Antitrust Update for the ABA Corporate Counseling Committee

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Outline

- Criminal Enforcement
- Antitrust Litigation
- IP/Antitrust
- Monopolization
- Mergers/Acquisitions
- International Competition Law
- Vertical/Distribution
- Trade Associations
- Consumer Protection

Criminal Enforcement Update

Kent A. Gardiner

Wm. Randolph Smith

Air Cargo Investigation

- $600 million in fines and still counting
  - In August, DOJ announced that British Airways and Korean Air Lines each agreed to plead guilty to price fixing on passenger and cargo flights and pay a $300 million fine
  - The plea agreements charged:
    - BA with fixing the rates charged for international air shipments of cargo and fixing the fuel surcharge charged to passengers on long-haul international flights
    - Korean Air with fixing rates charged for international air shipments of cargo and fixing fares charged passengers and certain travel agents for flights from the US to Korea

Air Cargo Investigation (Cont.)

- According to DOJ, both companies received **considerable discounts** from the Sentencing Guidelines ranges for their cooperation
  - BA's $300 million fine was a 33% discount from the proposed $447 million fine, the bottom end of its Guidelines range of $447 million - $894 million
  - Korean Air's $300 million fine was a 35% discount from the proposed $462 million fine, in the middle of its Guidelines range of $316 million - $633 million

Air Cargo Investigation (Cont.)

- **Virgin Atlantic and Lufthansa** were granted **amnesty** for being the first companies to voluntarily disclose their conduct
  - Virgin Atlantic was the first to report its participation with BA in the passenger fuel surcharge conspiracy
  - Lufthansa was the first to report its role in the international cargo conspiracy with BA and Korean Air
- ***Restitution but no criminal fines***

Air Cargo Investigation (Cont.)

- ***The Air Cargo plea agreements reinforce the value of being the first – or even second – company to report wrongdoing***
  - Virgin Atlantic and Lufthansa will face no criminal penalties for their participation in the cartels
  - Although second-in candidates BA and Korean Air paid extraordinary fines, they faced fines of up to $894 million and $633 million, respectively, if they had not cooperated with DOJ at an early stage in the investigation
  - In addition, DOJ has made clear that the later a company begins to cooperate in the investigation, the more individuals will be carved out of any resulting company plea agreement

Aggressive Criminal Prosecution of Individuals

- Since 2006, DOJ has expressed an **increased emphasis on securing jail time** for culpable executives
  - DOJ eliminated its no-jail deal for cooperating foreign nationals
  - DOJ now "carves out" multiple individuals from company plea agreements
- DOJ's new emphasis is evident in recent developments
  - In the Air Cargo plea agreements, DOJ carved out 10 executives from BA and 7 executives from Korean Air
  - The trial of Gary Swanson (former Sr. VP of Hynix America), for alleged price fixing in the DRAM case is set for Nov. 26, 2007

Aggressive Criminal Prosecution of Individuals (Cont.)

- Referring to international cooperation, AAG Barnett recently stated ***"[t]he safe harbors for antitrust offenders are rapidly shrinking."***

- Barnett pointed to both "the increasingly vigorous resolve that foreign governments are taking toward punishing cartel activity and their increased willingness to assist the United States in tracking down and prosecuting cartel offenders."

- Barnett cited DOJ's cooperation with the British government in seeking extradition of Ian P. Norris, a British national who was indicted in 2004 for his role in fixing prices of carbon brushes. Since June 2005, every British court to hear his case has found Norris to be extraditable. Norris' last hope is the House of Lords, which is scheduled to hear his appeal in January 2008.

"Global Antitrust Enforcement," Thomas O. Barnett, Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, presented at the Georgetown Law Global Antitrust Enforcement Symposium (September 26, 2007).

Antitrust Litigation Update

Kent A. Gardiner

Daniel A. Sasse

In re Elevator Antitrust Litigation, 2007 U.S. App. LEXIS 21086 (2d Cir. Sept. 4, 2007)

- Second Circuit applies rationale of *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007) to affirm dismissal of Section 1 and Section 2 claims
- Complaint primarily based on investigations by the Italian Antitrust Authority and the European Commission, including two admissions of wrongdoing
- District court dismissed all claims prior to Supreme Court's *Twombly* ruling

In re Elevator Antitrust Litigation (Cont.)

