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CFTC AND SEC PROPOSE NEW ANTI-MANIPULATION RULES FOR SWAPS AND SECURITY-BASED SWAPS**

By Daniel D. Edelman and William J. McSherry Jr.

Title VII of the Dodd-Frank Act, known as the Wall Street Transparency and Accountability Act of 2010, amended the Commodity Exchange Act (“CEA”) and the Securities Exchange Act of 1934 (the “Exchange Act”) to create a new regulatory framework for swaps and security-based swaps. Under these revisions, Title VII expanded and clarified authority to prohibit manipulative behavior. To implement this authority, both the Commodity Futures Trading Commission (“CFTC”) and the Securities Exchange Commission (“SEC”) recently proposed new rules intended to proscribe and regulate fraud and manipulation for swaps and security-based swaps.

Swaps are derivative transactions enabling parties to exchange financial instruments or the benefits associated with those instruments. Pursuant to financial contracts, swaps often involve parties agreeing to transfer to each other the cash flow stream, such as principal, interest or proceeds, from a commodity, an asset or an investment. Section 721 of the Dodd-Frank Act identifies common swaps to include interest rate swaps, foreign exchange swaps and credit default swaps. The CFTC has authority to regulate swaps in general. The SEC regulates security-based swaps.

On October 26, 2010, the CFTC proposed two new rules pursuant to Dodd-Frank’s section 753 anti-manipulation provisions. The proposed CFTC rules reflect an effort to ensure that the financial system is regulated in ways considered to have been ignored or lacking during the financial crisis. Most significantly, the CFTC created a catch-all anti-fraud rule patterned after Rule 10b-5 of the Exchange Act that explicitly prohibits manipulative devices, material misstatements or omissions, fraudulent business practices and misleading reports in connection with any swap or contract for sale of any commodity in in-

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terstate commerce. The CFTC will also continue vigorously to pursue price manipulation of swaps and commodities.

On November 3, 2010, the SEC introduced a new rule governing security-based swaps, known as Rule 9j-1 under section 763(g) of the Dodd-Frank Act. Although largely borrowing language from other securities' regulations, such as Rule 10b-5, Rule 9j-1 would provide a distinct anti-fraud regulation specific to security-based swaps. By tailoring anti-fraud regulation to a particular type of financial instrument and its risks, Rule 9j-1 signifies even more vigorous oversight by the regulatory agencies. The SEC has justified Rule 9j-1, however, on account of security-based swaps differing from other securities by contemplating ongoing payments during the life of the swap. Thus, in addition to fraud associated with the purchase or sale of the swap, the rules would impose liability for fraud that occurs throughout the lifetime of the swap.

A description of the proposed CFTC and SEC rules governing swaps and security-based swaps is contained in the full alert that is linked below. We will continue to monitor developments at the CFTC and SEC concerning any comments or revisions as these proposed rules proceed through the approval process, and we will update accordingly.

I. CFTC

Section 753 of the Dodd-Frank Act revised section 6(c) of the CEA, enhancing the CFTC's anti-manipulation authority. Based on this authority, on October 26, 2010, the CFTC proposed two new anti-manipulation regulations.

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A. REVISED CEA SECTION 6(C)

1. CEA § 6(C)(1)

Dodd-Frank established a new CEA § 6(c)(1), providing for broader authority over fraud-based manipulative schemes. It is a "catch-all" anti-fraud provision for swaps that is comparable to § 10(b) of the Exchange Act. It reads in pertinent part:

It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after the date of enactment of the Dodd-Frank Act . . .

As the statute provides, the CFTC must promulgate implementing rules within one year of Dodd-Frank's enactment, which was signed into law on July 21, 2010.

Revised § 6(c)(1) contains three new subsections. In section 6(c)(1)(A), the CEA defines the "Special Provisions for Manipulation by False Reporting." It provides that:

Unlawful manipulation for purposes of this paragraph shall include, but not be limited to, delivering, or causing to be delivered for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing or acting in reckless disregard of the fact that such report is false, misleading or inaccurate.

Section 6(c)(1)(B), captioned "Effect on Other Law," qualifies that Dodd-Frank provisions, such as revised section 6(c) will not affect CEA section 9(a)(2) that proscribes manipulating the price of any commodity and knowingly transmitting false or misleading reports concerning crop or market conditions affecting the price of any commodity. Finally, section 6(c)(1)(C), exempts "good faith mistakes" so that transmitting "false or misleading or inaccurate information to a price reporting service would not be sufficient to violate subsection (c)(1)(A)."

2. CEA § 6(C)(2)

Section 753 of Dodd-Frank also revised CEA § 6(c)'s prohibition against false reporting in new CEA § 6(c)(2). Now, the CEA proscribes not just false statements made in registration applications or reports filed with the CFTC but any material misstatements or omissions concerning swaps made to the CFTC at all. The provision reads:

It shall be unlawful for any person to make any false or misleading statement of a material fact to the [CFTC], including in any registration application or any report filed with the [CFTC] under this Act, or any other information relating to a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to omit to state in any such statement any material fact that is necessary to make any statement of material fact made not misleading in any material respect, if the person knew or reasonably should have known, the statement to be false or misleading.

3. CEA § 6(C)(3)

The last revision is new CEA § 6(c)(3)'s "other manipulation" provision, which adds to section 6(c)(1)'s anti-manipulation provision that "it shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce or for future delivery on or subject to the rules of the registered entity."

B. NEW CFTC ANTI-MANIPULATION RULES

While some of the provisions in the new CEA § 6(c) are self-actuating and need no rulemaking, the CFTC has now proposed two new rules to execute the anti-manipulation provisions in Sections 6(c)(1) and 6(c)(3). One rule is a new anti-fraud rule authorized under CEA § 6(c)(1) and will be comparable to Rule 10b-5 of the Exchange Act and anti-manipulation authority granted the Federal Energy Regulatory Commission and the Federal Trade Commission. The other will simply mirror the language of CEA § 6(c)(3).

1. PROPOSED NEW RULE UNDER CEA § 6(C)(1)

The CFTC proposed a new Part 180 to execute a rule under CEA § 6(c)(1). The proposed rule reads:

(1) It shall be unlawful for any person, directly or indirectly, in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or

subject to the rules of any registered entity, to intentionally or recklessly:

(a) use or employ, or attempt to use or employ, any manipulative device, scheme or artifice to defraud;

(b) make, or attempt to make, any untrue or misleading statement, of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;

(c) engage, or attempt to engage, in any act, practice or course of business, which operates or would operate as a fraud or deceit upon any person; or

(d) deliver or cause to be delivered, or attempt to deliver or cause to be delivered, for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing or acting in reckless disregard of the fact that such report is false, misleading or inaccurate. Notwithstanding the foregoing, no violation of this subsection shall exist where the person mistakenly transmits, in good faith, false or misleading information to a price reporting service.

