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ABA Antitrust Section Corporate Counseling Committee Antitrust Update

May 1, 2009

Federal Agencies Overview

Personnel Update: FTC

- **Jon Leibowitz**
  - » Designated Chairman of FTC on March 2
  - » Sole Democrat on the Commission, has been a Commissioner for five years
  - » Areas of Interest:
    - Stop "pay to delay" pharmaceutical patent settlements
      - – Pursue litigation
      - – Advocate for remedial legislation
    - Enhance consumer protection
    - Obtain additional FTC authority and resources

FTC: Senior Staff

- Richard Feinstein, Director, Bureau of Competition
- David Vladeck, Director, Bureau of Consumer Protection
- Joseph Farrell, Director, Bureau of Economics
- Susan DeSanti, Director, Policy Planning
- Jeanne Bumpus, Director, Office of Congress'l Relations
- Joni Lupovitz, Chief of Staff, Chairman Leibowitz

Personnel Update: DOJ

- **Christine Varney - Assistant Attorney General**
- **Areas of Interest:**
  - » Rebalance legal and economic theory
  - » Renewed collaboration with FTC
  - » Continued cooperation with global antitrust authorities

DOJ: Staff Appointments

- Sharis Arnold Pozen, Chief of Staff and Counsel
- Molly Boast, Deputy AAG for Civil Matters
- William Cavanaugh, Deputy AAG for Civil Matters
- Philip Weiser, Deputy AAG for International, Policy, and Appellate Matters
- Carl Shapiro, Deputy AAG for Economic Analysis
- Gene Kimmelman, Chief Counsel for Competition Policy and Intergovernmental Relations

Non-Merger Enforcement

- **In re Nat'l Ass'n of Music Merchants (April 14)**
  - » Organization of music instrument retailers allegedly violated FTC Act §5 by organizing meetings for members to share competitively sensitive information, including prices and business strategy
  - » Final Consent Order Prohibits "urging, encouraging, advocating, suggesting, coordinating, participating in, or facilitating in any manner" exchange of price information among manufacturers and dealers
    - Mandates antitrust compliance program

Non-Merger Enforcement

- **Microsoft Final Judgment Extended (April 22)**
  - » Microsoft settled abuse of monopoly power complaints in 2002
  - » Microsoft required to share Windows product information with competitors
  - » DOJ concern over quality of information Microsoft provides to competitors prompted request for extension
  - » 18 month extension will end May 12, 2011
    - Follows prior two year extension from 2006

Pharmaceutical Cases

- **FTC v. Bristol-Myers Squibb (March 30)**
  - » Bristol-Myers Squibb (BMS) and Apotex filed notice of patent litigation settlement agreement under 2003 FTC Order and Medicare Modernization Act
    - Did not reveal oral agreement to delay generic entry and limit competition after entry
  - » $2.1 million civil penalty for failure to report
    - BMS previously paid $1 million to settle DOJ's 2006 criminal complaint
    - Also has settled several related state actions

Pharmaceutical Cases

- **FTC v. Watson Pharmaceuticals (April 8)**
  - » FTC challenged patent litigation settlement agreement
    - Alleged that Solvay paid Watson and Par to delay generic competition to Solvay's testosterone-replacement drug AndroGel
  - » Central District of California granted defendants' motion to transfer to Northern District of Georgia
    - Jurisdiction where underlying patent cases were litigated and settlement agreements were executed

Tri-State Advisory Opinion

- **Advisory Opinion (April 13)**
  - » No intent to challenge proposed "clinical integration" of member physicians and hospital
    - Potential for significant quality and cost efficiencies
    - Collective price negotiation is reasonably related to integration and necessary to achieve efficiencies
    - Exercise of market power is unlikely, despite high participation levels, because members will remain available to contract independently