- Plaintiffs proffered three sources of "plausible" inferences of unlawful agreement
  - Conclusory allegations: general assertions the court characterized as "nothing more than a list of theoretical possibilities"
  - Similar contract terms: which the court said "can reflect similar bargaining power and commercial goals (not to mention boilerplate)" and "similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy"
  - European conduct: Plaintiffs claim that (1) "[t]he European misconduct reflects the existence of a worldwide conspiracy; and [(2)] even if the misconduct took place only in Europe, it is alleged that the market in elevators is a 'global market, such that prices charged in the European market affect the prices in the United States and vice versa'"

In re Elevator Antitrust Litigation (Cont.)

- But Second Circuit finds:
  - "Allegations of anticompetitive wrongdoing in Europe – absent any evidence of linkage between such foreign conduct and conduct here – is merely to suggest (in defendants' words) that 'if it happened there, it could have happened here'"
  - "Conclusory" allegations regarding a "global market" are insufficient where "there are no allegations of global marketing or fungible products, no indication that participants monitored prices in other markets, and no allegations of the actual pricing of elevators or maintenance services in the United States or changes therein attributable to defendants' alleged misconduct"
  - "Without an adequate allegation of facts linking transactions in Europe to transactions and effects here, plaintiffs' conclusory allegations do not 'nudge [their] claims across the line from conceivable to plausible.'"

In re Elevator Antitrust Litigation (Cont.)

- Section 2: Plaintiffs alleged "exclusionary conduct" such as designing elevators to prevent services by other providers, refusing to sell necessary elevator components, and obstructing competitors' attempts to purchase elevator parts
  - Second Circuit recognized legitimacy of ensuring product standards and quality by controlling service
  - Confirms rule that refusal to deal is legitimate except when it terminates prior course of dealing

Additional Post-*Twombly* Decisions

- *Behrend v. Comcast Corp.*, 2007 U.S. Dist. LEXIS 55952 (E.D. Pa. Aug. 1, 2007)
  - Denies motion to dismiss where complaint contained "clear allegations of actual agreements" among defendants and adequately alleged conduct "sufficient to support the characterizations of those agreements as horizontal market divisions"

- *Schafer v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 62271 (E.D. La. Aug. 22, 2007)
  - Grants motion to dismiss, finding that defendants' use of software program was "not economically irrational in a competitive market . . . [because] they had a strong economic incentive to keep payouts for damages low"
  - "It seems that the *Twombly* ruling supersedes any articulation of the 'plus factor' test given that [the] *Twombly* court sought 'to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct'"

- *In re Linerboard Antitrust Litig.*, 2007 U.S. Dist. LEXIS 64604 (E.D. Pa. Aug. 30, 2007)
  - Relying on *Twombly* and "plus factor" jurisprudence, denies summary judgment because evidence of parallel conduct coupled with no independent explanation for such conduct permitted reasonable inference of conspiracy

Additional Post-*Twombly* Decisions (Cont.)

- *McZeal v. Sprint Nextel Corp.*, 2007 U.S. App. LEXIS 22025 (Fed. Cir. Sept. 14, 2007)
  - Finds that "plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent"
  - Dissent claims that the majority's holding is "inconsistent" with *Twombly* because the plaintiff only alleged "conclusory allegations" concerning the alleged patent infringement

- *In re Graphics Processing Units Antitrust Litig.*, No. 06-07417, 2007 WL 2875686 (N.D. Cal. Sept. 27, 2007)
  - Dismisses Section 1 claim because complaint failed to show alleged parallel conduct was "historically unprecedented" and therefore did not alone suggest conspiracy
  - Rejects evidence defendants attended industry trade shows because opportunity to conspire alone is not enough, and finds that plaintiffs' reliance on the existence of a grand jury investigation is a "non-factor" because "[i]t is unknown whether the investigation will result in indictments or nothing at all"