(2) Nothing in this section shall be construed to require any person to disclose to another person nonpublic information that may be material to the market price, rate or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect.

(3) Nothing in this section shall affect, or be construed to affect, the applicability of the Commodity Exchange Act section 9(a)(2).

The CFTC's proposed new rule under CEA § 6(c)(1) is principally modeled after Rule 10b-5 of the Exchange Act but intended to account for unique features of the CEA and CFTC authority. It encompasses the following considerations:

- While CEA § 9(a)(2) remains in effect to prohibit manipulation or attempted manipulation of “the price of any commodity,” the new Section 6(c)(1) is broader and now prohibits the use or employment of “any manipulative or deceptive device or contrivance;”
- Under CEA § 6(c)(1), there must be a showing of scienter. Scienter means that the violator acted with intent to deceive, manipulate or defraud or with recklessness. Negligent conduct, even gross negligence, will not be sufficient to make out a claim. Reliance, loss causation and damages are not needed to establish an enforcement action brought by the CFTC;
- Materiality, which is applicable to sections 1(b) and 2 of the proposed rule, will also be defined as that term is used in interpreting Rule 10b-5. That is, materiality will be a fact-specific inquiry based on an objective test of whether the reasonable person would have considered the fact material. Omissions are material if there a substantial likelihood that the omitted fact would have been viewed by the reasonable persona as having significantly altered the total mix of information available.
- As with other provisions of the CEA, the proposed rule also includes an “attempt” proscription. To show attempt, there must be proof of the requisite intent and an overt act in furtherance of that intent.

2. PROPOSED NEW RULE UNDER CEA § 6(C)(3)

The CFTC’s proposed new rule under CEA § 6(c)(3) contains identical language to the statute itself. It reads that: “*it shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap, or of any commodity in interstate commerce or for future delivery on or subject to the rules of the registered entity.*” Under this revised rule, the CFTC will continue to interpret price manipulation and attempted price manipulation to cover every effort to influence the price of a swap, commodity or futures contract that interferes with market forces.

The CFTC will continue to apply a four part test in analyzing price manipulation. These include that: (1) the accused has the ability to influence market power; (2) the accused specifically intended to influence market price; (3) artificial prices existed; and (4) the accused caused the artificial prices. Sometimes economic analysis will be required to determine whether the conduct caused the artificial price. On other occasions, however, the illegal effect on price will be presumed from the nature of the conduct in question and other factual circumstances not requiring expert economic analysis.

II. SEC

Section 761(a)(2) of the Dodd-Frank Act amended the definition of “security” in section 3(a)(10) of the Exchange Act to include security-based swaps. As a security, therefore, security-based swaps will be subject to anti-manipulation provisions of the federal securities laws including Rule 10b-5. Dodd-Frank, however, went further. It amended the Exchange Act by creating a new section 9(j) to authorize fraud liability affecting “any transaction” associated with security-based swaps. Therefore, the SEC has proposed a separate rule effectuating section 9(j), known as Rule 9j-1, which is designed to encompass this more expansive liability.

In particular, the SEC underscored that a distinctive feature of security-based swaps is that, unlike other securities, they involve ongoing payments and deliveries. This means that fraud can occur not only with the purchase, sale or offering of the security but throughout the lifetime of the swap. In this context, parties to a security-based swap may engage in misconduct in connection with the swap designed to avoid or affect the value of ongoing payments or deliveries. A party faced with significant risk exposure might, for example, attempt to engage in manipulative or deceptive conduct that increases or decreases the value of payments or cash flows under a security-based swap relative to any referenced asset underlying the swap. Because such payments – or the avoidance of such payments – occur after the purchase of the swap but before its sale or termination, the SEC determined that a separate rule was needed to make it explicit that fraud or manipulation with respect to such payments is illegal.

A. NEW EXCHANGE ACT SECTION 9(J)

Section 763(g) of the Dodd-Frank Act created a new section 9(j) of the Exchange Act. It makes it unlawful for:

any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or of any facility of any national security exchange, to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security-based swap, in connection with which such person engages in any fraudulent, deceptive, or manipulative act or practice, makes any fictitious quotation, or engages in any transaction, practice, or course of business which operates as a fraud or deceit upon any person.

By covering any “person,” section 9(j) applies to a wide range of individuals and institutions. Some of those

include issuers, broker-dealers, security-based swap dealers, major security-based swap participants, security-based swap counterparties, and any customers, clients or other persons that use, employ or effect transactions in security-based swaps. Section 761 of the Dodd-Frank Act defines “security-based swap dealers” as those who hold themselves out as dealers in security-based swaps, make a market in security-based swaps, regularly enter into such swaps with counterparties and engage in business activity causing the person to be commonly known in the trade as a dealer or market maker in security-based swaps.

Section 9(j) explicitly directs the SEC to create rules and regulations in order to “*define and prescribe means reasonably designed to prevent such transactions, acts, practices, and courses of business as are fraudulent, deceptive or manipulative, and such quotations as are fictitious.*” Based on this authority, the SEC has proposed Rule 9j-1.

B. PROPOSED RULE 9J-1

Rule 9j-1 chiefly prohibits the same categories of misconduct as Rule 10b-5. Specifically, the rule would make it unlawful for:

any person, directly or indirectly, in connection with the offer, purchase or sale of any security-based swap, the exercise of any right or performance of any obligation under a security-based swap, or the avoidance of such exercise or performance:

(a) to employ any device, scheme or artifice to defraud or manipulate;

(b) to knowingly or recklessly make any untrue statement of a material fact, or to knowingly or recklessly omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;

(c) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(d) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Paragraphs (a) and (b) of Rule 9j-1 largely track the language of Rule 10b-5, though they explicitly provide for certain elements incorporated into 10b-5 liability. For example, Rule 9j-1 explicitly refers to “manipulative” conduct as well as to “knowingly or recklessly” made misstatements or omissions. The SEC makes it clear, however, that these paragraphs are to be construed consistent with Rule 10b-5. Paragraphs (c) and (d) are modeled after other provisions of the securities laws that do not require proof of scienter.

III. CONCLUSION

The new CFTC and SEC rules governing swaps and security-based swaps signify vigilance at regulating financial service products, especially derivatives. This vigilance is directed against financial fraud and manipulation beyond securities and at a more specific and heightened level for securities themselves. We will continue to monitor development at the SEC and CFTC concerning this and other proposed regulation.

