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The Antitrust Counselor

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Criminal Antitrust Enforcement: Will States Take the Plunge?

In both rhetoric and results, the Antitrust Division of the Department of Justice has demonstrated that it sees cooperation -- that is, the granting of leniency to conspirators in exchange for information and other assistance in building criminal cases -- as the centerpiece of modern antitrust criminal law enforcement. Whether measured in terms of the number of investigations initiated, the breadth of the anticompetitive activity under scrutiny, or the size of the fines and length of jail sentences imposed, there is little question that the Antitrust Division's criminal enforcement has become more active in the past decade. And the Division has not been understated about attributing the credit for these results. Scott Hammond, the current Director for Criminal Enforcement has commented that, while the Division has a number of powers at its disposal to prosecute antitrust cartel behavior, "the fact is that the U.S. Corporate Leniency Program has directly led to the detection and successful prosecution of more international cartels than all of these other powers combined. Unquestionably, leniency programs are the greatest investigative tool ever designed to fight cartels."

Since 1993, the rules governing federal cooperation have become more transparent, the penalties for *not* cooperating have become harsher and the benefits of cooperation have grown sweeter. But while the currents seemingly are moving strongly towards a system designed to give companies and executives greater incentives to cooperate with

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Defending Liberty
Pursuing Justice

Criminal Antitrust Enforcement Abroad

It used to be that foreign cartel participants concerned about going to prison could sleep fairly well at night as long as they stayed away from the United States. In the best-selling book *The Informant* – which describes the operation and investigation of the global lysine cartel – cartel participants based abroad expressed great reluctance to travel to the U.S., but ultimately could not resist an invitation to meet in Hawaii. When that meeting was recorded by the FBI and many of the participants subsequently went to prison, their initial concerns seemed to be validated. Similarly, as recently as 2002, choosing to reside in London rather than New York was a wise decision for a participant in a price-fixing conspiracy. A. Alfred Taubman, the chairman of Sotheby's in New York, went to prison for his alleged price-fixing agreements with Sir Anthony Tennant, chairman of Christie's. Tennant, on the other hand, remained safe from criminal prosecution (and extradition) in the United Kingdom.

Recently, however, there has been a significant shift in expectations about global criminal enforcement of antitrust violations.. There is a clear global trend towards expanding the use of criminal penalties for antitrust violations, which should be a wake-up call to multinational corporations and their counsel. Cartel participants now face the prospect of criminal sanctions – and, potentially, extradition requests – from a variety of jurisdictions affected by their conduct, including numerous jurisdictions across Europe, Asia, and North and South America. For in-house antitrust counsel at multinational corporations, the most important aspect of this development is that they must now add to their list of concerns the risk that executives (particularly, although not exclusively, those based abroad) can face time in a foreign prison if they violate the competition laws of the foreign nation.

The proliferation of foreign criminal antitrust statutes has been a less-visible aspect of what is arguably one of the most successful U.S. exports in the past few years – antitrust law. Along with private actions (another much-debated aspect of U.S. antitrust law that is slowly but surely making inroads abroad), the increase in foreign criminal antitrust enforcement is making it harder for cartel participants to sleep soundly anywhere these days. Indeed, if Sir Tennant of Christie's had continued his alleged meetings with Alfred Taubman *after* June 2003, things may have worked out quite differently for him. The following brief survey lists some of the jurisdictions where criminal prosecution for cartel offenses is possible.

Europe. While the laws of the European Union itself provide only for sanctions on companies, not individuals, it would be a mistake to assume that prison time is not a risk for cartel participants in Europe. Due in part to legislation enacted over the past few years, criminal penalties for competition law violations are now, in theory, possible in Austria, Estonia, France, Germany (for bid rigging), Greece, Hungary, Ireland, Norway, the Slovak Republic, Slovenia, and the United Kingdom. Criminal prosecutions may also be brought in egregious cases in Russia and the Czech Republic. The potential fines and prison terms vary significantly based on jurisdiction. For example, the maximum prison sentence for competition law violations is two years in the Czech Republic, three years in Norway, and five years in the United Kingdom. In other countries, such as Denmark, individual monetary penalties may be assessed for competition law or related violations, even if a prison sentence is not authorized.

Asia and the Middle East. U.S.-style prosecution of cartel participants has also expanded into Asia. In Japan, while the individual fines are low, individuals can now be sentenced to up to three years in prison for cartel violations. Criminal sanctions are also available to some extent in Korea and Israel, and will soon be authorized in Australia.

North and South America. In addition to the United States, individuals who violate the competition laws of Brazil, Canada, and Mexico may be subject to

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criminal prosecution in those jurisdictions. Canada has had a vibrant criminal enforcement regime for more than a decade, with high fines and potential prison terms of up to five years. While criminal enforcement in Brazil has been rare, that may be changing, and Brazil also authorizes prison terms of up to five years. In Mexico, criminal prosecutions are limited to price-fixing and output restrictions concerning staple consumer goods, but violators may face up to *ten* years in prison – a prospect that no well-counseled U.S. employee based in Mexico is likely to ignore.