- *Sheridan v. Marathon Petroleum Co. LLC*, 2007 U.S. Dist. LEXIS 74022 (S.D. Ind. Sept. 28, 2007)
  - Finds that "the mere possibility of later 'unearthing direct evidence' through discovery is not enough to preclude dismissal'" but the moving party "still bears a weighty burden"
  - Dismisses tying claim because alleged express tying theory was not supported
  - Dismisses conspiracy claim because plaintiffs only alleged agreement to fix prices and failed to "allege[] any additional facts to support this bare allegation …"

IP/Antitrust Update

Robert A. Lipstein

Broadcom v. Qualcomm,
2007 U.S. App. LEXIS 21092 (3rd Cir. Sept. 4, 2007)

- Broadcom alleged that Qualcomm monopolized and attempted to monopolize certain markets for cellular telephone technology and components by manipulating the standards-setting process and failing to license 3G cellular technology in a fair and nondiscriminatory manner
- Alleged anticompetitive conduct includes:
  - Inducing standards-determining organizations ("SDOs") to include its proprietary technology in cellular phone standard "by falsely agreeing to abide by the SDOs' policies on IPRs [intellectual property rights], but then breached those agreements by licensing its technology on non-FRAND [fair, reasonable, and non-discriminatory] terms"
  - "Ignor[ing] its FRAND commitment to the ETSI and other SDOs by demanding discriminatorily higher (i.e., non-FRAND) royalties from competitors and customers using chipsets not manufactured by Qualcomm"
- District court dismissed all claims for failure to state a claim

Broadcom v. Qualcomm (Cont.)

- Third Circuit reverses, finding "conduct that undermines the procompetitive benefits of private standard setting may, at least in some circumstances, be deemed anticompetitive under antitrust law"
- Determines that "[m]isrepresentations concerning the cost of implementing a given technology may confer an unfair advantage and bias the competitive process in favor of that technology's inclusion in the standard"
- Applies four-part test: "(1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an SDO's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct"
- Holds that licensing a patent on terms contrary to those promised to SDOs during the standard-setting process, thus allowing price increases, is sufficiently anticompetitive to support monopolization claims

Broadcom v. Qualcomm (Cont.)

This is one of several legal entanglements between the rival wireless chip makers

- In a separate infringement lawsuit, the District Court for the Southern District of California found that Broadcom had successfully demonstrated Qualcomm's "deadly determination to achieve its goal of holding hostage the entire industry" due to misconduct before the Patent and Trademark Office. *Qualcomm Inc. v. Broadcom Corp.*, 2007 U.S. Dist. LEXIS 57136 (S.D. Cal. Aug. 6, 2007).

- In addition, last year the International Trade Commission banned import of Qualcomm mobile phones after Broadcom filed a targeted complaint that alleged the phones infringed on a Broadcom patent relating to a power-saving technique. On September 14, the Court of Appeals for the Federal Circuit granted Qualcomm's motion for a stay pending appeal; Qualcomm is now seeking reversal of the underlying infringement finding.

Monopolization Update

Robert A. Lipstein

Christopher E. Ondeck

Bundled Discount Precedent

- *SmithKline Corp. v. Eli Lilly & Co*., 575 F.2d 1056 (3rd Cir. 1978), discounted bundles could satisfy the conduct element under Section 2

- *Ortho Diagnostics Sys., Inc. v. Abbott Lab, Inc*., 920 F. Supp. 455 (S.D.N.Y. 1996), discounted bundles above AVC could satisfy the conduct element

- *Le Page's v. 3M*, 324 F.3d 141 (3rd Cir. 2003), discounted bundles can satisfy the conduct element when offered by a seller with market power where the competitor cannot match the bundle

The Antitrust Modernization Commission View

Bundled discounts violate Section 2 only when:

- after allocating all discounts from the entire bundle to the competitive product(s), it was sold below incremental cost
- defendant is likely to recoup these short-term losses
- the bundled discount adversely affects competition