ENDNOTES

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WHAT A HEADACHE: KAISER WINS NEURONTIN MARKETING CASE**

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In re Neurontin Marketing and Sales Practices Litigation, -- F. Supp. 2d --, 2010 WL 4325225 (D. Mass.) (Kaiser Foundation Health Plan, Inc. v. Pfizer, Inc.)

Pfizer falsely and unlawfully promoted numerous off-label uses of the drug Neurontin, which became a best-seller. Kaiser obtained a multimillion-dollar verdict against Pfizer. Pro tip: if your drug is called “snake oil” by your own sales team, take it off the market for anything but making snakes shiny.

As the district court summarized, the drug companies suppressed negative clinical results and extensively publicized positive ones. Warner-Lambert ultimately pled guilty to criminal violations of the FDCA for its off-label

marketing and paid civil fines and criminal penalties totaling \$430 million.

In previous litigation, the court granted defendants summary judgment against two other third party payors suing for false advertising because they hadn't provided admissible evidence to create disputed fact issues with respect to reliance or causation. Kaiser, which spent about \$200 million on Neurontin from 1996-2004, sued for violations of RICO and the California UCL. A jury found that Pfizer engaged in a RICO enterprise that committed mail and wire fraud by fraudulently marketing Neurontin for off-label conditions such as bipolar disorder, neuropathic pain (pain caused by nerve damage), and migraine, and at doses greater than 1800 mg/day, though it did find for defendants with respect to plaintiffs' claims of fraudulent promotion of Neurontin for nociceptive pain (pain caused by injury). The jury awarded \$47,363,092, which was trebled pursuant to the RICO statute.

The court then considered whether the same conduct violated the UCL, which, because it provides for only equitable relief, was a question for the court, though it nonetheless empaneled an advisory jury, which also found Pfizer liable. The court commented favorably on the caliber of most of both sides' expert witnesses, but noted pointedly that, "[r]emarkably, Pfizer did not offer live testimony from any officer or employee, nor was any Pfizer representative present during the trial."

Kaiser proved that Pfizer "fraudulently marketed Neurontin by making material misrepresentations in advertising supplements, articles it sponsored, and direct communications to Kaiser," and "by showcasing positive information about Neurontin's efficacy in the published literature, while suppressing negative evidence from Pfizer-sponsored clinical trials about Neurontin's efficacy for bipolar disorder, neuropathic pain, migraine, and at doses greater than 1800 mg/day." Kaiser proved that there was little or no scientific evidence that Neurontin is effective for the treatment of those conditions at those doses. Kaiser further proved that Pfizer's conduct caused it injury "in the form of reimbursements for Neurontin prescriptions in excess of payments for alternative prescriptions that would have been made for more or equally effective, but less expensive medicines, in the absence of Pfizer's fraudulent marketing campaign." Kaiser was entitled to over \$95 million in restitution. (By way of comparison, in 2003 alone, Neurontin sales were over \$2 billion.)

As early as 1994, Parke-Davis identified Kaiser as a potentially lucrative customer: Kaiser was second on marketers' list of top 10 HMOs targeted for Neurontin, and it remained a target throughout the relevant period, including a Kaiser-specific marketing plan in 2004. Pfizer

detailed to doctors who were Kaiser decisionmakers and paid them to serve as speakers and publish articles.

Equally early on, Parke-Davis (acquired by Pfizer in 2000) strategized about marketing Neurontin for off-label uses in order to enhance profits, even as efforts to expand approved uses "hit a brick wall" at the FDA. At the time of acquisition, Pfizer estimated that 87.5% of Neurontin prescriptions were for unapproved indications, including 14.7% for bipolar disorder, 33% for neuropathic pain, and 3.8% for migraine.

To promote off-label uses, Pfizer sponsored publications, funded continuing medical education, and directly promoted to doctors. It also worked with an advertising partner to "spin, delay and/or suppress negative evidence about Neurontin." One of Kaiser's witnesses, who donated her fee to Johns Hopkins and published her findings in the NEJM to get the truth out, found that "what was in the published record didn't agree with what was actually planned or what had been done" and that there was a "failure to publish results that were known." Of 21 trials sponsored by the defendants, each and every trial exhibited "some form of bias or deviation from the truth," such as changing the primary outcome being studied when the data didn't support a positive effect on the original primary outcome sought to be measured. (Example taken from the court's opinion: one study that initially concluded that Neurontin provided no benefit over placebo was changed to eliminate any reference to the control group, so that patients who felt less pain after treatment counted as success. The court found that this was an intentional misrepresentation in that it specifically changed the lead investigator's primary conclusion.) The court found this testimony credible and compelling. This publication bias distorted the information available to doctors, influencing their prescribing decisions.

The court found that Pfizer's promotions were intentionally misleading, because Pfizer promoted only good results while knowing that numerous well-controlled studies showed that Neurontin didn't work for the off-label indications (including some that showed Neurontin to be worse than placebo for bipolar disorder, which was especially troubling given Neurontin's association with suicide risk). One published study even said it was the "first" to evaluate Neurontin for neuropathic pain, which Pfizer knew to be false because it had in hand a negative unpublished study. Pfizer consistently failed to disclose known negative results, even in so-called "review" articles supposedly canvassing the available data, and even when the negative studies were more reliable than the positive ones (for example, when the positive ones were subject to unblinding).

Continuing medical education was another venue for Pfizer's intentionally misleading promotions, which pro-

pounded deliberate half-truths. The opinion goes into great detail about the strategies employed.

Medical liaisons who marketed to doctors were also trained to promote off-label uses. At one Parke-Davis training session, for example, two lawyers gave a videotaped presentation on FDA regulations on off-label promotion. “While the camera was recording, the two attorneys explained the FDA’s rules regarding off-label promotion of drugs, although they stated their belief that these were ‘odd’ rules.” Not only did this not correspond to actual practice among liaisons, the lawyers then turned off the camera “and explained that the medical liaisons should not worry about these FDA regulations. They told the audience of medical liaisons ‘that it was ... our job to sell’ and ‘that we needed to dismiss what [was] just said and just be very careful ... about how we went about doing [off-label marketing].’” At another training, a Parke-Davis employee “handed out two notepads with the text ‘Ladies and Gentlemen of the Jury’ and ‘Your Honor, I plead.’ She explained that these notepads were meant to emphasize the ‘importance of not creating a paper trail.’” Practice tip: Don’t do this. (This and other evidence came from qui tam litigation initiated by a former Parke-Davis liaison, who ultimately received over \$24.6 million.)