Mergers and Acquisitions Update

FTC vs. Whole Foods

- February 2007: Whole Foods announces acquisition of its rival, Wild Oats
- June 2007: FTC files motion for preliminary injunction, initiates (but stays) administrative proceeding
- August 2007: District Court denies FTC's request for preliminary injunction
- July 2008: DC Circuit Court reverses lower court's decision
- August 2008: FTC lifts stay on administrative proceeding; announces intention to proceed in Part 3
- March 2009: FTC and Whole Foods announce settlement

FTC vs. Whole Foods

- The FTC's case
  - » FTC alleged transaction would adversely affect competition in narrow market for "premium natural and organic supermarkets" ("PNOS")
  - » FTC claimed Whole Foods and Wild Oats were the two largest competitors in this market
- The Parties' defense
  - » Significant competition exists between natural and organic grocers and conventional supermarkets
  - » Customers "cross-shop" across both segments

FTC vs. Whole Foods

- District Court decision
  - » FTC failed to meet its burden of proving PNOS is a relevant product market and that the merger, if consummated, would result in increased prices
- Circuit Court decision
  - » FTC demonstrated requisite likelihood of success under Sec. 13(b)
  - » FTC is entitled to presumption in favor of PI by "rais[ing] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation"

FTC vs. Whole Foods

- **The Settlement**
  - » Requires Whole Foods to divest 32 Wild Oats stores
    - Consent decree covers 17 separate geographic markets (out of the 29 alleged in the FTC's amended complaint)
    - Consent decree covers 13 stores that are currently in operation and 19 stores that have been closed
  - » Also requires Whole Foods to divest Wild Oats brand and other assets (IP, leases, permits, etc.)

FTC vs. CCC/Mitchell

- CCC Information Services proposed merger with Mitchell Int'l valued at $1.4 billion
- On November 25, 2008, FTC sued to block the transaction
  - » FTC alleged the transaction would harm competition in two markets:
    - Integrated electronic systems used to estimate the cost of collision repairs (known as "estimatics")
    - Software systems used to value passenger vehicles that have been totaled (known as total loss valuation ("TLV") systems)

FTC vs. CCC/Mitchell

- FTC's Complaint alleges transaction would have reduced number of competitors from three to two and resulted in market share in excess of 50% in both markets

FTC vs. CCC/Mitchell

- March 9: District Court granted FTC's motion for preliminary injunction and enjoined the transaction
- District Court held FTC had raised questions "so serious, substantial, difficult, and doubtful" regarding the merits of the proposed transaction that a full hearing before the Commission was warranted
- Following decision, CCC and Mitchell abandoned merger

Other Recent Enforcement

- ***BASF/Ciba***
  - » Two leading suppliers of high performance pigments used in automotive and other industries
  - » Settled for divestitures of two pigment businesses
  - » FTC did not impose any conditions beyond those required by the European Commission

Other Recent Enforcement

- ***Lubrizol/Lockhart***
  - » FTC challenged consummated acquisition of oxidate assets
  - » Alleged lessened competition in rust preventatives that contain oxidates
  - » Order requires Lubrizol to transfer the acquired assets to Additives Int'l and eliminate a non-compete provision in original agreement

Litigation Update

Lower Court Highlights

- Third Circuit will hear *Twombly* Challenge in Chocolate Litigation
- Class Action Fairness Act *Kaufman v. Allstate New Jersey Insurance Co.*, No. 08-4911 (3d Cir. 2009)
  - » CAFA does not require every class member to assert a claim against the local defendant in order for the case to be exempt from federal jurisdiction under the local controversy rule
  - » Injuries resulting from the alleged conduct and related conduct of each defendant need not both have occurred in the state where the action was filed to qualify for remand

Lower Court Highlights

- *Leegin* case dismissed on remand
  - » *Leegin* made vertical price restraints ("resale price maintenance" or "RPM") subject to rule of reason
    - Vertical price agreements no longer treated as *per se* unlawful
    - Provides leeway for retail distribution agreements to exercise retail price control
  - » Legislative opposition at federal and state levels
    - Senator Kohl (D. Wis.) introduced bill
    - Maryland has enacted "*Leegin* repealer"
      - – Prohibits RPM agreements
      - – Preserves *Colgate's* "right to choose"