Cascade Health v. PeaceHealth,
2007 U.S. App. LEXIS 21075 (9th Cir. Sept. 4, 2007)

- Ninth Circuit rules on validity of bundled discounts
- McKenzie Willamette Hospital sued sole competing hospital, PeaceHealth, for monopolization, attempted monopolization, conspiracy to monopolize, tying, and exclusive dealing, as well as state law violations
- Claimed, *inter alia*, that PeaceHealth offered insurers large bundled discounts for "tertiary" services if they made PeaceHealth their exclusive preferred provider for primary, secondary, and tertiary care
- Jury rendered verdict in favor of McKenzie; final award of $16.2 million after trebling
- On appeal, Ninth Circuit acknowledged the pro-competitive benefits of bundling, but recognized possible anti-competitive effects:
  - possible to "use a bundled discount to exclude an equally or more efficient competitor and thereby reduce consumer welfare in the long run"
  - "can . . . pose the threat of anticompetitive impact by excluding less diversified but more efficient producers"

Cascade Health v. PeaceHealth (Cont.)

- Ninth Circuit rejected the *LePages* standard articulated by Third Circuit and adopted **"discount attribution" standard**, as recommended by the AMC:
  - "If the resulting price of the competitive product or products is below the defendant's incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2"
  - "This standard makes the defendant's bundled discounts legal unless the discounts have the potential to exclude a *hypothetical* equally efficient producer of the competitive product" and "provides clear guidance for sellers that engage in bundled discounting practices"
- But rejected the AMC's recommendation that plaintiff also prove recoupment and anticompetitive effect
- **So now there is a split in the circuits on the test for bundled discounts**

Linkline Communications v. California, 2007 U.S. App. LEXIS 21719 (9th Cir. Sept. 11, 2007)

- Defendants sought judgment on the pleadings for price squeeze claim by Linkline

- Ninth Circuit holds *Trinko* does not eliminate price squeeze as a viable claim under Section 2
  - "Narrow reading" of *Trinko*
  - Regulation of industry does not prevent price squeeze claims
  - Leaves open the possibility for re-examining claim on summary judgment depending on source of claimed harm

- Vigorous dissent:
  - Setting of wholesale price not actionable under *Trinko*
  - No market power or claim of below cost pricing at retail

DOJ Enforcement

DOJ AAG Barnett offers 5 principles to "inform and guide" Section 2 enforcement:

- Focus on "harm to consumer welfare"
- Focus on "anticompetitive conduct and effect," not "mere size"
- Focus on injury to competition, not competitors
- Avoid over deterrence by having "clear, administrable and objective rules"
- Avoid cures that are worse than the disease

"Global Antitrust Enforcement," Thomas O. Barnett, Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, presented at the Georgetown Law Global Antitrust Enforcement Symposium (September 26, 2007).

DOJ View On Section 2 Remedies

DOJ AAG Barnett spoke on Section 2 remedies:

- Behavioral remedies are a "necessary but difficult challenge."
- Remedies should not impinge on the ability of the defendant to compete aggressively in the future.
- Remedies must account for reality that "markets change in ways we cannot predict."

"Section 2 Remedies: A Necessary Challenge," Thomas O. Barnett, Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, presented at the Fordham Competition Law Institute 34th Annual Conference on International Antitrust Law & Policy (September 28, 2007).

Merger and Acquisition Update

Jeane A. Thomas

Bridget E. Calhoun

Wm. Randolph Smith

FTC v. Whole Foods,
2007 U.S. Dist. LEXIS 61331 (D.D.C. Aug. 16, 2007)

- FTC filed for a temporary injunction on June 6, 2007, alleging that the transaction would adversely affect competition in narrow market for "premium natural and organic supermarkets"
- The Commission provided expert testimony and analyses to show that entry by Whole Foods has had a significant impact on profit margins and prices at nearby Wild Oats stores, and that the transaction would have a significant adverse effect on "core" customers that do not also shop at conventional supermarkets
- FTC made extensive use of other qualitative evidence, including statements by Whole Foods' CEO:
  - "By buying [Wild Oats] we will … avoid nasty price wars"
  - "[This transaction will] eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing natural/organic food chain to rival us"

FTC v. Whole Foods (Cont.)