Parke-Davis continued these activities even after FDA investigated its off-label promotions and rejected its supplemental NDAs for expanded indications/higher doses, because there was insufficient evidence to support them, though the FDA did approve Neurontin for treating a type of neuropathic pain associated with shingles. The FDA required that the label include the phrase “[a]dditional benefit of using doses greater than 1800 was not demonstrated.”

In 2004, Warner-Lambert (owned by Pfizer) pled guilty to two felony counts of marketing Neurontin for various unapproved uses and paid a \$240 million criminal fine and a \$190 million civil fine. The plea included an admission of the illegal off-label promotions through the use of sales representatives, medical liaisons, advisory board meetings, consultants meetings, and teleconferences.

Pfizer’s victory: Though there was some evidence that Pfizer wanted to promote Neurontin for nociceptive, rather than just neuropathic, pain, that evidence wasn’t enough to show fraudulent marketing. There were some sloppy references to pain generally, and some internal discussions showing hope that it could be marketed for nociceptive pain, but that wasn’t enough to meet Kaiser’s burden on this point.

In making its decisions about approving Neurontin on its formulary for various conditions, Kaiser relied on Pfizer’s misrepresentations, both generally and in specific communications to Kaiser. The court accepted as cred-

ible testimony that Kaiser would not have approved the significantly more expensive Neurontin for these off-label uses had it not been for the misrepresentations and failure to disclose negative information. Kaiser has 95% compliance with its formulary, so formulary restrictions “necessarily affect the number of prescriptions written for any given drug.” Kaiser also analyzed how prescribing decisions changed when physicians attended continuing medical education that promoted Neurontin; new starts of Neurontin increased by 62%, and the CME had a continuing effect. The court found that direct communications to Kaiser physicians also caused Kaiser injury because it ended up reimbursing for Neurontin rather than for less costly alternatives.

Pfizer argued that Kaiser didn’t do enough to prevent prescriptions for Neurontin once it became aware of the fraud. Kaiser didn’t remove Neurontin from its formulary or impose restrictions, and favorable information about Neurontin for the treatment of neuropathic pain even remained on the Kaiser website until the week before trial. But Kaiser did start a vigorous information campaign to reduce off-label prescribing once it became aware of Pfizer’s off-label marketing, including banning detailing of Neurontin to its physicians and beginning a campaign to promote appropriate use of the drug. When it learned about the qui tam suit, Kaiser increased its efforts, which were resource-intensive and successful in decreasing new starts of Neurontin.

Damages were difficult to quantify because prescription decisions are influenced by a number of factors, including doctors’ clinical experience and those of their colleagues. No individual doctor testified that he or she prescribed Neurontin as a result of fraudulent off-label promotion. (Would any doctor’s insurer be happy with such testimony?) And during the relevant period Kaiser didn’t track Neurontin data by medical indication. Instead, Kaiser offered an expert opinion from a health economist linking use to Pfizer’s promotional spending.

Pfizer criticized the calculations because the expert equated promotional spending on off-label marketing with promotional spending on fraudulent off-label marketing. Though off-label marketing can be truthful, the court found the assumption reasonable in this case “given the pervasive nature of the publication fraud that infected the nationwide sources of information available to all physicians.” The expert concluded that 99.4% of prescriptions for bipolar disorders were caused by fraudulent marketing, 70% of those for neuropathic pain, 27.9% of those for migraine, and 37.5% for doses over 1800 mg/day. Another expert then converted this into dollar amounts paid for Neurontin: roughly \$69.4 million, excluding interest. Subtracting the cost of alternative, much cheaper, treatments that Kaiser almost cer-

tainly would have paid for instead, the expert calculated nearly \$62.5 million in damages.

Defendants argued that any misrepresentations were not material because Neurontin is actually effective off-label for the disputed conditions. The court found that there was no reliable scientific evidence for this, except that there was some evidence of efficacy for some kinds of neuropathic pain. But there was no reliable evidence to support a broad indication of neuropathic pain. The double-blind, randomized, controlled trial was the gold standard, entitled to the most weight, and the court adopted the FDA's requirement of two such trials as a reliable standard followed by the scientific community, rather than Pfizer's proposed standard that Kaiser needed to prove that the drug was not effective for any patient.

The court agreed with the advisory jury that defendants engaged in fraudulent business acts or practices with respect to all off-label indications except nociceptive pain and that those fraudulent acts or practices caused Kaiser damages.

Defendants argued that they had no duty to disclose negative information about Neurontin, but under California law, nondisclosure or concealment can be actionable fraud when a defendant makes partial representations but also suppresses material facts. Such half-truths can be accurate in some sense but still likely to mislead or deceive. The court concluded that "Pfizer had a duty to disclose scientific data demonstrating the lack of efficacy of Neurontin for off-label uses. This duty arose because Pfizer was marketing the drug for unapproved uses by disclosing positive information about the drug while suppressing negative information in its possession." Pfizer's failure was "particularly outrageous in the area of bipolar disorder where there was not a scrap of evidence supporting efficacy and where there were actual negative side effects of depression for certain segments of the population." Moreover, because off-label prescriptions are legal, it is imperative that doctors have accurate scientific information. The suppressed information would likely have been material to any Kaiser doctor in determining the best treatment, and it was material to health plans like Kaiser managing a drug formulary.

The UCL has a four year statute of limitations, and the complaint was filed February 1, 2005. Plaintiffs argued that a related class action filed May 14, 2004 tolled the UCL statute of limitations per *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), but that class action didn't make UCL claims, thus not putting Pfizer on notice of Kaiser's claims.

Plaintiffs also argued that defendants fraudulently concealed the facts, thus tolling the statute. California law is unsettled on whether the discovery rule applies to

UCL claims, but California courts have applied a discovery rule in fraud-based UCL cases. Thus, the statute of limitations starts to run when a reasonable person would have discovered the factual basis for a claim. A suspicion of wrongdoing, or actual notice, trumps fraudulent concealment, no matter the lengths to which a defendant has gone to conceal the wrongdoing.

The court found that Kaiser proved Pfizer's fraudulent concealment of the facts underlying the UCL claims because Pfizer kept suppressing negative results, even when people acting for Kaiser requested all available information. Pfizer argued that Kaiser was put on notice by an article in *The Pink Sheet* on April 3, 2000, stating that Warner-Lambert was under investigation by the US for off-label promotions of Neurontin. "While this article may have suggested to Kaiser that defendants were violating FDA rules about off-label promotion, there is nothing in the article that supports an inference that Neurontin might not be effective for certain off-label indications for which it was widely used."

Pfizer also argued that Kaiser should have been on notice when the *qui tam* lawsuit was unsealed in 2000. But "[t]he unsealing of a case in Massachusetts, unaccompanied by extensive press coverage, cannot be viewed as sufficient notice, particularly to a California corporation." Instead, Kaiser was put on notice in 2002, when defendants' fraud was nationally publicized, at which point it investigated its injuries.