Antitrust Criminal Penalty Enhancement and Reform Act of 2004

- **ACPERA may be gone before we ever knew what it meant?**
  - » Signed into law June 22, 2004 the Act:
    - Increased criminal penalties and fines
    - Reduced civil exposure (single damages, no joint and several liability) if amnesty applicant cooperates
  - » LCD Plaintiffs just filed for clarification and seek to force the amnesty applicant to cooperate
  - » ACPERA's civil damages limitation will sunset June 22, 2009

Criminal Enforcement Update

New Administration

- Impact of the new administration on criminal antitrust enforcement
- AAG
  - » Christine Varney
- DAAG for Criminal Enforcement
  - » Scott Hammond (career)

Procurement Fraud Task Force

- DOJ allocating significant resources to combating procurement fraud and bid-rigging in connection with government contracts
- Close coordination with Department of Defense Office of Inspector General and Special Inspector General for Iraq Reconstruction
- Emphasis on prosecuting non-Sherman Act violations
  - » Money laundering (*U.S. v. Blake*) (March 19)
  - » Bribery (*U.S. v. Cobos, Azar*) (April 3)

Procurement Fraud Task Force

- American Recovery and Reinvestment Act of 2009 provides more than $500 billion in stimulus spending (Feb. 17)
- DOJ Antitrust Division sent out alert in April raising concerns about collusion, bid-rigging, and price-fixing
- Applies to all uses of stimulus money
  - » particular concern to companies with less experience in government procurement
- Training may be needed on “rules of road” for companies new to such government involvement

Air Transportation Investigations

- DOJ in ongoing investigations of air cargo and passenger industries
- Guilty pleas by Cargolux Airlines International (Luxembourg), Nippon Cargo Airlines (Japan), and Asiana Airlines (Korea) yield $214 million fines
- 15 companies have pleaded or agreed to plead guilty in DOJ air transportation investigations
- Fines now total more than $1.6 billion across both investigations

Air Transportation Investigations

- Air Cargo plea agreements underscore benefits of DOJ amnesty program and early self-reporting
  - » Virgin Atlantic (passenger case) and Lufthansa (cargo case) will face no criminal penalties for their participation in the cartels
    - Executives also immunized
  - » British Airways and Korean Air paid significantly reduced fines based on early cooperation
  - » In practice, DOJ will grant amnesty even to very high level cartel participants

Recent Case: Marine Hose

- **Bid-rigging, price fixing, and market allocation**
  - » Virginia Harbor Services and Trelleborg Industries entered guilty pleas on April 20, 2009 – total fine of $11 million
- **Significant prison sentences for executives**
  - » Sea Star
    - 1 pled: 78 – 97 months
  - » Horizon
    - 3 pled: 63 – 78; 57 – 71; 46 – 57 months

Recent Case: Marine Hose

- **Significant prison sentences for executives**
  - » Bridgestone (no corporate fine reported)
    - 1 pled: $80K fine + 24 months
  - » Dunlop (corporate fine: $2MM)
    - 1 pled: 30 months
  - » Manuli (corporate fine: $4.54 MM)
    - 2 pled: 12 – 14 months

Recent Case: LCD Display

- Four companies and nine executives have agreed to plead guilty and pay more than $600 million in criminal fines
- LG Display, Sharp, Chunghwa, and Hitachi have all pled guilty in conspiracy to fix prices of LCD panels sold to large retailers
  - » LG Display Co. Ltd. paid $400 million fine
- April 27, 2009: Korean executive from LG agreed to plead guilty and serve 1 year in prison in US for role in conspiracy

