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Antitrust Update

Due Diligence Information Exchange by Competitors Engaged in Merger Discussions Upheld by Seventh Circuit

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In This Issue

On January 10, 2011, the United States Court of Appeals for the Seventh Circuit issued a decision analyzing whether two competitors engaged in merger discussions and pre-integration planning had violated the antitrust laws by, among other things, exchanging certain competitively sensitive business information during due diligence and merger negotiations.[1] In this case, a private challenge to the exchange was rejected. The decision is notable for its examination of the rarely litigated but important question of how much, and what types of, information can be shared between competitors that are negotiating a merger or acquisition.

Background

Omnicare, a provider of pharmacy services to assisted living and nursing facilities, brought an antitrust action against UnitedHealth and PacifiCare, two health insurers that provide senior citizens with supplemental prescription drug coverage under Medicare. In 2005, Omnicare signed a pharmacy services agreement with UnitedHealth, but could not reach an agreement with PacifiCare. While the two health insurers were negotiating pharmacy services agreements with Omnicare, they were also negotiating a merger with each other. After the defendants signed their merger agreement (but before closing), Omnicare resumed negotiations with PacifiCare, and Omnicare and PacifiCare ultimately signed an agreement that included economic terms more favorable to PacifiCare than the terms that UnitedHealth accepted in its agreement with Omnicare. After the two health insurers consummated their merger, UnitedHealth withdrew from its pharmacy services agreement with Omnicare and joined PacifiCare's more favorable agreement with Omnicare.

Omnicare then sued UnitedHealth and PacifiCare, alleging that the two health insurers violated Section 1 of the Sherman Act by forming a "buyers' cartel" in which they shared information and conspired to obtain lower prices from Omnicare during merger negotiations and pre-integration planning.

The district court held that Omnicare "failed to produce evidence of action by UnitedHealth and PacifiCare that is inconsistent with lawful conduct on the part of two competing entities engaged in legitimate merger discussions and planning" and granted defendants' motion for summary judgment.[2] The Court of Appeals affirmed.

Pre-Closing Information Exchanges

To support its conspiracy claim, Omnicare sought to demonstrate that the defendants had improperly shared with each other competitively sensitive strategic information and prescription drug pricing data during merger negotiations. Omnicare presented the following specific evidence of allegedly improper information exchange between the defendants:

- PacifiCare's written response to due diligence questions from UnitedHealth regarding Medicare's Part D Prescription Drug Program;

- table comparing Part D bids, prepared as part of due diligence;
- Part D risk assessment prepared by a UnitedHealth-affiliated actuary after meeting with PacifiCare representatives;
- talks between the defendants' executives regarding difficulties negotiating with Omnicare; and
- the exchange between UnitedHealth and PacifiCare of averages and ranges of prescription drug reimbursement rates.[3]

The Seventh Circuit "had to walk a fine line" examining premerger information exchanges.

The Seventh Circuit noted that it had to "walk a fine line" when examining pre-merger information exchanges. The court was hesitant to "chill business activity by companies that would merge but for a concern over potential litigation." However, the "mere possibility of a merger cannot permit business rivals to freely exchange competitively sensitive information." To allow competitors to do so "could lead to 'sham' merger negotiations" and "allow for periods of cartel behavior" before a merger is consummated.[4]

In this case, the court found that the defendants' exchange of information did not support an inference of a conspiracy. First, the health insurers exchanged aggregated pricing data and did not share any detailed drug price data or specific pricing strategy. The court noted that PacifiCare "sometimes disclosed less information than was requested because that was 'what the attorneys permitted'" and that the information was "restricted to 'sample regions,' 'high level review' and 'estimates.'"[5] Second, the information was shared with a limited number of high-level executives evaluating the merger "on the eve of the merger agreement." Third, the defendants provided a legitimate business justification for sharing the information – it was critical to UnitedHealth's valuation of PacifiCare. And, finally, the information exchange process was monitored by outside antitrust counsel.[6] As a result, the court found the information exchange was insufficient to establish an inference of conspiracy.[7]

Pre-Closing Integration Planning

Omnicare also alleged that a reference to using PacifiCare "as a stalking horse to obtain the best service and contracts" in a strategic memo drafted after the merger agreement was signed but before the deal was closed demonstrated that the defendants had conspired to obtain lower prices from Omnicare.[8]

The court found that while the memo "unquestionably" demonstrated that the defendants "were communicating about their future plans," the prospective language in the memo made it unlikely a jury would conclude that the memo was intended to guide PacifiCare's pre-closing actions regarding Omnicare.[9] The court also questioned the timing of the memo, as it was circulated long after the conspiracy had allegedly started.