Pfizer then contended that Kaiser couldn't recover under the UCL for Neurontin prescriptions written outside California. The parties agreed that Massachusetts choice-of-law rules applied, and for fraud that means application of the law of the state in which a plaintiff took action in reliance on a defendant's representations. Kaiser argued that the Kaiser entity that primarily gathered information on Neurontin and corresponded with Pfizer was in California, while Pfizer argued that only prescriptions written in California were subject to California law. Courts have held that the UCL doesn't apply to conduct occurring outside California. However, California courts have also permitted certification of nationwide class actions under the UCL. Thus, applying California law was legitimate as long as Kaiser showed that it relied, in California, on defendants' misrepresentations. It did so.

Kaiser's headquarters are in California, where it's incorporated; the majority of its members and operations are in California; its drug information service, which gathered the information on Neurontin, is in California. The service creates monographs summarizing its findings and shares them across regions. As a result, Kaiser formularies are very similar across regions, and the Medicare formulary is identical. In addition, Pfizer specifically targeted Kaiser for off-label Neurontin prescriptions.

Kaiser is “an evidence-based organization” and its drug information service relied on Pfizer’s misrepresentations, as a result of which its physicians relied on those misrepresentations. Thus, the court found, Pfizer’s misrepresentations “were made, received and relied on primarily in California,” resulting in a legitimate claim under the UCL for all prescriptions.

Causation: the UCL allows restitution of any money or property “which may have been acquired by means of” a violation. This was the most difficult issue. In *Rule v. Fort Dodge Animal Health, Inc.*, 607 F.3d 250 (1st Cir. 2010), plaintiffs in a proposed class action sought to recover for an undisclosed safety risk associated with a veterinary medicine. The plaintiff conceded that the drug was ineffective, and the court held that where a product had been consumed and provided the intended benefit the plaintiff couldn’t show a concrete injury or adverse economic impact. But Rule was inapplicable. First, plaintiffs proved that Neurontin was totally ineffective in treating certain off-label conditions, so it didn’t provide the intended benefit. In addition, even if the drug may have had effectiveness for some pain, Kaiser demonstrated a “significant adverse economic impact” because it could have paid for less expensive alternatives.

Still, there were three layers of causation. (1) What misrepresentations and omissions did Kaiser rely on, and did that cause injury? (2) Would doctors nonetheless have prescribed Neurontin if Kaiser hadn’t recommended it to them or if there had been restrictions on Neurontin’s formulary status? (3) How can the number of prescriptions caused by fraudulent marketing be quantified?

Under Tobacco II, reliance can be proved by showing that a misrepresentation or nondisclosure was an immediate cause of the plaintiff’s injury-producing conduct, which can be done by showing that without the misrepresentation the plaintiff in all reasonable probability wouldn’t have engaged in the conduct. A plaintiff need not show that the misrepresentation was the only cause, or even the predominant or decisive factor, as long as it played a substantial part in the plaintiff’s decision. And a presumption, or at least an inference, of reliance arises when a misrepresentation was material. Nor, in the context of an extended marketing campaign, need a plaintiff prove reliance on particular ads or statements.

Pfizer’s off-label campaign was extensive and long-term. Kaiser relied on direct misrepresentations from Pfizer as well as the misrepresentations introduced into the literature by Pfizer. Pfizer argued that Kaiser couldn’t have relied on the misrepresentations, because one published study expressly mentioned the potential issue of unblinding, putting Kaiser on notice of potential problems. But the study’s author claimed that proper analysis had been done to ensure reliability, and this was not

true. Kaiser didn’t and couldn’t have known the truth without access to the raw data. Plus, Parke-Davis didn’t mention this key flaw in its ad campaign, which generated more than 85 million impressions. Kaiser’s witnesses credibly testified that they lacked a full understanding of the study’s flaws because of the way in which it was presented.

Pfizer also argued that Kaiser’s true motive in its anti-Neurontin campaign was expense rather than lack of efficacy; some regions put the drug back on the formulary after it went generic. Thus, misrepresentations weren’t a substantial factor in Kaiser’s decisionmaking. But cost can be a factor along with lack of efficacy in determining a formulary’s contents. “If it had known the truth, Kaiser would likely not have removed restrictions on, or sanctioned widespread use of, an extremely expensive drug whose efficacy was not established, or even disproven (i.e., with respect to bipolar disorder).”

As to prescribing behavior: would the doctors have prescribed Neurontin even if Kaiser had published truthful monographs and/or restricted it on the formulary? No Kaiser physician testified that she wouldn’t have prescribed Neurontin had she known the truth. To the contrary, Pfizer’s experts, with impressive credentials, all stated they’d reviewed the data and still believed that Neurontin might be effective. Courts have refused to accept proof of fraud on the market in the aggregate to show causation in individual drug cases.

However, the fact that Kaiser physicians have a 95% compliance rate with the Kaiser formulary was proof that they would likely have changed their Neurontin prescribing behavior had Kaiser issued negative monographs and made different formulary decisions. Based on the successful anti-Neurontin campaigns starting in 2002, the court found that it was more likely than not that Kaiser would have taken action to reduce inappropriate Neurontin prescriptions if it had known the truth earlier, and that doctors would have responded by using cheaper alternatives, even for neuropathic pain where there is some evidence of efficacy for certain narrow indications.

Pfizer argued that Kaiser’s experts were only using impermissible generalized proof by creating percentage estimates of reductions in prescriptions. But Pfizer relied on class action cases; this is not a class action, and probabilistic harm to a population translates into predictable and quantifiable harm to Kaiser since Kaiser made relevant overarching decisions and paid for it all.

The UCL provides a court with broad discretion in awarding restitution, and the standard of proof for a damages determination is “patently less stringent” than the requirements for standing under the UCL, though an award can’t be arbitrary and capricious or un-

ported by the record. Here, the appropriate measure of Kaiser's damages was the difference between the cost of Neurontin and the cost of the cheaper and more optimal drug that would have been prescribed without the misrepresentations.

Pfizer argued that efficacy is patient-specific. For example, tri-cyclic antidepressants are among the alternative treatments, and while they're generally effective for treating pain, they fail for some patients and can have unpleasant side effects. Pfizer claimed that Neurontin would be better tolerated by some patients. Even if that was true, Kaiser proved that "other drugs are equally or more effective and much cheaper, and would likely have been the first line of treatment if the truth about Neurontin's efficacy had been known. Moreover, Neurontin has its own drawbacks; that is, depression with or without suicidal ideation in some patients."