Antitrust and Intellectual Property

Broadcom v Qualcomm

- Broadcom filed lawsuits in multiple forums alleging infringement and anticompetitive acts
  - » At issue: chipsets used in 3G and 4G wireless devices
  - » Broadcom ITC case had restricted handset supplies to wireless providers
- Companies announced settlement of all litigation (both US and non-US) (April 27)
  - » Qualcomm to pay $891 million to settle Broadcom infringement claims
  - » Cross-licensing deal included☐
- Would have generated court decisions on several antitrust/IP questions: *e.g.*, definition of RAND

Reverse Payments

- (April 27) Fed Circuit *In Re: Ciprofloxacin* held payments by Bayer to generic to delay entry as part of settling patent litigation do not violate antitrust laws if:
  - » Patent litigation not baseless
  - » Restrictions don't exceed scope of patent
- *Amicus* by law professors and public interest advocates ask Supreme Court to resolve conflict among circuits

Princo v ITC (Philips v ITC)

- **Federal Circuit, April 21, 2009**
- **Take away: Antitrust analysis by Federal Circuit continues to diverge from DOJ analysis in this area**
- **Background**
  - » Philips, Sony, and two other companies formed patent pool to license patents to make recordable CDs (CD-R) and rewritable CDs (CD-RW)
  - » Philips as pool administrator brought ITC action against CD-R/RW manufacturers to prevent importation of infringing products (2002)
  - » Princo asserted “patent misuse” defense based on long-standing DOJ analysis of patent pools

Princo v ITC (Philips v ITC)

» **DOJ analysis**

- Inclusion in pool of patents that are or have "substitutes" (*i.e.,* competing technologies) raises two potential competition concerns:
  - Potential for "price fixing" of competing patents offered by competing pool members
  - Potential for "exclusionary effect" of discouraging pool licensees from using competing technologies
- Pool should include only patents that are "complements" (*i.e.*, technologies for which no competing technologies are available)

Princo v ITC (Philips v ITC)

- ITC Hearing Examiner decided for Princo (2003)
  - Pool included competing patents, therefore misuse
  - All patents in pool unenforceable
- ITC affirmed on similar but narrower grounds (2004)
- Federal Circuit reversed ITC (2005)
  - Based on inadequate proof:
    - that there were commercially viable (and therefore "competing") technologies
    - that there was any foreclosure
  - Remanded on other issues to ITC

Princo v ITC (Philips v ITC)

- At ITC on remand, Princo argued patent misuse on two theories based on pool including patents for competing technologies (one Philips, one Sony):
  - Tying essential and non-essential patents
  - Agreement to not license these patents individually outside pool = price fixing and/or foreclosure
- ITC decided for Philips/pool (2007):
  - Rejected both Princo misuse theories
  - Princo discs infringed
  - Patents valid and enforceable

Princo v ITC (Philips v ITC)

- **Federal Circuit opinion (April 21, 2009)**
  - » Affirmed ITC rejection of Princo's patent misuse defense based on tying theory
  - » Remanded to ITC on Princo's patent misuse defense based on alleged agreement between Philips and Sony to not license patents for competing technologies

Princo v ITC (Philips v ITC)

- Some highlights of Federal Circuit reasoning:
  - » "Perfect certainty" not required to demonstrate that a patent is essential
    - Potential licensee may reasonably believe that a license to a particular patent "might be necessary" to practice standard, and therefore would benefit from inclusion of that patent
    - Particular patent at issue (challenged as "non-essential") *was* essential because patent claims on their face "would have presented an obvious source of concern" for a manufacturer practicing the standard

Princo v ITC (Philips v ITC)

- Highlights of Federal Circuit reasoning (cont'd):
  - » Even essential patents can be basis of misuse challenge, on Philips/Sony agreement to not license challenged patent for uses outside of the pool *(i.e.*, for competing technologies):
    - "Agreements preventing licensing of competing technologies" may violate antitrust laws
    - Such agreements "are not within the rights granted to a patent holder"
    - Therefore may constitute patent misuse

Princo v ITC (Philips v ITC)