- In their defense, the parties provided rebuttal evidence to show that:
  - There is significant and growing competition between natural and organic grocers and conventional supermarkets
  - Customers "cross-shop" between the two grocery segments
  - Whole Foods' prices are based on prices in both conventional and unconventional supermarkets
- On August 16, the district court denies the FTC's request for a temporary restraining order
- As the court notes, "this case hinges almost entirely on the proper definition of the relevant product market"

FTC v. Whole Foods (Cont.)

- Judge Friedman finds that the FTC failed to meet its burden of proving that "premium natural and organic supermarkets" constitute a relevant product market and that the merger, if consummated, would result in increased prices
- The decision focuses on the expert economic testimony and evidence, and largely ignored internal company documents – including Whole Foods CEO's statements regarding the probable effect of, and motivation for, the transaction
- The Commission's emergency motion for an injunction pending appeal was denied
- The parties have now closed the transaction, but the FTC has not decided whether to proceed with administrative litigation

In re Evanston Northwestern Healthcare, FTC Dkt No. 9315 (Aug. 2, 2007)

January 2000

- ENH acquires Highland Park Hospital combining three hospitals along Chicago's North Shore; transaction was reported and cleared under HSR process

April 2002

- FTC announces retrospective review of several hospital mergers

February 2004

- FTC challenges the acquisition, alleging that ENH was able to raise prices charged to managed care organizations well above prices charged at comparable hospitals

October 2005

- ALJ decides in favor of FTC and orders divestiture of Highland Park to restore competition

In re Evanston Northwestern Healthcare (Cont.)

August 6, 2007

- Commission affirms the ALJ's finding that the acquisition violates Section 7, relying on:
  - Contemporaneous and post-merger statements by management and consultants
  - Economic analysis of post-merger price increases
- Different remedy
  - Although structural remedies are preferred, Commission decides that a conduct remedy is appropriate in this "highly unusual case"
  - Divestiture would be more difficult and costly due to length of time and significant integration since closing
- Injunctive remedy requires ENH to establish separate and independent negotiating teams for the two hospitals groups
  - "[T]o allow [managed care organizations] to negotiate separately again for those competing hospitals"

Additional Enforcement Actions

- **Jarden/K2** (FTC Aug. 28, 2007)
  - Proposed combination of two leading suppliers of monofilament fishing line
  - Consent order requires divestiture of four types of monofilament line
  - Order also requires company to ensure that certain employees previously engaged in R&D and marketing of the divested assets are precluded from working on competitive fishing line products for a period of two years
- **ARA/Fresenius** (FTC Sept. 7, 2007)
  - ARA agreed to pay Fresenius to close two dialysis clinics and to acquire two additional competing Fresenius dialysis operations
  - Consent order issued despite the fact that the parties had voluntarily terminated their agreement in response to the FTC's antitrust concerns
  - Consent order prohibits either party from agreeing to allocate any dialysis market, and requires ARA to notify the FTC prior to acquiring any dialysis clinics in the Warwick/Cranston area of Rhode Island, as such acquisitions would likely fall below the HSR thresholds

Additional Enforcement Actions (Cont.)

- **Mylan/Merck** (FTC Sept. 27, 2007)
  - Proposed acquisition of Merck's generic drug subsidiary
  - FTC alleged that the transaction would reduce competition in five generic drugs
  - Consent order requires divestiture of Merck's assets related to those drugs to Amneal Pharmaceuticals, and requires Mylan and Merck to provide transitional services and assist Amneal in obtaining all necessary FDA approvals
- **First Group/Laidlaw** (DOJ Sept. 27, 2007)
  - Proposed combination of two large school bus service companies
  - DOJ alleged that the transaction would harm competition for school bus contracts in Alaska
  - In order to eliminate antitrust concerns, the parties agreed to divest FirstGroup's Anchorage school bus business to Forsyth Transportation pursuant to DOJ's "fix-it-first" policy