The above list would have looked quite different just a few years ago. The criminal enforcement regimes in the United Kingdom, Hungary, and (imminently) Australia have only come into effect recently. Moreover, while criminal sanctions for competition law violations are still very rare in Europe, the recent wave of amendments to foreign competition laws authorizing criminal enforcement reflects a real cultural shift. Indeed, in a 2004 OECD roundtable, it was noted that a trend exists among OECD member countries towards acknowledging that sanctions on individuals, including imprisonment, can be an effective and important method of combating cartels. It is also possible that this cultural shift will result in greater criminal enforcement in some of those jurisdictions that have long had unused criminal sanctions for competition law violations on the books. Such trends are likely driven by many of the same forces (*i.e.*, an effort to enhance deterrence) that are driving the increased acceptance of private antitrust enforcement in many of these same jurisdictions. Similarly, many of the same arguments can be heard against the spread of both of these American exports – for example, the concern that the increased company and individual exposure resulting from international criminal enforcement will make companies less likely to file leniency applications for undiscovered cartels.

It will likely be a few years before the increased risks facing cartel violators will become fully visible to the public. To begin with, many jurisdictions are likely to bring criminal cases only where the cartel activity persisted significantly beyond the effective date of the statute providing for such penalties. Moreover, an investigation of a large multinational cartel can take many years prior to reaching court. Ireland has had the legal power to prosecute cartels criminally since 1996, but the first conviction was on March 2 of this year. John Fingleton, the head of the U.K.'s Office of Fair Trading, recently estimated that it would be at least three to five more years before any criminal cases reached court in the U.K. But the lack of publicly-known prosecutions in these jurisdictions does not change the very real increased exposure facing multinational corporations and their employees today.

> "The proliferation of criminal antitrust enforcement regimes worldwide presents a great challenge for the antitrust counselor and litigator."

The proliferation of criminal antitrust enforcement regimes worldwide presents a great challenge for the antitrust counselor and litigator. The mere threat that company employees could be subject to criminal prosecution in a foreign jurisdiction for competition law violations has significant implications for a company's compliance practices and defense strategies. For example, companies accused of having participated in global cartels may now need to consider whether or not company employees based abroad will need to obtain their own lawyers in connection with cartel investigations. Companies may also face the unwelcome prospect of their foreign-based employees being asked to provide testimony to avoid criminal prosecution. Moreover, all of these issues may arise in jurisdictions that apply vastly different standards to matters that U.S. lawyers have come to take for granted. For example, competition authorities and courts in Europe may not consider communications between a U.S.-based lawyer and an employee based in Europe to

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Supreme Court Docket/*Volvo*: Revisiting the Robinson-Patman Act

On January 10, 2006, the U.S. Supreme Court re-visited the Robinson-Patman Act for the first time since its ruling in *Brooke Group Ltd v. Brown & Williamson Corp.* when it issued its decision in *Volvo Trucks North American, Inc. v. Reeder-Simco GMC, Inc.* In this secondary line injury case, the Court held that a manufacturer of special-order products (here, Volvo) sold through a customer-specific competitive bidding process did not violate the Robinson-Patman Act's ("RP Act") prohibition on price discrimination when it offered different wholesale prices to dealers that were not competing directly against one another for sales to the same customer. The Court held that, in the absence of "actual competition with a favored . . .dealer," a complaining dealer, "cannot establish the competitive injury required under the Act." Furthermore, even though the plaintiff, Reeder-Simco ("Reeder), had competed with other dealers in head-to-head competition in at least two instances, the Court determined that the evidence of discriminatory pricing was insufficient to establish a violation of the RP Act. Even if Volvo's pricing in these two instances could be considered discriminatory, the Court determined that "it was not of such magnitude as to affect substantially competition between Reeder and the 'favored' Volvo dealer."

The Court's decision in *Volvo* provides suppliers of special-order products that are sold through a bid process with a significant level of comfort regarding their ability to offer different prices and discounts to dealers that do not compete directly against one another for the same end-customer opportunities. The Court specifically rejected Reeder's attempt to establish the requisite discrimination and competitive injury with evidence that Volvo had offered lower prices to dealers participating in bid opportunities in which Reeder was not involved. Moreover, even in instances where dealers are competing with one another, the decision suggests that a dealer must demonstrate more than a few, isolated incidents of discrimination in order to establish an RP claim.

Yet, while the decision provides answers to some of the lingering questions about the scope of the RP Act's prohibition on secondary-line price discrimination, many open questions remain unanswered by *Volvo.* For instance, the Court declined to address whether the RP Act should ever apply in the context of bidding markets, where only one firm ultimately purchases the supplier's product; hence, it could be argued that a "disfavored purchaser" – one who actually buys product at a higher price – can never exist. In addition, the Court left open the possibility that more robust and systematic evidence from a plaintiff could support a claim under similar circumstances if it could show that its overall ability to compete was undermined by regularly receiving inferior offers from the manufacturer or supplier.

Finally, due to the unique issues that are presented in bid markets for special-order goods, lessons from *Volvo* may be limited and difficult to decipher in other business contexts. For example, while *Volvo* includes dicta regarding the RP Act's primary goals (*i.e.*, the protection of interbrand competition rather than intrabrand competition), the Court's discussion regarding the RP Act's standard of proof for "injury to competition" in a secondary-line discrimination claim demonstrates that the policies underlying the RP Act still conflict with the basic principles underlying other federal antitrust laws. Consequently, it is difficult to predict how the lower courts will interpret these contradictory messages. One can expect, however, that RP Act jurisprudence will likely remain a source of controversy and confusion for some time to come.

