreements had the potential to delay the start of the generic applicant’s 180-day marketing exclusivity and thereby delay subsequent generic entry. Based on these conclusions, Chairman Muris again called for requiring brand-name companies and first generic applicants to provide copies of certain agreements to the FTC and DOJ. For more information see <http://www.ftc.gov/os/2003/06/030617pharmtestimony.htm>.

Increased Use of Unfairness Policy

Statement Expected at FTC—In a recent speech, FTC Bureau of Consumer Protection Director J. Howard Beales III described the “rise, fall, and resurrection” of the FTC’s unfairness authority in consumer protection enforcement. Beales asserts that while the FTC “will continue to rely on its deception authority to attack fraud and protect consumers from misleading advertising,” it should not hesitate to resort to its unfairness authority “to attack situations—like widespread unilateral breach of contract, or the cramming of unauthorized charges onto phone bills—where there is widespread consumer injury, but where deception simply does not fit.” For more information see <http://www.ftc.gov/speeches/beales/unfair0603.htm>.

Raising Rivals' Costs—David Scheffman, outgoing Director of the FTC's Bureau of Economics, and Richard Higgins of LECCG, recently authored a paper reviewing the evolution of the literature concerning raising rivals' costs. The paper, based on a speech delivered at a George Mason University antitrust symposium, is expected to be published in a future issue of the *George Mason University Law Review*. In the meantime, it can be found at <http://www.ftc.gov/be/RRCGMU.pdf>.

Overview of Recent DOJ Antitrust Division Activities—A June 2003 speech by Deborah Platt Majoras, Deputy Assistant Attorney General for Antitrust, recaps recent DOJ enforcement activities. Criminal enforcement highlights concern the corporate amnesty/leniency program, as well as cartel and bid-rigging prosecutions. Ms. Platt Majoras also spoke about recent merger enforcement activities, including *UOM Kymmene/MACtac*, *DirecTV/Echostar*, and *Northrup Grumman/TRW*; competitor collaborations; consent decree enforcement (i.e., the Microsoft litigation); business review letters; and recent competition advocacy and policy. Her remarks can be found at <http://www.usdoj.gov/atr/public/speeches/201159.htm>.

Merger Gun-Jumping Case—DOJ sued Smithfield Foods, Inc. in February 2003 for an alleged failure to comply with the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR"). DOJ is seeking a civil penalty of approximately \$5.5 million. Smithfield claims it acquired stock of IPB Inc. solely for investment purposes in an HSR-exempt transaction. DOJ contends that the exemption does not apply because Smithfield was considering and taking steps toward a Smithfield/IPB combination at the time of the stock acquisition. For more information see <http://www.usdoj.gov/atr/cases/smith0.htm>.

FTC Statement on Negotiating Merger Remedies—The FTC's Bureau of Competition has issued guidance on negotiating merger remedies. Its statement is meant to expedite the settlement process in contentious mergers. It addresses issues concerning: (1) the assets to be divested; (2) identifying an acceptable buyer;

(3) the divestiture agreement; (4) additional order provisions; (5) orders to hold separate and/or maintain assets; (6) divestiture applications; and (7) timing. The statement can be found at <http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm>.

Obstruction in Cartel Investigations—In a speech earlier this year, Assistant Attorney General for Antitrust R. Hewitt Pate declared "the Division's firm resolve to prosecute conduct that interferes with our cartel investigations, regardless of the nationality of the firm involved or where the acts of obstruction took place. With increased frequency, the Division is uncovering evidence of obstruction of justice, and we will aggressively investigate such conduct." By way of example, Mr. Pate discussed DOJ's settlement with The Morgan Crucible Company PLC ("Morgan"), stemming from Morgan's efforts to interfere with a price-fixing investigation through witness tampering and document destruction. Morgan pled guilty to obstruction and was sentenced to pay the statutory maximum \$500,000 fine on each obstruction count for a total fine of \$1 million. Mr. Pate's remarks can be found at <http://www.usdoj.gov/atr/public/speeches/200736.htm>.

Tax Deductibility of Government Settlement Payments—A bill introduced on April 29, 2003, by Sen. Max Baucus (D-Mont.) and co-sponsored by Senators Charles Grassley (R-Iowa) and John McCain (R-Ariz.) would amend the Internal Revenue Code of 1986 to eliminate the deductibility of any amounts paid or incurred before April 27, 2003 to a government entity "in relation to the violation of any law or the investigation or inquiry into the potential violation of any law." Senate Bill 936, entitled the "Government Settlement Transparency Act of 2003," would not affect the treatment as a trade or business expense deduction of any amount paid as "restitution for damage or harm caused by the violation of any law or the potential violation of any law." The proposed legislation and ongoing information concerning its status can be found on the Thomas Web site at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.00936>.

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.

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