Coming Attractions

- **Monsanto/DPL Tunney Act Proceeding**
  - State AGs have filed opposition to DOJ remedies
- **XM/Sirius**
  - DOJ and FCC decisions pending on fiercely-disputed market definition issue
- **Google/DoubleClick**
  - FTC and EC assessing potential competitive effects in online advertising

International Competition Law Update

Werner Berg

Thomas De Meese

Europe: CFI Ruling in *Microsoft*
Case T-201/04 (Sept. 17, 2007)

The facts:

- Microsoft refused to supply its competitors with “interoperability information” and to authorise them to use that information to develop and distribute products competing with its own products in the work group server operating system market
- Microsoft sold its Windows Media Player only together with the Windows PC operating system
- EC fined Microsoft € 497 million for abuse of dominance

Europe: CFI Ruling in *Microsoft* (Cont.)

CFI ruling issued September 17, 2007:

- CFI upheld EC decision on all points (apart from Trustee appointment)
- Review standard: no “manifest error” by EC
- Criteria for analyzing refusal to supply interoperability information
  - product or service indispensable to the exercise of an activity in a neighbouring market
  - exclusion of effective competition in that market
  - prevention of appearance of a new product for which there is potential consumer demand (similar product incorporating significant technical development suffices)
- Criteria for analyzing bundling of the Windows client PC operating system and Windows Media Player (MP)
  - dominance in market for client PC operating systems
  - distinct products
  - customer can only acquire both products together (it is irrelevant that there is no charge for the MP)
  - tying leads to significant risk of weakening effective competition
  - no objective justification; Microsoft could not demonstrate that the product integration generated significant technical benefits to outweigh the consumer harm associated with bundling

Europe: CFI Ruling in *Akzo Nobel*
Joined Cases T-125/03 and T-253/03 (Sept. 17, 2007)

- The Facts:
  - Akzo claimed privilege during dawn raid for (i) emails between management and in-house counsel and (ii) documents drafted in order to obtain legal advice from outside counsel
  - The EC nevertheless seized the documents after a cursory review
- CFI ruling September 17, 2007:
  - Right to refuse cursory look by EC to disputed documents if it would reveal privileged content
    - In such case, sealed envelope pending resolution of the dispute
    - Promise by the EC not to rely on documents is insufficient
  - No legal privilege for communications with in-house counsel
  - Documents **exclusively** prepared for the purpose of obtaining legal advice from outside counsel in exercise of the rights of defense are privileged
  - Merely discussing document with outside counsel is insufficient

Europe: Commission SO to Rambus

August 23, 2007: First application of article 82 to “patent ambush”

- Rambus owns and is asserting patents covering the technology included in a DRAM standard
- Rambus failed to disclose the existence of these essential patents in the context of the DRAM standard setting process
- **Exploitative Abuse:** claiming unreasonable royalties for licenses of these essential patents

Europe: Other News

- 08/02 – Commission sends SO to companies in sodium chlorate sector
- 09/12 – CFI confirms fines in needles and other haberdashery products cartel case
- 09/14 – Commission adopts four decisions requiring DaimlerChrysler, Fiat, Toyota and GM to give independent repairers access to repair information
- 09/19 – Commission fines members of fasteners cartels over € 328 million
- 09/19 – Commission legislative proposal includes unbundling in energy sector

China: Anti-monopoly Law ("AML") Adopted

- Adoption August 30, 2007; Effective August 1, 2008
- Aims to establish a "*socialist market economy*"
- Mirrors established antitrust regimes and covers
  - Horizontal agreements (e.g. market allocation)
  - Vertical agreements (e.g. RPM)
  - Unilateral conduct (abuse of a dominant position)
  - Merger Control
- Enforcement:
  - Chinese Enforcement Authority (to be established)
  - Committee responsible for developing policies and guidelines
- Interesting issues include:
  - Effective regulation of state-owned companies (Art. 7)
  - Balancing exercise (Art. 15)
  - Unfairly high prices (Art. 16)
  - Definition of joint dominance (Art. 18)
  - Intellectual Property and Abuse (Art. 54)
- DOJ held workshop with Chinese Ministry of Commerce staff to train them on merger review practices