<u>Background</u>

Reeder was a dealer of heavy duty trucks for Volvo. Heavy duty trucks are typically custom-built by the manufacturer to meet precise customer specifications, and are usually sold by dealers through a competitive bidding process in which the customer requests bids from multiple dealers for one or more manufacturers. Reeder alleged that, as part of a plan to reduce its number of dealers, Volvo violated the Robinson-Patman Act by providing other dealers with more favorable discounts on competitive bid opportunities for the sale of heavy

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Will States Take the Plunge?

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federal antitrust authorities and greater certainty if they do, there is a significant locus of power that this trend does not account for: the states. Nearly every state attorney general has the ability to seek criminal sanctions for anticompetitive conduct, and none is beholden to the federal government when making decisions about whether to initiate grand jury investigations or file criminal charges of its own.

As discussed in this article, the federal structure promoting cooperation could be jeopardized if the states become more involved in criminal investigations targeting anticompetitive conduct that is national in scope. Companies and individuals that are already cooperating with the federal government, or that are interested in doing so, could find themselves in a state's crosshairs. To be sure, state attorneys general have an interest in prosecuting antitrust crimes that have local impact. But the unpredictability associated with robust criminal enforcement by the states that is not coordinated with the Antitrust Division could give companies and individuals reason to pause before cooperating with federal authorities.

I. Overview of the Federal Leniency Program

While the Antitrust Division has had a leniency program in place since 1978, it remained relatively moribund until 1993, when the Division undertook a significant revision of the Corporate Leniency Program. This was followed the next year by the Division's introduction of a new Individual Leniency Program for executives. Since then, the cooperation program -- and the Division's fortunes along with it -- have improved, as the statistics show:

"All but three states have the ability to criminally prosecute at least some form of antitrust violation"

	1995	2004
Number of Leniency Applications/Year	2	24
Fines Collected (Millions)	$41.4	$141.2
Days of Incarceration	3,902	7,334

What accounts for this change? Predictability. Several changes have increased the ability of would-be cooperators to make informed predictions about whether the benefits of cooperation outweigh the costs of admitting to involvement in anticompetitive conduct.

One of the most important changes has been the increased transparency of the rules governing cooperation. Before 1993, applicants had no guarantee that they would qualify for leniency, even if they were the "first in the door" to report anticompetitive conduct. In 1993, however, the program was changed such that a company and its executives now *automatically* receive leniency if the company first reports its involvement in cartel behavior prior to the beginning of an investigation and: (1) the Division has not already received information from any other source about the criminal activity; (2) the corporation took prompt action to end its involvement in the activity when it learned of it; (3) the corporation fully confesses its involvement in the crime and cooperates with the Division to build a case against co-conspirators; (4) the admission of guilt is truly a corporate act, rather than the isolated confessions of certain executives; (5) the corporation makes restitution where appropriate; and (6) the corporation was not a leader in, or originator of, the criminal conduct. Corporations can also qualify for automatic leniency even after the Division has begun an investigation under certain specified circumstances.

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The risks to companies and individuals choosing not to cooperate have also increased. In 2004, Congress amended the penalty provisions of the Sherman Act, increasing the maximum term of imprisonment for an antitrust violation from three to ten years, the maximum fine for corporations from $10 million to $100 million and the maximum fine for individuals from $350,000 to $1 million. And in 2005, the U.S. Sentencing Commission -- following a recommendation by the Antitrust Division -- amended the federal Sentencing Guidelines to boost the recommended jail terms and fines for convicted antitrust violators.

Finally, the benefits of cooperation have been made more tantalizing. In addition to qualifying for total immunity from federal criminal liability, cooperators now benefit from a law enacted by Congress in 2004 which statutorily bars private antitrust plaintiffs from seeking treble damages against those federal cooperators who also agree to assist plaintiffs build theirs cases against the remaining co-conspirators.

II. The Wild Card: State Prosecutions

While the Antitrust Divisions has made significant strides towards securing cooperation in federal investigations, there is nothing about the current system of federal cooperation that addresses or accounts for parallel -- and potentially conflicting -- criminal enforcement by state attorneys general. Indeed, predictability is not the word that comes to mind when thinking about the independent enforcement decisions and priorities of 50 sovereign governments. A number of states have a record of maverick conduct in the area of antitrust enforcement, and nearly every state is armed with its own criminal sanctions for antitrust violations of some stripe. And while most state attorneys general have not actively exercised their criminal enforcement powers, many have.

All but three states have the ability to criminally prosecute at least some form of antitrust violation. The types of anticompetitive conduct that the different states can target, however, vary widely. Many states have generally applicable antitrust laws that mirror Section 1 of the Sherman Act and thus carry criminal sanctions for the range of *per se* unlawful agreements in restraint of trade. Other states impose criminal penalties only for certain types of anticompetitive conduct, such as price-fixing or bid-rigging. Some states have also used their general criminal statutes -- such as larceny and bribery statutes -- to prosecute antitrust violations.

The penalties for criminal violations vary. Criminal fines can range from $1,000 in some states to $1 million in others. A number of states impose jail terms of less than one year, but many carry greater terms. The maximum penalty in New York, for instance, is four years' imprisonment while the maximum term defendants face in Minnesota is seven.