Merger Agreement Carve-Out

The court also considered and dismissed other evidence presented by Omnicare on its conspiracy claim.[10] Omnicare claimed that a provision in the UnitedHealth/PacifiCare merger agreement that required UnitedHealth's approval for PacifiCare business expenditures greater than $3 million and a carve-out allowing PacifiCare to enter or amend Medicare Part D contracts was evidence that UnitedHealth and PacifiCare had reached an agreement regarding a Part D contracting strategy. The court found that the carve-out was not sufficient evidence from which to infer a conspiracy. The court concluded that the provision was as compatible with the defendants' legitimate business activity as it was with Omnicare's conspiracy theory.[11]

Impact of Court's Decision

This decision is generally consistent with current guidance from the Department of Justice and Federal Trade Commission on information sharing in the context of merger negotiations between competitors.[12] These guidelines are particularly important with respect to the following points:

- Parties should share information only if it is legitimately necessary for due diligence.
- Sharing aggregated data reduces antitrust risks.
- Creating a limited "due diligence team" with personnel who are not responsible for pricing and marketing decisions is strongly advised.
- There may be a weaker rationale for sharing certain

competitively sensitive information significantly in advance of signing a merger agreement.

- The rationale for information exchange is also weaker, but not absent, for a buyer to share competitively sensitive information with the seller.
- Parties may conduct pre-integration planning, including sharing information that relates to legitimate pre-closing discussions of post-merger operations, but no steps should be taken to effectuate those plans prior to closing.

As the court noted in its decision, antitrust counsel for both parties were consulted about information exchanges during merger negotiations. The use of antitrust advisors during merger discussions, and through consummation of the deal, can help ensure that proper information sharing safeguards are in place and that antitrust risk is minimized.

1 *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697 (7th Cir. 2011).

2 *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 594 F. Supp. 2d 945, 974 (N.D. Ill. 2009).

3 *Omnicare*, 629 F.3d at 709.

4 *Id.* at 709-10, quoting Omnicare, 594 F. Supp. 2d at 968.

5 *Id.* at 710.

6 *Id.* at 710.

7 "Viewed separately and collectively, Omnicare's evidence of information exchange would not enable reasonable jurors to infer that United and PacifiCare inappropriately shared information damaging to competition in and of itself (Omnicare's alleged standalone claim), nor that the information exchanged facilitated the development or advancement of a coordinated negotiating and pricing strategy." *Id.* at 711.

8 *Id.* at 708.

9 *Id.* at 708.

10 Omnicare claimed that PacifiCare's negotiating tactics, UnitedHealth's communications to Omnicare after the deal was signed but before the deal closed, and UnitedHealth's actions regarding its own contract with Omnicare also supported the conspiracy claim.

11 *Id.* at 712. *See Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1173 (7th Cir. 1990).

12 *See* U.S. Dep't of Justice & FTC, Antitrust Guidelines for Collaborations Among Competitors (2000), available at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf; *see also* William Blumenthal, General Counsel, FTC, *The Rhetoric of Gun-Jumping, Remarks Before the Association of Corporate Counsel, Annual Antitrust Seminar of the Greater New York Chapter* (Nov. 10, 2005), *available at* http://www.ftc.gov/speeches/05speech.shtm.

Antitrust Suit Alleging Text-Messaging Conspiracy Allowed to Proceed Based on "Parallelism Plus"

By Alex Khachaturian

A recent Seventh Circuit decision held that antitrust plaintiffs need not plead direct evidence of agreement, nor exclude possible legitimate justifications for alleged parallel business conduct consistent with an agreement to satisfy the heightened pleading standard of "plausibility" set forth in *Bell Atlantic Corp. vs. Twombly*,[1] if sufficient circumstantial evidence is also pled. In *In re Text Messaging Antitrust Litigation,*[2] the Seventh Circuit (Posner, J.) took the unusual step of accepting an interlocutory appeal to review and affirm a district court's decision permitting the filing of an amended complaint.