Result: \$65.4 million in restitution, plus prejudgment interest as a matter of right, bringing the total to nearly \$95.3 million. However, because this amount reflects the same damage claims encompassed by the jury claim, it would not be added to the jury verdict. (This confuses me, but then I don't do RICO. Wouldn't the trebling of damages under RICO be an independent penalty, so that the court should subtract the initial award, but still pay the extra restitution under the UCL claim?)

ETA: I recommend *White Coat, Black Hat* for more depressing tales of pharmaceutical marketing. Neurontin is unusual only in that Pfizer got caught.

ENDNOTES

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ANTITRUST LAW UPDATES

DISTRICT COURT SAYS THAT USE OF "& ASSOCIATES" IN COMPANY NAME AND "SUBROGATION SPECIALIST" TITLE DO NOT A LAW FIRM MAKE

In *In re Cheaves*, 2010 WL 4400048 (Bankr. M.D. Fla. 2010), the United States District Court for the Middle District of Florida addressed FDCPA and FCCPA claims regarding a collection letter. Leslie D. Cheaves filed a voluntary petition under Chapter 7. Lauren Greene was the trustee. Cheaves owed money to the West Coast-Southern Medical Service, Inc. Prior to the bankruptcy filing, West Coast retained Douglas, Knight & Associates, Inc.

(DKA) as its collection agent. DKA mailed a collection letter entitled "Validation Notice" to the Cheaves, which identified West Coast as the creditor, and stated the account balance and the account number.

Cheaves' 2010 prepetition claims for alleged violations of the FDCPA and the FCCPA were property of the bankruptcy estate and subject to administration by the trustee. The parties agree that the Cheaves is a consumer, that the debt owed by her to West Coast is a consumer debt, that DKA is a debt collector as defined in the FDCPA and that both the FDCPA and the FCCPA apply to the Collection Letter.

The complaint alleged that the Collection Letter violated the FDCPA by falsely representing that it was sent by an attorney. The parties agreed that DKA is not an attorney or a law firm.

The provision of the FDCPA at issue in this case, § 1692e, states, in part, that a debt collector "may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." This includes "[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney" and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."

The Eleventh Circuit and the majority of federal circuit courts have adopted the "least-sophisticated consumer" standard in analyzing claims brought under the FDCPA. The least sophisticated consumer can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care. However the test has an objective component in that while protecting naive consumers, also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness.

The court decided that since the standard applied is objective in nature the determination is a question of law. The Trustee alleged that the Collection Letter falsely represented and implied that DKA is an attorney or a law firm for three reasons: first, the letterhead displayed the name "Douglas, Knight & Associates, Inc.," implying that DKA is a law firm; second, the job title (Subrogation Specialist) of the letter's signatory is a legal and highly technical title that also implied that the letter was sent by a law firm; and lastly, because the first sentence of the collection letter stating that DKA has been "obtained by" West Coast further implied that DKA is an attorney or law firm.

The Trustee argued, without authority, that the wording "& Associates" is most commonly associated with

law firms. The term “associates” is in no way limited to law firms but is used as well by a wide variety of businesses not engaged in the practice of law.

The Trustee’s second argument, regarding the use of the title “Subrogation Specialist” also failed. The court agreed that the word “subrogation” is a technical word that is not always understood by the least-sophisticated consumer. In fact, the court said it had “no idea” what the words “subrogation specialist” mean but the Trustee failed to meet her evidentiary burden that a least-sophisticated consumer would be misled into thinking that the words “Subrogation Specialist” implied that the Collection Letter was sent by an attorney.

Finally, the trustee argued the Collection Letter’s statement “[w]e have been *obtained* by the above creditor who has turned over to us for collection your account for the amount listed above” (emphasis added) implied that a law firm was involved. Any number of words could have been used in the Collection Letter to indicate that DKA was collecting the debt on behalf of West Coast. Using the least-sophisticated consumer standard, the court found that the use of the word “obtained” did not indicate the involvement of an attorney.

The Trustee’s FCCPA claims rested entirely upon the allegations supporting her FDCPA claims and also failed.

DOJ BRINGS MORE CHARGES FOR PRICE FIXING ON AIR CARGO AND AIR PASSENGER SERVICES

All Nippon Airways Co. Ltd. (ANA) has agreed to plead guilty and to pay a \$73 million criminal fine for its role in two separate conspiracies to fix prices in the air transportation industry, according to a November 1, 2010, DOJ announcement. Similarly, a Miami grand jury also recently returned an indictment against two executives of Cargolux Airlines International S.A., a Luxembourg-based corporation, for participating in a conspiracy to fix and coordinate certain surcharges on air cargo shipments to and from the United States, according to the DOJ.

According to a two-count felony charge against ANA, the Japan-based airline engaged in a conspiracy to fix one or more components of cargo rates charged for international air cargo shipments from at least as early as April 1, 2000, until at least February 14, 2006. ANA is also charged with engaging in a conspiracy to fix unpublished passenger fares on tickets purchased in the United States from at least as early as April 1, 2000, until at least April 1, 2004. The Cargolux indictment charges Ulrich Ogiermann, president and CEO of Cargolux, and Robert Van de Weg, senior vice president of sales and

marketing of Cargolux, with conspiring with others to suppress and eliminate competition by fixing and coordinating certain surcharges, including security and fuel surcharges, charged to customers located in the United States and elsewhere for air cargo shipments including to and from the United States. Ogiermann is also charged with participating in the conspiracy from at least as early as October 2001, until at least February 2006. Van de Weg is charged with participating in the conspiracy from at least as early as December 2003, until at least February 2006, said the department.

Both airlines transport a variety of cargo shipments, such as heavy equipment, perishable commodities and consumer goods, on scheduled international flights. ANA also transports passengers on scheduled flights within Japan and internationally, including to and from the United States. ANA typically offered unpublished passenger fares to travel agents for purchase by certain consumers.

According to the charges, ANA, Ogierman, and Van de Weg carried out the conspiracies by agreeing during meetings and other communications on certain components of the cargo rates to be charged for shipments to and from the United States. ANA is also charged with for doing the same with unpublished passenger fares to be charged on tickets purchased in the United States. As part of the conspiracies, ANA levied cargo rates and unpublished passenger fares in accordance with the agreements reached, and monitored and enforced adherence to the agreed-upon cargo rates and unpublished passenger fares. For their part, Ogiermann, Van de Weg, and their co-conspirators monitored the surcharge agreements and accepted payments at collusive and noncompetitive rates.

ANA, Ogiermann, and Van de Weg are charged with price fixing in violation of the Sherman Act, which carries a which carries a maximum penalty of 10 years in prison and a \$1 million fine for individuals and a maximum fine of \$100 million for each violation committed after June 22, 2004, and \$10 million for violations committed before that date for corporations. The maximum fine for each count may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.