To date, the history of state criminal antitrust enforcement has generally not been rich. Based on the number of reported indictments and cases -- which obviously does not include any secret grand jury investigations -- only a handful of all states that have criminal enforcement powers has actively and meaningfully exercised them. And in the past, those states that have pursued anticompetitive conduct criminally have, by and large, restricted their aim to local businesses, industries and conduct.

There are signs, however, that at least some attorneys general are beginning to set their sights on bigger prey. The most notable example is the recent investigation that New York State Attorney General Eliot Spitzer conducted of Marsh & McLennan, Inc. ("Marsh") and a number of its high-ranking executives. Marsh is a leading insurance broker that helps customers -- typically businesses looking to purchase insurance for employees -- find an appropriate insurance carrier for their needs. Marsh does business in many states, including New York, and around the world.

In 2004, Spitzer filed a Complaint charging Marsh with,

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among other things, engaging in a scheme to "rig bids and submit false quotes to unwitting clients throughout New York *and across the United States*. " The Complaint alleged that Marsh had entered into agreements to submit false bids with some of "the world's largest insurance companies," including American International Group ("AIG"), Hartford Financial Services Group, and ACE, Ltd. The possibility of criminal prosecution was very much on the table, and Marsh was able to avoid criminal charges only after replacing its Chairman and CEO with an executive committed to reforming the company and agreeing to pay $850 million in restitution. In addition, eight former Marsh executives were indicted by Spitzer's office for bid-rigging and grand larceny.

The Marsh case is an important reminder that nothing limits the states' ability to investigate large, international companies for alleged criminal antitrust conduct that has national, as well as local, impact. This certainly comes as no surprise to civil antitrust lawyers, who have seen the states become active in challenging national mergers based on concerns about local anticompetitive effects. Indeed, in two seminal cases -- *Massachusetts v. Campeau Corp.* and *California v. American Stores Co.* -- individual states sued to enjoin large, national mergers even though federal authorities had already reviewed and blessed the transactions. The trend is not likely to abate any time soon. As Patricia Conners, the Chair of the National Association of Attorneys General ("NAAG") Multistate Antitrust Task Force, said in 2002, "It's well settled that state attorneys general have the ability to bring multi-state matters or even single-state matters that, in effect, have an impact on national policy."

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III. Challenges to Federal Cooperation

The appearance of state attorneys general in the kind of criminal cases that have traditionally been in the Antitrust Division's backyard could raise a real concern: a state might easily investigate and prosecute the same companies and people the Division has relied upon for cooperation in building its cases.

Although there is no reported instance of this conflict yet occurring in the antitrust context, it has already happened in another area of traditional federal criminal enforcement -- securities fraud cases. In August 2003, the Oklahoma Attorney General, Drew Edmondson, indicted telecommunications giant WorldCom, its CEO Bernard Ebbers, its CFO Scott Sullivan and four other former high-level managers for violating the Oklahoma Securities Act by fraudulently inflating the value of WorldCom stock. Federal prosecutors in New York, however, were already investigating precisely the same group for federal securities fraud violations, although they had not yet filed charges by the time Edmondson unveiled his case. From the perspective of the federal prosecutors, the Oklahoma indictment hamstrung their investigation by charging many of the same individuals that the U.S. Attorney's Office needed to convince to cooperate.

Had the state charges proceeded, federal prosecutors would have been forced to select potential cooperators from a field of candidates that would have been subjected to the full brunt of state criminal enforcement, including being pilloried in press conferences and suffering damage as a result of adversarial litigation. This kind of baggage makes would-be cooperators less attractive because it can affect their credibility and, thus, their value to a prosecutor. Ultimately, after negotiations with the U.S. Attorney's Office, the Oklahoma Attorney General agreed to withdraw the state charges in favor of federal prosecution, and the U.S. Attorney's Office signed up Scott Sullivan -- one of the defendants named in the Oklahoma indictment -- as a cooperator in its successful case against Bernard Ebbers.

The lesson of WorldCom is that the states -- by unilaterally inserting themselves in investigations of national dimension that would normally be the province of federal prosecutors -- can disrupt federal coopera-

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tion efforts. That a state has already done this in a securities case serves notice that it can happen in an antitrust investigation.

Even more serious disruption to federal cooperation can occur if a state were to file criminal antitrust charges against targets that are *already* cooperating with federal prosecutors. A state might take the position, for instance, that a decision by federal authorities to grant leniency to a company did not fully take into account significant local anticompetitive damage caused by the cooperator's conduct, and that -- in the state's view -- it is unjust to give the company a "complete pass." Or a state may believe that certain executives of the cooperating company should be charged because of particular notoriety or infamy surrounding their conduct in the local community. In either case, even companies or individuals that have successfully convinced the Antitrust Division to grant leniency could still face serious criminal charges from a state attorney general.

The filing of state antitrust charges against either cooperators already working, or interested in working, with the Antitrust Division would surely affect the predictability that now attends the federal cooperation process and that makes cooperation so attractive to federal targets. The prospect of having to litigate a state criminal case despite -- and, indeed, potentially because of -- cooperation with the Antitrust Division could well cause some to pass on federal cooperation entirely.

Of course, any state criminal prosecution of national targets would raise fewer concerns if there were effective coordination of criminal investigations among the states themselves and between the states and the Antitrust Division. To a certain extent, such coordination does occur on the civil antitrust side. The NAAG Multistate Antitrust Task Force is an effective clearinghouse that allows individual states to jointly plan and file damages actions. The Task Force is also involved in coordinating conduct with federal regulators, most visibly in the merger context. Unfortunately, there has been no real coordination to date between the states and the federal government in the area of criminal antitrust enforcement.