Background

Class plaintiffs alleged that defendant wireless telecommunication service providers Verizon Wireless, AT&T Mobility L.L.C., Sprint Nextel Corporation and T-Mobile USA, Inc., conspired to fix prices for text messaging services. The district court dismissed the first amended complaint for failure to meet the "plausibility" standard set out by the Supreme Court in *Twombly*. Plaintiffs moved to further amend the complaint by adding fact allegations in an effort to satisfy their obligations under *Twombly*. The district court (Kennelly, J.) granted the motion to amend and then granted defendants' motion under 28 U.S.C. § 1292(b) to certify that ruling for appeal.[3]

First Amended Complaint Insufficient

The first amended complaint was based on allegations that (1) defendants engaged in parallel pricing conduct; (2) defendants had the opportunity to collude through an industry group; (3) defendants failed to deny a price-fixing conspiracy when responding to Congressional inquiries into the matter; (4) the structure of the text-messaging market was prone to collusion; and (5) defendants' price increases were "historically unprecedented," contrary to economic experience, and against defendants' interest.[4] The district court examined each of these allegations in turn, and found that taken together, plaintiffs "failed to allege plausibly that defendants' conduct was anything other than 'merely parallel conduct that could just as well be independent action,'"[5] which doomed their claim under *Twombly*. The Court found that defendants' parallel price increases may have been the result of "follow-the-leader" but were not necessarily pursuant to agreement;[6] defendants' industry group meetings represented nothing more than an opportunity to conspire, absent specifics regarding any agreements or statements suggesting agreements made at them or any details regarding their structure, content or purpose;[7] and defendants' failure to deny a price-fixing conspiracy in their responses to Congressional inquiries could not lead the Court to infer that such a conspiracy existed because those inquiries made no direct allegations of price-fixing.[8] Further, the Court found that the defendants' price increases were not in fact "historically unprecedented," and could be explained by the relative novelty of text-messaging technology and the desire to incentivize customers to purchase bulk plans rather than individual minutes.[9]

Second Amended Complaint Upheld

Plaintiffs addressed these deficiencies in the second amended complaint by alleging for the first time that a division of the defendants' industry group formed committees of high-level executives that conducted meetings "narrowly focused on text messaging and pricing," that detailed price information was disseminated at these meetings, and that their stated purpose was "to profit together by placing the interests of the industry above and before the individual companies' individual interests."[10] Plaintiffs also identified several of the participants of these meetings and the dates that they occurred.[11] The district court held that this new factual detail provided "additional support for the claim of an express agreement that carrie[d] plaintiffs over the plausibility threshold [set

out by *Twombly*]"[12] and granted the motion to amend.

Judge Kennelly thereafter granted defendants' motion to certify his ruling to the Seventh Circuit, noting that "[t]hough (as plaintiffs argue) the Seventh Circuit had issued dozens of decisions concerning the application of *Twombly*, the contours of the Supreme Court's ruling, and particularly its application in the present context, remain unclear."[13] The Seventh Circuit agreed.

The Seventh Circuit's Opinion

The Seventh Circuit reasoned that "the concerns underlying [the question of whether a complaint states a claim under *Twombly*]," namely the possibility of subjecting defendants to bulky, burdensome discovery in a suit of dubious merit, warranted an interlocutory appeal.[14] Though insisting that "[s]uch appeals should not be routine, and won't be," the Court authorized the appeal because "[p]leading standards are in ferment after *Twombly* and *Iqbal*,[15] and therefore an appeal seeking a clarifying decision that might head off protracted litigation is within the scope of section 1292(b)."[16]

The Seventh Circuit went on to affirm the district court's ruling, holding that the second amended complaint's allegations of a "mixture of parallel behaviors, details of industry structure, and industry practices that facilitate collusion" constituted a "plausible" claim that defendants had agreed to fix prices, unlike a "complaint that merely alleges parallel behavior [and thus] alleges facts that are equally consistent with . . . an inference that the conditions of [the defendants'] market have enabled them to avoid competing without having to agree not to compete."[17] The Court emphasized that *Twombly* did not necessarily demand allegations of direct or "smoking gun" evidence of price-fixing conspiracy, such as admissions by conspirators, to reach the "plausibility" threshold. Citing to a host of noted pre-*Twombly* decisions, the Court held that "[d]irect evidence of conspiracy is not a sine qua non . . . Circumstantial evidence can establish an antitrust conspiracy."[18] The Court also cited to a footnote in *Twombly* that discussed the type of "parallel plus" conduct that would state a claim under the new standard, and concluded that the circumstantial evidence pled in the second amended complaint, most notably the detail regarding trade association meetings, the rapidity of the pricing structure changes and the highly concentrated nature of the industry (defendants together represented 90% of the market) fell into that category.[19]

Pleading standards are "in ferment" after *Twombly* and *Iqbal*.