India: Amended Merger Notification Rules

- As of September 10, 2007, reporting requirement changes from voluntary to mandatory
- Filing thresholds based on combined assets/revenues in India worldwide -- no local nexus or competitive effect required
- Mandatory 210 day initial waiting period before closing
- Stiff penalties:
  - Failure to notify -- up to 1% of total turnover or assets
  - Failure to comply with Commission orders -- from US $2500/day to 3 years imprisonment
- DOJ AAG Barnett: "A number of these changes pose practical issues, and … we will continue to work with the Indian competition officials …"

Vertical/Distribution Update

Robert A. Lipstein

Cautious Approach to RPM After *Leegin*

- Post-*Leegin,* smart money has been on holding back from major restructuring of resale price programs:
  - Close decision could be short-lived
  - State laws not in harmony with Sherman Act
- *Leegin* itself has been sued again, this time in the Eastern District of Tennessee, on a rule of reason theory, offering an early federal test of the new theoretical framework
- Of the 23 states that have antitrust laws that do not necessarily follow federal law
  - **17 signed on as amicus to PSKS in support of *Dr. Miles***
  - **Key states include: Illinois and New York**

Leegin Already Under Attack

- Prominent commentators speak out against the decision:
  - **FTC Commissioner Harbour**: There is "no body of sound empirical economic evidence to show that minimum vertical price fixing is, on balance, more likely than not to be beneficial to consumers"
  - **Former FTC Chairman Pitofsky**: "Virtually all agree that minimum resale price maintenance, if allowed, will result in higher prices to consumers"
  - **Senator Kohl** (Kohl's department store family): *Leegin* makes him "particularly worried about the effect of this new rule permitting minimum vertical price fixing on the next generation of discount retailers, the next Sam Walton"

Robinson-Patman Update

- ***Feesers, Inc. v. Michael Foods. Inc.,*** 2007 U.S. App. LEXIS 19294 (3rd Cir. Aug. 14, 2007)

  - Plaintiff Feesers buys food and sells it in prepared form to customers who sell it in their own cafeterias. Defendant Michael Foods alleged to have sold food to Defendant Sodexho at lower prices than to Feesers. Sodexho buys food, prepares it, and sells it to customers in cafeterias also run by Sodexho.

  - Court reinstates Feesers' RP claim, finding that customers could switch from self-provisioning cafeterias to outsourcing and vice versa, and that customers do so based on prices.

  - Court finds it persuasive that Feesers' could produce at least one example where the pricing given to Feesers by Michaels was implicated in a customer's decision to switch from Sodexho to Feesers.

Robinson-Patman Update (Cont.)

- ***Camarda v. Snapple,*** 2007 U.S. Dist. LEXIS 68101 (S.D.N.Y. Sept. 13, 2007)
  - District court dismisses claims by "area route distributors" (ARDs) that "master distributors" (MDs) sold Snapple at lower prices to transshipping interlopers
  - Court rejects plaintiffs' theory that their MD sold to other companies at a lower price, and these companies then sold into exclusive geographies of the ARDs, due to lack of proof that MD had sold to any transshipping company at prices lower than those available to ARDs
  - Court also dismisses allegation that Snapple itself sold to an MD in another geographic area, which in turn sold to companies that sold into exclusive geographies of the ARDs, because it improperly sought to compare prices at the MD level of distribution to those at the ARD level
  - Court cites *Volvo v. Reeder-Simco*: "isolated price differentials didn't suffice with regard to high dollar items such as Volvo trucks, and this Court is constrained to conclude that the isolated price differentials of 24-bottle cases of 16 ounce beverages proffered by Plaintiffs are likewise insufficient . . ."