Including these charges, as a result of this investigation, a total of 19 airlines and 14 executives have been charged in the DOJ’s ongoing investigation into price fixing in the air transportation industry. To date, more than \$1.6 billion in criminal fines have been obtained and four executives have been sentenced to serve prison time.

FTC PUTS CONDITIONS ON SIMON PROPERTY GROUP'S ACQUISITION OF PRIME OUTLETS

The Federal Trade Commission (FTC) is requiring Simon Property Group, Inc. to divest property and modify tenant leases as part of a settlement designed to preserve outlet center competition in parts of southwest Ohio, Chicago, Illinois, and Orlando, Florida, in the wake of Simon's purchase of Prime Outlets Acquisition Company, LLC.

Under the proposed settlement, Simon will sell either its Cincinnati Premium Outlet center located in Monroe, Ohio, or its Prime Outlets-Jeffersonville outlet center in Jeffersonville, Ohio. In addition, Simon has agreed to remove radius restrictions for tenants with stores in its outlet malls serving the Chicago and Orlando markets. This allows competing outlet centers or outlet mall developers wanting to enter those markets to sign leases with tenants that otherwise would have been prevented from doing so due to the radius restrictions.

On December 8, 2009, Simon, a real estate investment trust, and Prime signed an agreement under which Simon would acquire all of Prime's 22 outlet centers for approximately \$2.3 billion.

This settlement announcement resolves FTC competitive concerns that the transaction raised in several local markets. According to a complaint simultaneously filed by the FTC, without the settlement provisions, Simon's acquisition of Prime would have illegally reduced outlet center competition by:

- eliminating direct and substantial competition between Simon and Prime in southwest Ohio; Chicago, Illinois; and Orlando, Florida;
- giving Simon a monopoly in outlet centers serving the Southwest Ohio market; and
- allowing Simon to prevent or limit new outlet center entry and competition in the Chicago and Orlando local markets.

In Chicago and Orlando, new entry is likely to prevent any increase in rents to outlet mall tenants. However, many of Simon's leases include radius restrictions that prevent the tenants from opening other stores in outlet malls within a specified distance. As a result of these restrictions, an outlet mall developer wanting to open a new outlet center serving either Chicago or Orlando would find it difficult to sign key tenants to leases.

COURT FINDS THAT SPINE TREATMENT COMPANY FAILED TO ALLEGE COMPETITOR ENGAGED IN ANTICOMPETITIVE CONDUCT

A California District Court recently held that a company selling minimally invasive spine treatments failed to state a claim for monopolization against a competitor. See *Carefusion Corp. v. Medtronic, Inc.*, 2010 WL 4509821 (N.D. Cal. 2010).

In the late 1980s and early 1990s Doctors Mark Reiley and Arie Scholten developed kyphoplasty, a minimally invasive vertebral compression fracture (VCF) treatment procedure. They subsequently filed and received patents for their procedure, founded a business (Kyphon) and assigned the patents to it.

Since its founding in 1994, Kyphon has acquired additional patents and patent rights related to minimally invasive VCF treatment products, including former competitors. Plaintiffs CareFusion Corporation and CareFusion 2200 alleged that, since Kyphon's founding, Kyphon used its monopoly power to "artificially raise the prices on their kyphoplasty products." Specifically, they point to 2008 DOJ press release announcing a \$75 million settlement between Medtronic Spine LLC (Kyphon's corporate successor) to settle allegations of a seven-year marketing scheme that resulted in fraudulent Medicare claims in relation to Kyphon's kyphoplasty procedure. According to the DOJ press release, Kyphon's marketing practices were aimed at persuading hospitals to use kyphoplasty treatment, which could be billed to Medicare at a higher inpatient (e.g., overnight) rate, rather than on a less-costly outpatient basis appropriate for kyphoplasty treatment.

CareFusion filed a complaint alleging antitrust violations under the Sherman Act. Kyphon countered with a motion to dismiss. Specifically, Kyphon argued that CareFusion had not adequately pled that defendants' actions constituted "anticompetitive conduct" or that the alleged harms constituted the requisite "antitrust injury."

According to CareFusion, the relevant market is the "minimally invasive vertebral compression fracture (VCF) treatment product market, which includes, but is not limited to, kyphoplasty (by balloon or otherwise) and vertebroplasty." Alternatively, they alleged that the relevant market is the "kyphoplasty product market."

They claimed that after Medtronic's acquisition of Kyphon in July 2007, (merger agreement) and November 2007, (completed merger), Kyphon possesses 85% of the market share in the VCF treatment product market, and 97% of the market in the kyphoplasty product market.

Kyphon did not contest the allegations as to the relevant market and monopoly power, and CareFusion's allegations were not implausible on their face. The court found that they had adequately pled monopoly power in the relevant market and satisfied the first element of a § 2 claim.

The second element of a monopolization claim, willful acquisition or maintenance of monopoly power, requires a showing that defendant engaged in "anticompetitive conduct," or in other words, that defendant's acts amount to "exclusionary or predatory conduct," not power "gained from growth or development as a consequence of a superior product, business acumen, or historic accident." This element is necessary to distinguish between legitimate competition and conduct that interferes with competition.

However, anticompetitive conduct alone does not establish a monopolization claim; rather, the plaintiff must connect that anticompetitive conduct to a corresponding antitrust injury in order to establish "antitrust standing." The Ninth Circuit has established a four-part definition of antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." In practice, then, a plaintiff must show how defendant's anticompetitive conduct harms both competition and plaintiff.

Here, CareFusion alleged three types of anticompetitive conduct: 1) bad faith patent enforcement; 2) an illegal Medicare fraud marketing and pricing scheme; and 3) illegal acquisition of patents, licenses, and competitor companies to dominate the market. CareFusion also alleged two types of injury: 1) delayed entry into the market based on Defendants' anticompetitive conduct; and 2) potential threat of litigation regarding CareFusion's products in the kyphoplasty market. As to the market and competition overall, CareFusion argues that Kyphon's conduct (especially in regard to acquisitions of patents and companies) prevented competitors from entering the market.

CareFusion argued that Kyphon threatened to enforce its patents with full knowledge that these patents were invalid or unenforceable because Medtronic itself said so in its defense to litigation initiated by Kyphon. Such a claim is often referred to as a *Handgards* claim, or "sham litigation." The court found a "fatal flaw" in CareFusion's argument. Even if Defendants believed the patents were invalid, they did not actually bring suit, or make direct threats that they would bring suit, against CareFusion for patent infringement, thus it made no sense to speak of "sham litigation" or "bad faith prosecution."