IV. What Lawyers Should Know

Attorneys representing corporations and individuals interested in cooperating with the Antitrust Division must be mindful of the possibility of state criminal enforcement and take such enforcement into account when advising clients about whether to cooperate federally. Lawyers should consider taking the following steps in addition to conducting the kind of thorough internal investigation into the nature and scope of any anticompetitive conduct by the client that would normally be required before considering cooperation.

- Determine which, if any, states might pursue a criminal prosecution by analyzing those states in which the client does significant business or employs a large number of people.

- Next, determine whether any of these states has a history of active criminal antitrust enforcement. It is a good bet that states that have already brought criminal antitrust cases will be the ones that might bring them in the future.

- If you determine that one of these affected states is particularly active and aggressive, or has previously taken an interest in the type of conduct or the particular industry at issue -- assume that any admissions made in the course of attempting to secure federal leniency will come to the state's attention, thus raising the possibility of a separate investigation and charges.

At the very least, concerns about state enforcement should be raised with the Antitrust Division, which would most likely have an interest in seeking to dissuade the state from proceeding with its criminal charges.

In the end, the possibility of state criminal antitrust prosecution will likely complicate decisions about whether and how to cooperate, but it should not frustrate those decisions entirely if the prospect of state enforcement is anticipated and well managed. The real risk is if that prospect is simply ignored.

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Volvo

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duty trucks.

Specifically, Reeder offered evidence of three types of transactions in an effort to establish that Volvo had engaged in unlawful "secondary-like" price discrimination:

- ***First***, Reeder compared discounts that it received from Volvo in four bid situations in which Reeder won the business against larger concessions that Volvo granted to other dealers who successfully competed on bids in which Reeder did not participate ("purchase-to-purchase comparisons").

- ***Second***, Reeder compared discounts that it received in connection with several unsuccessful bids it made against non-Volvo dealers with greater concessions that Volvo granted to other Volvo dealers who were successful in bids in which Reeder did not participate ("offer-to-purchase comparisons"); and

- ***Third***, Reeder provided evidence of two occasions in which Reeder bid and competed directly against another Volvo dealer that received a more favorable price than Reeder ("head-to-head comparisons").

At trial, the jury determined that Volvo had engaged in unlawful price discrimination, injuring Reeder and harming competition between Reeder and other Volvo truck dealers. On appeal, the Eight Circuit affirmed. Volvo subsequently filed a petition for certiorari to the U.S. Supreme Court. Volvo's petition noted that there was a split in authority among the Court of Appeals over whether a plaintiff can establish that it is a "disfavored purchaser" under the RP Act when it does not actually make any purchases in the transactions that are alleged to be discriminatory. The Supreme Court granted certiorari to resolve whether a manufacturer can be liable for secondary-line price discrimination under the RP Act in the absence of evidence that the manufacturer discriminated between dealers competing to resell a special-order product to the same retail customer.

In their briefs to the Court, Volvo, along with the U.S. antitrust enforcement agencies (writing as *amicus curiae*), argued that the Act requires discrimination between different purchasers. They urged the Supreme Court to decide that the RP Act does not apply to "markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory." Since there would only be potentially one purchaser of Volvo's products in these bidding markets, Volvo and the enforcement agencies argued that Volvo could not engage in any transactions where it sold its product to one dealer on more favorable terms than it sold to another competing dealer. Instead, there would be only one purchase and one rejected offer. They recognized that a number of previously decided RP cases held that the RP Act does not apply to mere offers to sell or attempts to buy a product. Reeder, on the other hand, argued that it had purchased trucks from Volvo in contemporaneous bidding opportunities and, in at least several instances, it was competing for the same customer dollar as the other bidders. Several Court of Appeals decisions had indicated that this type of evidence would be sufficient to establish a RP claim.

The Supreme Court's Opinion

The Supreme Court reversed the Eighth Circuit and held that Volvo did not violate the Robinson-Patman Act's prohibition on price discrimination

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be protected by the attorney-client privilege. U.S.-based company antitrust counsel face the danger of being thrust into a difficult and unexpected role – coordinating an antitrust defense that includes navigating through the criminal procedures of multiple jurisdictions, many of which have legal systems that operate under fundamentally different premises and which have little or no precedent to suggest how large multinational cartel cases will be handled.

The potential for employees to be subject to criminal prosecution in multiple jurisdictions also raises significant issues for those considering filing leniency applications. As discussed above, the value of "being first" and avoiding prosecution in the U.S. seems less attractive if key employees will still be subject to potential criminal prosecution in other countries. As has become routine in the merger control area, leniency applications will now need to be closely coordinated and timed among numerous jurisdictions that have varying rules and substantive requirements. In short, life just became a lot more dangerous for cartel participants, and a lot more complicated for their companies' lawyers.