Distributor Termination Update

- ***Norris v. The Hearst Trust***, 2007 U.S. App. LEXIS 22304 (5th Cir. Sept. 18, 2007)
  - Distributors of Houston Chronicle sued publisher Hearst Corp. for allegedly terminating them for refusing to go along with an anticompetitive scheme to inflate circulation figures
  - Fifth Circuit affirms lower court decision dismissing plaintiff's claims, finding that distributors lacked antitrust standing or an antitrust injury
  - The alleged conduct -- tampering with circulation figures -- could only hurt consumers of the paper's advertising services or the paper's rivals, not plaintiffs

Trade Association Update

Christopher E. Ondeck

Klickads v. Real Estate Bd. of NY,
2007 U.S. Dist. LEXIS 57305 (S.D.N.Y. Aug. 6, 2007)

- Plaintiff Klickads, a listings information technology firm that sells listings databases to real estate brokerage firms, brought suit under Sections 1 and 2 against defendants Real Estate Board of NY (REBNY), a real estate industry trade association

- In 2002, REBNY, whose members make up the bulk of residential real estate brokers in Manhattan, implemented a system for sharing listings, because no "MLS-like" system existed; Klickads claimed that REBNY's policies relating to the "R.O.L.E.X" database denied access to some third parties while designating others as "preferred vendors"

- REBNY's motion for summary judgment was granted in part and denied in part

Klickads v. Real Estate Bd. of NY (Cont.)

Section 1 - The court denied summary judgment, stating that plaintiff raised a genuine issue of fact as to:

1) whether the brokerage defendants had acted in concert to restrain trade

2) whether REBNY and RealPlus had ***agreed*** to block any further potential competitors from access to R.O.L.E.X

3) the definition of the relevant market, the substitutability of other databases with R.O.L.E.X., and barriers to entry

4) whether the defendants' justification for denying access to R.O.L.E.X. outweighed anti competitive effects

Section 2 - The court granted summary judgment, finding that:

plaintiff had *inadequately alleged a conspiracy* to form a "shared monopoly" between the co-defendants

Tunica Web Adver. v. Tunica Casino Operators Ass'n, 2007 U.S. App. LEXIS 19279 (5th Cir. Aug. 13, 2007)

- Plaintiff alleged Tunica Casino Operators Association, a trade association formed by the various Tunica casinos, violated Section 1 by a refusal to deal
- District court granted defendant's motion for summary judgment
- 5th Circuit reversed and remanded, holding that:
  - Plaintiff raised genuine issues of material fact as to whether the defendant casinos had engaged in concerted action via trade association meetings, wherein they allegedly decided to refuse to advertise on "tunica.com," a website owned by plaintiff, in order to decrease the value of the domain name and permit its purchase at a low price sometime in the future
  - *Per se* violation of the Sherman Act does not require plaintiff to be a direct competitor

Consumer Protection Update

Bridget E. Calhoun

Hidden Charges

- The FTC is investigating hidden and unauthorized charges in several contexts:
  - Stored Value Cards
  - Gift Cards
  - Telephone Bills
- Lessons learned for companies imposing extra charges:
  - Ensure that customers agree to receive the underlying service
  - Notify customers of the nature and amount of the related charges

Other Issues

The FTC and state consumer authorities have also focused on:

- Weight Loss Products – continued active enforcement
- Sub-prime Mortgages – shows responsiveness to national epidemics
- Gas Prices – shows currency of enforcement efforts

Lessons learned include:

- Be scrupulous in verifying and substantiating all claims, especially regarding weight-loss products, and avoid the FTC's 7 "Red Flags" of weight-loss advertising
- Be especially cautious in industries that are under public scrutiny, such as sub-prime financing, fast food service, and toy manufacturing
- Fully disclose any limits or conditions to the availability of special, below-market prices

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Crowell & Moring LLP is a full-service law firm with more than 350 lawyers practicing in litigation, antitrust, government contracts, corporate, intellectual property and more than 40 other practice areas. More than two-thirds of the firm's attorneys regularly litigate disputes on behalf of domestic and international corporations, start-up businesses, and individuals. Crowell & Moring's extensive client work ranges from advising on one of the world's largest telecommunications mergers to representing governments and corporations on international arbitration matters. Based in Washington, D.C., the firm also has offices in California, New York, London, and Brussels. Visit Crowell & Moring online at http://www.crowell.com.