Implications

The Seventh Circuit in *In re Text Messaging Antitrust Litigation* interpreted the pleading demands of *Twombly* and *Iqbal* as requiring that the allegations of a complaint "establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as 'preponderance of the evidence' suggest." While this formulation may not be much more definitive than terms like "plausibility" and "probability," the decision does make clear that allegations of (i) parallel business conduct accompanied by (ii) meetings among the defendants discussing the subject matter of the complaint's allegations in a highly concentrated industry, even when no direct evidence of actual agreement is pled and when alternative economic justifications for the conduct may exist, may be enough to overcome a motion to dismiss and carry a suit into the discovery phase under *Twombly*. Both the Northern District of Illinois and the Seventh Circuit in *In re Text Messaging Antitrust Litigation* relied heavily on the factual detail regarding the persons involved, time, place and purposes of industry group meetings as essential support bolstering the "plausibility" of that circumstantial evidence of agreement, demonstrating yet again the vigilance required to avoid the risks presented by overly ambitious trade association activities.

1 550 U.S. 544 (2007).

2 630 F.3d 622 (7th Cir. 2010).

3 Minute Entry, *In re Text Messaging Antitrust Litigation*, No. 1:08-cv-7082 (N.D.Ill. Oct. 25, 2010).

4 *See id.* at *1; *see also In re Text Messaging Antitrust Litigation*, No. 1:08-cv-7082, 2009 WL 5066652, at *6-11 (N.D. Ill. Dec. 10, 2009) (granting defendants' motion to dismiss the first amended complaint for failure to state a claim under *Twombly*).

5 *In re Text Messaging Antitrust Litigation*, No. 1:08-cv-7082, 2009 WL 5066652, at *5-6 (quoting *Twombly*).

6 *See id.* at *8.

7 *See id.* at *6-7.

8 *See id.* at *7.

9 *See id.* at *8-11.

10 *In re Text Messaging Antitrust Litigation*, No. 1:08-cv-7082, 2010 WL at *3.

11 *See id.*

12 *See id.* at *2-3 (N.D. Ill. Apr. 30, 2010).

13 Minute Entry, *In re Text Messaging Antitrust Litigation*, No. 1:08-cv-7082 (N.D. Ill. Oct. 25, 2010).

14 *In re Text Messaging Antitrust Litigation*, 630 F.3d at 625-26.

15 *Aschroft v. Iqbal*, 129 S.Ct. 1937 (2009) (extending *Twombly* outside antitrust context).

16 *In re Text Messaging Antitrust Litigation*, 630 F.3d at 626.

17 *Id.* at 627.

18 *Id.* at 628-29.

19 *Id.* at 628.

20 *Id.* at 629.

Leegin Redux: "It ain't over until it's over"

By Alan R. Kusinitz

On February 22, 2011, the Supreme Court denied plaintiff PSKS's writ of certiorari,[1] thereby declining to clarify or resolve any open antitrust issues raised by the Court's landmark decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* ("Leegin I").[2] Fifth Circuit and District Court dismissals were thereby upheld.[3] While the denial of certiorari finally ends PSKS's legal odyssey, the courts and antitrust practitioners are left to grapple with *Leegin I*'s open issues.