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Trinko One Year Later: A Look Back

For decades, many companies have been unwilling to exercise their right to unilaterally refuse to deal with their rivals. In light of the broad scope often afforded *Aspen Skiing*, the vague nature of the essential facilities doctrine and the monopoly-leveraging theory, and the uncertainty of success on a motion to dismiss, lawful monopolists and other companies alike have often been unwilling to expose themselves to the potential litigation costs of such a decision. In *Verizon v. Trinko*, 540 U.S. 398 (2004), the U.S. Supreme Court established the principle that, as a general matter, a company's unilateral refusal to deal is not a proper basis for Section 2 liability, regardless of the company's intent. In doing so, the Court strictly curtailed the scope of those refusal to deal claims that can survive a motion to dismiss, requiring that plaintiffs show the defendant's termination of a prior voluntary course of dealing. In light of this decision, all companies – even those that enjoy monopoly power – now have greater freedom than ever before to protect their products, facilities, and intellectual property from their rivals.

It is well recognized that the activities of those companies which enjoy monopoly power are held to a higher legal standard, and certain conduct on the part of such monopolies may be illegal that would not be

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Volvo

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when it offered different wholesale prices to Reeder and other Volvo dealers that were not competing with Reeder for sales to the same customer. According to the Court, its secondary-line Robinson-Patman decisions indicate that a "hallmark of the requisite competitive injury . . . is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." The Court "decline[d] to permit an inference of competitive injury" from Reeder's evidence of purchase-to-purchase and offer-to-purchase comparisons due to the absence of actual competition between Reeder and a favored Volvo dealer and the "mix-and-match, manipulable quality" of such evidence. The Court, however, suggested in dicta that Reeder may have been able to establish the requisite competitive injury had it provided (1) a "systematic study" or "statistical analysis" which showed that Volvo "consistently favored" other dealers and/or (2) evidence that customers did not invite Reeder to bidding opportunities due to its inability to secure favorable price concessions from Volvo.

Moreover, even though Reeder did compete with other Volvo dealers in head-to-head competition in at least two instances, the Court determined that Reeder's evidence that it received less favorable pricing than other Volvo dealers in those cases was insufficient to establish discrimination. For instance, in the first example that Reeder provided, Volvo actually increased its discount to Reeder to match the discount it provide another dealer, and neither dealer won the bid. In the other alleged instance of discrimination, Volvo actually offered Reeder and the so-called "favored" dealer the same price prior to the submission of bids, but Volvo subsequently provided the competing dealer a larger discount only *after* it had won the bid. Thus, there was no evidence that Reeder was "disfavored vis-à-vis other Volvo dealers." Moreover, even if Volvo had engaged in some limited price discrimination in this instance, the Court determined "it was not of such magnitude as to affect substantially competition between Reeder and the 'favored' Volvo dealer."

Key Implications & Lessons

For the antitrust practitioner and counselor, a few key implications and lessons can be gleaned from the *Volvo* decision:

> If a manufacturer is selling customized goods to a single dealer involved in a competitive bidding situation, *Volvo* provides the manufacturer with the ability to offer different terms and discounts than it might offer to other dealers involved in separate bidding opportunities. Even if the dealer receiving a more or less favorable offer may compete with other dealers in an overall sense, *Volvo* indicates that there must be more than a few instances of direct competition between the dealers for the same customer in order for a dealer to establish a RP claim.
>
> The Supreme Court declined to address the question of whether the RP Act applies to differences in the offers provided to competing dealers in bid markets when only one dealer ultimately purchases the manufacturer's product. Consequently, the split in the lower courts on this issue remains unresolved. Thus, to avoid any risk of violating the RP Act, manufacturers should offer the same terms and discounts when two or more dealers are bidding against one another for the same customer's business (absent an available defense, such as

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Volvo

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meeting competition or cost justification). Likewise, since the RP Act also prohibits a purchaser from knowingly inducing a supplier to engage in unlawful price discrimination, a dealer participating in a bidding contest against a competing dealer of the same supplier should consider the risks involved in seeking to obtain preferential terms from the supplier. Nonetheless, some parties may be willing to take some risk in this area, in light of existing case law (which remains unaltered by the *Volvo* decision), which holds that the RP Act should not apply when a supplier makes two or more discriminatory "offers" that only result in one actual sale or purchase.

Even when selling to a single dealer involved in a competitive bidding situation, suppliers should be sure that they can identify whether their dealers have the opportunity or ability to participate in the same bidding opportunity. If other dealers can compete with one another and the supplier consistently provides more favorable terms to some dealers, the disfavored dealers may be able to establish (through a systematic study or statistical analysis) that the manufacturer's discrimination has injured its ability to compete with the favored dealers in one or more bidding opportunities.

Since the Court's dicta regarding the proper interpretation of the RP Act emphasizes that "interbrand" competition "is the primary concern of the antitrust laws" and seemingly adopts a rule of reason approach rather than any bright-line rules, *Volvo* may be helpful to defendants accused of RP violations in other situations. Indeed, the Court declared that it would resist interpretations of the Robinson-Patman that "were geared more to the protection of existing competitors than the stimulation of competition," and would "continue to construe the Act 'consistently with the broader policies of the antitrust laws.'" To the extent this encourages lower courts to avoid making presumptions about injury to competition based on harm to individual competitors, defendants may have a better chance at presenting arguments that their conduct has not violated that RP Act.