- Highlights of Federal Circuit reasoning (cont'd):
  - » Misuse challenge to agreement preventing licensing a patent outside pool does not require:
    - that technology in challenged patent has been developed "to the point of commercial viability"
    - that technology in challenged patent qualify as "potential competition" under strict requirements in antitrust law (*i.e.*, probable, timely, significant entry)
  - » Remand to ITC to decide degree of commercial viability of technology in challenged patent

Princo v ITC (Philips v ITC)

- Federal Circuit opinion analysis differs from DOJ's in some important ways:
  - » Opinion confounds "infringement" and "essentiality"
    - Infringement = whether practice of standard would infringe patent ("blocking" patent)
    - Essentiality = whether more than one technology (patented or not) could perform that required function
      - – If so, no patent for any technology that could perform that function should be in pool

Princo v ITC (Philips v ITC)

- Opinion confounds “necessary” and “essential”
  - Necessary = manufacturer practicing standard would want license to every patent likely infringed by a function of manufactured device
  - Essential = whether more than one technology (patented or not) could perform a required function
    - If so, no patent for either technology that could perform function should be in pool
- Issue of whether a competing technology exists is at core of antitrust analysis for both price fixing and exclusion concerns on what patents are in pool

Princo v ITC (Philips v ITC)

- Opinion confounds "price fixing" and "exclusion" concerns
  - Price fixing
    - Arises from *inclusion in pool* of competing (substitute) patents
    - Concern: pool licensors are jointly pricing competing technologies
  - Exclusion
    - Pool includes patent when competing technology (patented or not) exists *outside pool*
    - Concern: patent/technology outside pool may, as practical matter, be foreclosed from paid use
      - pool licensees already have patent for technology performing that required function

European Union and Other International Jurisdictions

European Union

ECJ Ruling in *France Telecom*

- **Case C-202/07, judgment April 2, 2009**
- ECJ declined opportunity to align EU law on predatory pricing with the US *Brooke Group* standard regarding recoupment
  - *Brooke Group* requires (a) pricing below variable cost ***and*** (b) real risk of recoupment (of losses sustained in below-cost pricing)

ECJ Ruling in *France Telecom*

- **The facts**
  - Wanadoo, France Telecom subsidiary, was dominant provider of Internet access in France
  - Offered high-speed access services at prices below total cost and, for a period, below variable cost
  - Internal documents indicated plan to foreclose development of competition in this new market
  - European Commission fined Wanadoo Euro 10.35m for predatory pricing.
  - France Telecom appealed, unsuccessfully at first instance, then to the ECJ

ECJ Ruling in *France Telecom*

- ECJ's Advocate General issued an Opinion (a kind of internal *amicus* brief) recommending dismissal of fine on basis that a real risk of recovery (recoupment) had not been shown
  - AG's Opinions are followed in approximately 75% of cases
- ECJ rejected suggestion that predatory pricing could be found without examining whether there was real risk that losses from below-cost pricing could be recouped
- ECJ also rejected Wanadoo's argument that it was only matching competitor prices, finding this was not a defense to predatory pricing

EC Acts on Energy Companies

- Following-on from its Energy Sector Inquiry (2007), Commission pursuing several cases against former energy incumbents
- Similar follow-on cases (albeit on different issues) can be expected following the Pharma Sector Inquiry report later this year

EC Acts on Energy Companies

- **EDF in France (March 11, 2009)**
  - Dawn raids investigating suspected illegal conduct intended to raise prices on French wholesale electricity market
- **RWE in Germany (March 18, 2009)**
  - Commitments to divest gas transmission network; EC closed investigation of RWE for abuse of dominance
- **ENI in Italy (March 19, 2009)**
  - SO alleging abuse of dominance by (a) refusing competitors access to ENI's gas transmission network and (b) strategic underinvestment in the network