CareFusion also alleged that, "in or about 2000," Kyphon engaged in a "years-long" scheme to market their kyphoplasty products by convincing certain hospitals that they could bill Medicare at a higher overnight rate, even though, according to CareFusion, kyphoplasty does not require overnight care. Although Kyphon ultimately settled these allegations for \$75 million with DOJ CareFusion challenged the "marketing and pricing scheme" that allegedly allowed Kyphon to artificially raise prices for kyphoplasty products and improperly divert sales away from less-costly VCF treatment (e.g., vertebroplasty).

It was not clear to the court from the complaint how Kyphon's Medicare "marketing and pricing scheme," if true, amounted to the type of "exclusionary or predatory conduct" that is sufficient to establish anticompetitive conduct. CareFusion also failed to explain how Kyphon's "illegal Medicare pricing scheme" caused it any injury.

Section 7 of the Clayton Act, prohibits as unlawful an acquisition with the effect of "lessen[ing] competition" or tend[ing] to create a monopoly. With respect to claims of patent-based monopolization, "where a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the antitrust laws."

CareFusion's final allegations as to anticompetitive conduct related to Kyphon's history of acquiring or licensing patents in the kyphoplasty field, threatening and bringing litigation over allegedly invalid patents, and taking over competitor companies. Specifically, it pointed to Kyphon's conduct during earlier litigation and the eventual merger in late 2007 as evidence of anticompetitive conduct. Although some of CareFusion's allegations regarding patent and corporate acquisitions are more detailed than others, the court found that most of its allegations, taken as a whole, were insufficient to establish anticompetitive conduct and corresponding antitrust injury.

FORMER PRESIDENT OF NEW JERSEY MANUFACTURER AND DISTRIBUTOR OF FOOD SERVICE EQUIPMENT HARDWARE CHARGED WITH CONSPIRACY TO ALLOCATE CUSTOMERS

An Atlanta grand jury returned an indictment early last month against the former president and CEO of a Lakewood, New Jersey-based manufacturer and distributor of food service equipment hardware, for conspir-

ing to allocate customers for the sale of commercial and institutional food service equipment hardware, including walk-in refrigeration equipment, the DOJ announced.

The one-count felony indictment, returned in U.S. District Court in Atlanta, charges Thomas E. Carr with participating in a conspiracy to allocate customers for the sale of food service equipment hardware sold in the United States and elsewhere beginning in or about early 2004 and continuing at least through December 2008. The purpose of the charged conspiracy was to suppress and eliminate competition in the sale of the food service equipment hardware manufactured or sold by Carr and his co-conspirators.

Food service equipment hardware includes fabricated parts, such as cafeteria hardware, equipment legs and casters, and fabrication supplies, and walk-in refrigeration components, such as metal racks, door hinges, handles, latches, closers, and panel fasteners.

According to the indictment, Carr and co-conspirators agreed during meetings, telephone and e-mail discussions to allocate customers of food service equipment hardware; not to compete for one another's protected customers or to submit intentionally high prices or bids to certain customers; and to exchange prices to customers so as not to undercut one another's prices. As part of the conspiracy, Carr and co-conspirators submitted bids and sold food service equipment hardware at collusive and noncompetitive prices.

Carr is charged with allocating customers in violation of the Sherman Act, which carries a maximum penalty of 10 years in prison and a \$1 million fine for an individual. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.

Carr's charge is the third to arise from an ongoing federal antitrust investigation of customer allocation in the food service equipment hardware industry. On May 19, 2010, Kason Industries Inc. and its former president, Peter A. Katz, pleaded guilty to the same customer allocation conspiracy charge. On August 17, 2010, Kason Industries was sentenced to pay a criminal fine of \$3.3 million. Katz is scheduled to be sentenced on January 5, 2011.

COCA-COLA'S ACQUISITION OF ITS LARGEST NORTH AMERICAN BOTTLER APPROVED

Following a public comment period, the Federal Trade Commission has finally approved a final order

settling charges that The Coca-Cola Company's \$12.3 billion acquisition of its largest North American bottler, which also distributes Dr Pepper brand carbonated soft drinks in specific geographic markets, would have been anticompetitive. The order requires Coca-Cola to limit access to the confidential competitive business information of rival Dr Pepper Snapple Group.

CASE HIGHLIGHTS

PROVIDER OF LOAN DOCUMENT PREPARATION SERVICES FAILED TO ALLEGE THAT COMPANY WOULD ATTAIN MONOPOLY POWER

A vendor providing loan document preparation services failed to allege that a company that developed a loan origination system and owned an online loan transaction network would attain monopoly power in the document preparation services market, as required to state a claim under the Sherman Act for attempted monopolization. The vendor failed to provide plausible allegations that there were any barriers to entry into the market given that the vendor's allegations showed only that there was a barrier to entry for a submarket consisting of document preparation services provided to users of the company's document preparation services product. *See Doc-Magic, Inc. v. Ellie Mae, Inc.*, 2010 WL 3987495 (N.D. Cal. 2010).

DAIRY FARMERS SUFFICIENTLY STATED THAT MILK MARKETER WAS AGENT OF DAIRY COOPERATIVE

Dairy farmers sufficiently stated that a milk marketer was an agent of a dairy cooperative, as required to hold the cooperative responsible for attempted monopolization and monopolization by the marketer in violation of the Sherman Act. The farmers alleged that the marketer was subject to the cooperative's direction and control, the marketer was formed by the cooperative to act as the cooperative's exclusive marketing agent, the cooperative exercised control over more farmers through the marketer, the cooperative and the marketer together had punished farmers, haulers, and independent processors who operated outside of their sphere of influence, and the cooperative and the marketer together had harmed competition. *See Allen v. Dairy Farmers of America, Inc.*, 2010 WL 3430833 (D. Vt. 2010).

PINEAPPLE PRODUCERS' ALLEGED ANTICOMPETITIVE CONDUCT DID NOT HAVE EFFECT OF DELAYING COMPETITORS' ENTRY INTO AFFECTED MARKET

Assuming that pineapple producers possessed monopoly power in a market limited to certain fresh, whole, extra-sweet pineapples, neither the “threat” letters sent to competitors and others, giving the impression that such pineapples were patented by the producers, nor the purported “sham” patent infringement litigation, concerning a different type of pineapple, in which the producers engaged had the anticompetitive effect of delaying competitors’ entry into the designated market. Thus, the evidence did not establish a monopolization claim under the Sherman Act against the producers. *See American Banana Co., Inc. v. J. Bonafede Co., Inc.*, 2010 WL 4342217 (2d Cir. 2010).