Nonetheless, the dicta regarding the focus on promoting interbrand competition is at odds with RP precedent that the Court reaffirmed in *Volvo*. For instance, the Court reiterated that its RP decisions indicate that a "hallmark of the requisite competitive injury. . . is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." This standard remains inconsistent with the analysis that routinely takes place under Section 1 or 2 of the Sherman Act when assessing harm to competition. In a Section 1 or Section 2 case, the focus is not on harm to a single competitor, but rather on harm to the overall level of competition in the relevant market. In *Volvo*, the court did not require the plaintiff to put forth evidence that the favored purchaser possessed market power or that it was using this buying power in a manner than harmed interbrand competition. Instead, after *Volvo*, as before, the standard presumes harm to competition when individual competitors are placed at a competitive disadvantage to their rivals through discriminatory pricing. Thus, it's unclear whether the Court's dicta will provide any meaningful benefits to defendants that may have procompetitive reasons for wanting to offer different terms and conditions to their customers.

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illegal for similar companies in competitive markets. However, determining whether a company with monopoly power that has refused to deal has acted lawfully, or has in fact violated Section 2 of the Sherman Act, has long been one of the most unsettled issues of antitrust law. In *Trinko*, the Court brought far greater clarity to this issue, and greatly narrowed the scope of potential Section 2 liability. The full implications of *Trinko*, however, may not yet be fully understood. In particular, the Court's analysis raises the question of whether a company's refusal to deal, when based on its refusal to license its intellectual property, may ever be a proper basis of Section 2 liability.

Background

The *Trinko* case was brought by the Law Offices of Curtis Trinko, a New York City law firm, and a local telephone service customer of AT&T. In its complaint, Trinko alleged that Verizon, the incumbent local exchange carrier, had discriminated against it in the provision of local telephone service as part of an anticompetitive scheme to prevent AT&T and other CLECs from encroaching upon Verizon's historic local telephone monopoly. At the core of this claim, the plaintiff alleged that Verizon had effectively refused to grant AT&T access to its local telephone network. The federal district court dismissed Trinko's complaint. On appeal to the Second Circuit, the court reinstated the plaintiff's antitrust claims, holding that the plaintiff had, in fact, stated a valid claim that Verizon was monopolizing the market for local telephone service by refusing access to an essential facility, or alternatively, that it was attempting to use its monopoly to gain a competitive advantage in another related market.

The Supreme Court, however, reversed the Second Circuit's decision and held that the plaintiff's refusal to deal and monopoly leveraging claims failed to state a cause of action under Section 2 of the Sherman Act.

***Trinko* & Unilateral Refusals To Deal**

The Supreme Court first established the principle that a company could lawfully refuse to deal with its rivals in *United States v. Colgate & Co*, 250 U.S. 300 (1919). In that case, the Court stated that, "*in the absence of any purpose to create or maintain a monopoly*, the [Sherman] act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise its own independent discretion as to [those] parties with whom it will deal." The *Trinko* decision significantly expanded this principle.

In *Trinko*, the Supreme Court held that Section 2 does not generally require a company – even one with monopoly power – to deal with its competitors, or to share with them the basis of their monopoly power, regardless of the monopolist's intent. In its opinion, the Court specifically emphasized that not all conduct which may harm consumers is anticompetitive or in violation of the antitrust laws. Indeed, the Sherman Act does not prohibit the acquisition of monopoly power resulting from growth or development as a "consequence of a superior product, business acumen, or historic accident." As the Court explained, the "opportunity to charge monopoly prices – at least for a short period – is what attracts business acumen in the first place." It is this incentive that induces risk taking, and which produces innovation and economic growth. As such, the Court recognized that the pursuit and acquisition of monopoly power must be protected: "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."

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Based upon this recognition, in *Trinko* the Supreme Court further protected the right of monopolists and other companies with market power to refuse to deal with their rivals. To compel a company to share the source of their advantage, the Court noted, would be in "tension with the underlying purpose of antitrust law, since it may lessen the incentive of the monopolist, the rival, or both to invest" in economically beneficial assets. Moreover, requiring such sharing would also force the courts to act as central planners, to determine "the proper price, quantity, and other terms of dealing," a role, the Supreme Court recognized, for which they are ill-suited.

The Supreme Court therefore held that, as a general matter, "the Sherman Act does not restrict the long-recognized right of a [company] … freely to exercise his own independent discretion as to [those] parties with whom he will deal." In doing so, the Court omitted the *Colgate* language which formerly limited this right, requiring the "absence of any purpose to create or maintain a monopoly." By omitting any reference to their "purpose", the Court appears to have eliminated consideration of a company's competitive or anticompetitive intent, instead effectively replacing it with the recognition that the pursuit of monopoly profits is a legitimate and lawful business goal.

Trinko's Boundary

So what's left of *Aspen Skiing*? Is a company's right to refuse to deal completely unfettered? Well, no. Despite supporting a company's broad right to refuse to aid its rivals, the *Trinko* opinion did recognize some limitation upon this right. Addressing the specific facts of *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985), the Court noted that, "the high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified …. Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2."

In *Aspen Skiing*, the plaintiff and defendant each operated ski resort facilities in the Aspen, Colorado area. For a significant period of time, both parties cooperated in a joint marketing effort to offer an "all-Aspen" ticket, which allowed skiers to purchase a single ticket granting them access to either of their resorts. Eventually, however, the defendant, which operated the larger of the facilities, cancelled its participation in the joint ticket program after the plaintiff refused to accept a decreased share of the ticket revenue. In order to prevent the plaintiff from creating its own "all-Aspen" pass, the defendant also refused to sell the plaintiff tickets to its resort, at either a wholesale or retail price. In response, the plaintiff filed suit, alleging that the defendant's refusal to deal violated Section 2 of the Sherman Act.