Earlier Energy Cases

- **PPC in Greece (March 5, 2008)**
  - Greece found to infringe EU competition rules by granting former state electricity company PPC a near monopoly of exploitation rights over lignite coal deposits in Greece thereby limiting ability of other generating companies to compete effectively
- **E.ON in Germany (Nov 26, 2008)**
  - Commitments to divest approx. 5000 MW of generating capacity and its extra-high-voltage electricity transmission network; EC closed investigation of E.ON for abuse of dominance by, among other acts, withdrawing capacity from the wholesale electricity market to raise prices

SO Issued to Airline Alliances

- Commission issued SOs to certain airlines involved in two transatlantic alliances (April 20) :
  - » Star Alliance: Air Canada, Continental, Lufthansa, United
  - » **one**world: American Airlines, British Airways, Iberia
- Commission concerns:
  - » Agreements within each alliance going beyond basic alliance structure to include:
    - Joint management of schedules, capacity, pricing and ticket sales
    - Revenue sharing
- Commission called “misleading” comments from Continental describing issuance of SO as “routine”

International Private Enforcement

- **Collective Settlement, but not Collective Action**
  - » Marine Hose Litigation in United Kingdom
    - Parker ITR has attempted to settle all litigation by depositing 16% of non-U.S. sales (1/31/02 – 5/2/07) into escrow account.
    - Must opt-in. Direct and indirect purchasers can claim in exchange for giving right to sue.
  - » UK High Court denied "Representative Action" against BA in air cargo litigation
  - » Hydrogen Peroxide Group seeks €430 in private action case in Germany

International Private Enforcement

- **Private enforcement**
  - » European Parliament declared its support for Commission proposals that seek to facilitate private actions for damages in the EU (March 26)
  - » Commission reported to be working on legislation to implement its proposals

Other Developments

- **Credit cards**
  - » MasterCard: Commission reached interim settlement with MC
    - Pending MC's appeal of 2007 Commission Decision declaring unlawful MC's cross-boarder multilateral interchange fees (MIFs)
    - MasterCard to reduce credit and debit card MIFs by up to 84% pending appeal (April 1)
  - » Visa: Commission issued SO to Visa
    - Same analysis as in MC case (April 6)

Other International

China Prohibits Coke Acquisition

- China's Ministry of Commerce prohibited Coca-Cola's acquisition of Chinese Juice manufacturer Huiyuan (March 18)
  - » Prohibition caused surprise
    - Two parties' combined share of total juice market low (est. 25%)
    - Limited overlap in individual juice segments

China Prohibits Coke Acquisition

- Decision not published, but brief statement by Ministry indicates concerns focused on:
  - » Coke's ability to leverage dominance in carbonated drinks
  - » Combination of Coke's existing Minute Maid juice brand with the Huiyuan brand
  - » Risk that smaller Chinese juice producers would be squeezed out

China Prohibits Coke Acquisition

- Absent decision, difficult to assess early concerns that decision driven by protectionism
- Understood that Ministry sought divestment of the Huiyuan brand to remedy concerns but this was unacceptable to Coca-Cola

Telecom Italia in Argentina

- Argentina's antitrust agency prohibited Telecom Italia from exercising voting rights of its 50% shareholding in Telecom Argentina, second largest telecoms operator in Argentina (April 3)
- Relates to agency's ongoing investigation of Spain's Telefonica
  - » Telefonica owns
    - Argentina's largest telecoms operator (Telefonica de Argentina) and
    - Stake in a holding company which owns 24.5% of Telecom Italia
  - » Agency is investigating whether this link gives Telefonica dominant position in Argentina

Cartel Enforcement in Brazil

- Brazil's antitrust agency issued annual report and announced record cartel enforcement (April 27)
  - » Conducted 93 dawn raids in cartel investigations
  - » Arrested 53 individuals on suspicion of price fixing, market allocation and/or bid rigging
- Case levels expected to remain high
  - » Recent agency reports say:
    - Almost 300 ongoing cartel investigations during 2008/2009
    - 100+ executives facing criminal actions for cartel activity

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Participating attorneys

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