In *Aspen Skiing*, the Supreme Court's decision focused on two factors: the defendant's termination of a voluntary (and presumably profitable) course of conduct without a valid business justification, and its refusal to sell tickets to the plaintiff, even at retail price. The Court found that this conduct demonstrated that the defendant was willing to sacrifice short-term profits in hopes of gaining monopoly profits in the long term. Based on this determination, the Court found that the defendant's actions were exclusionary and in violation of Section 2.

Since the Court's decision in 1985, *Aspen Skiing* has often been interpreted broadly to support a large variety of allegations in which a monopolist could be characterized as excluding, or refusing to deal with a rival, without a valid business justification. In *Trinko*, however, the Court declared that *Aspen Skiing* was "at or near the outer boundary of § 2 liability." The Court noted that the defendant's conduct "suggested a willingness to forsake short-term profits to achieve an anticompetitive end" and "revealed a distinctly anticompetitive bent." This pattern of conduct, the Court held, represents a "narrow exception" to the general rule that a party is free to choose

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those with whom it will deal. In this manner, the Court limited the scope of *Aspen Skiing* to its facts, and made the termination of a prior voluntary course of dealing a prerequisite to a valid refusal to deal claim.

Trinko's Impact & IP Protection

The Supreme Court's decision in *Trinko* further insulates companies that may be characterized as possessing monopoly power from competitors' allegations that their refusal to deal violates Section 2. By removing the former limitations of *Colgate*, the Court established that companies have a general right to refuse to deal, regardless of their intent or the existence of a legitimate business justification. Only where a company with monopoly power unilaterally terminates a voluntary and profitable course of dealing, and does so without a valid business justification, does a refusal to deal claim exist. This decision severely limits the scope of those refusal to deal claims which can survive a motion to dismiss, and significantly reduces the potential litigation costs which have often prevented companies from exercising their right to chose those with whom they will deal.

This decision may also have a particularly profound impact upon a company's ability to protect its intellectual property. As a number of circuit courts held prior to *Trinko*, a unilateral refusal to deal is supported by a legitimate business justification when it is premised upon a company's refusal to license its intellectual property. Indeed, in the absence of illegal tying, fraud on the Patent and Trademark Office, or sham litigation, companies generally have a right to enforce their statutory intellectual property rights free from liability under the antitrust laws. Because the protection of IP rights constitutes a legitimate business justification, the Court's holding in *Trinko* appears to support the principle that a company's unilateral refusal to deal in products or services that are protected by patents, copyrights, or trademarks, is always lawful, regardless of any pre-existing course of dealing.

Where a refusal to deal is premised upon on a company's desire to protect its intellectual property rights, however, the circuit courts have split regarding whether to additionally consider that company's subjective intent. Specifically, in *Image Technical Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195 (9th Cir. 1997), the Ninth Circuit held that while "a monopolist's desire to exclude others from its [protected] work is a presumptively valid business justification for any immediate harm to consumers …. [n]onetheless, this presumption is rebuttable." The court found that "neither the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct." The Federal Circuit, on the other hand, has held that a company's subjective motivation is irrelevant. In *In re Independent Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000), the court held that "[a] patent holder may enforce the statutory right to exclude other from making, using, or selling the claimed invention free from liability under the antitrust laws." The court furthermore held that it "[would] not inquire into his subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patented invention may have an anticompetitive effect …. [it] will not inquire into the patentee's motivations for asserting his statutory right to exclude."

Based on the Supreme Court's clear adoption of a non-interventionist position in *Trinko*, it seems likely that the Court will eventually side with the Federal Circuit and refuse to consider the subjective motivation behind a company's refusal to license its intellectual property. This holding would grant intellectual property holders an unfettered right to refuse to license their IP, or to deal in any part of their business protected by the intellectual property laws, regardless of their previous course of dealings. While *Trinko* has already significantly nar-

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rowed the circumstances under which a monopolist may be liable for refusing to aid its rivals, in time its specific implications on a company's ability to protect its intellectual property, often the source of its competitive advantage, may also become a significant aspect of its legacy.

Trinko Looking Forward

In the two years since the Supreme Court issued its decision, a number of lower courts have drawn upon *Trinko* to support the principle that, absent a voluntary, pre-existing course of dealing, companies have a right to unilaterally refuse to deal with their rivals without consideration of their business justification. As the court noted in *People's Choice Wireless, Inc. v. Verizon Wireless*, 31 Cal. Rptr. 3d 819 (Ct. App. 2005), "the right to refuse to deal remains sacrosanct … [it] does not violate the spirit or policy of antitrust law." In addition, *Trinko* has also been cited in order to strengthen the protections afforded companies whose refusals to deal are based on their refusal to license IP. As the court held in *Medtronic Minimed Inc. v. Smiths Medical*, 371 F. Supp. 2d 578 (D. Del. 2005), in order to "safeguard the incentive to innovate … [with few exceptions] the antitrust laws contain no duty to aid competitors." Indeed, as the court in *Medtronic* noted, allowing claims to be brought based on a defendant's refusal to license its intellectual property "would undermine the fundamental goal of encouraging innovation." While these cases demonstrate an encouraging trend, only in time will we know the full extent to which *Trinko* affords those rights protection.

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