Leegin I: Easier Said than Done

In *Leegin I*, a divided Supreme Court (5-4)[4] overturned the rule that resale (vertical) price fixing ("RPM") was *per se* illegal. Henceforth, vertical price-fixing (*e.g.*, price-fixing between a manufacturer and its distributors) would be neither *per se* illegal nor *per se* legal, but would be judged under the rule of reason, balancing precompetitive effects and anticompetitive effects. In so doing, the Supreme Court, left open several substantive and procedural issues. For example, the Court provided no guidance about whether a supplier engaged in dual distribution and, therefore, in actual or potential competition with its distributor customers, would risk horizontal price-fixing claims if it were to enter into RPM agreements with its distributors. Similarly, the Court did not provide guidance as to RPM agreements in three-step distribution systems, *i.e.*, sales by manufacturers to distributors who resell to retailers, who then resell to the ultimate consumer.[5] Procedurally, the Court provided no guidance as to the appropriate rule of reason "litigation structure," but left to the trial courts to "devise rules over time ... and [to devise] presumptions where justified."[6]

Given that the Supreme Court did not dismiss PSKS' case, but merely remanded the case for further proceedings pursuant to the rule of reason, it was possible that some of these issues would be raised and resolved on remand. In fact, PSKS raised some of these issues on remand, but neither the district court, the Fifth Circuit nor the Supreme Court chose to grapple with the open issues.

The Case on Remand

In *Leegin I*, the Supreme Court remanded plaintiff's case to the Fifth Circuit which, in turn, remanded the case to the district court for the Eastern District of Texas for proceedings consistent with the Supreme Court's opinion.[7] PSKS filed a second amended complaint attempting to conform its allegations to the rule of reason as required by the Court's opinion, and by Fifth Circuit jurisprudence, which requires a plaintiff in a rule of reason case properly to plead a relevant product market.[8] In its second amended complaint, PSKS asserted that there were two relevant markets: (i) the retail market for Leegin's women's accessories and (ii) the wholesale sale of brand-named women's accessories to independent retailers.[9]

Defendant Leegin argued that these markets were "untenable" and moved to dismiss the second amended complaint for failure to state a claim for relief. Relying on a *Twombly/Iqbal* pleading standard,[10] both the district court and the Fifth Circuit agreed, finding that these two "markets" were "untenable," "implausible" and "insufficient"[11] as a matter of law. The first market definition failed because a single brand cannot be its own market, "except where consumers are 'locked in' to a specific brand by the nature of the product."[12] Importantly, PSKS did not plead that there were any structural barriers to

the substitution of products from other manufacturers for Leegin's products.[13]

The district and appellate courts also found the second (wholesale) market definition lacking for three reasons. First, PSKS's definition improperly focused on the type of distribution (wholesale vs. retail) rather than the product.[14] Second, "independent retailer" was considered not relevant to a proper market definition because PSKS did not allege facts that could establish why "independent" retailers do not compete with other types of retailers (*e.g.*, chain stores).[15] Finally, absent actual anticompetitive effects,[16] a plaintiff must plausibly allege that the defendant has market power in a relevant market. Here, "women's accessories" is "too broad and vague" to constitute a market, and even if it did, "it is impossible to imagine that Leegin could have power over such a market."[17] PSKS's failure to allege a plausible market was fatal to its case on remand.

Relying on the Supreme Court's suggestion that further development of the rule of reason as applied to RPM should be left to the district courts, PSKS argued that RPM arrangements utilized by dual distributors, such as Leegin, should be analyzed differently than in instances that are purely vertical (*i.e.*, where the manufacturer does not participate at the retail level).[18] PSKS argued that dual distribution should be treated as a horizontal rather than a vertical arrangement, and that price setting in dual distribution arrangements should be considered at least presumptively illegal, if not *per se* illegal. Both the district court and the Fifth Circuit rejected PSKS's approach. The district court noted that at least eight circuits analyzed dual distribution restraints under the rule of reason and since the rule of reason requires a properly defined market, which PSKS failed to allege, PSKS's dual distribution claim failed as well.[19] Similarly, the Fifth Circuit held that:

PSKS' argument that resale price maintenance in dual distribution should be treated differently was rejected.

> PSKS's claim fails anyway as a matter of market definition. For the same reason, we do not need to address the argument of amicus American Antitrust Institute that RPM arrangements should carry a presumption of illegality; that RPM arrangements should be treated as "inherently suspect" because they lead to higher prices or reduced output; that dual distribution systems should be presumptively illegal; and that without a presumption of illegality, the rule of reason amounts to a rule of per se legality for RPM.[20]

PSKS's second amended complaint also alleged that Leegin entered into a horizontal "hub and spoke" price-fixing conspiracy with its independent retailers (other than plaintiff). Specifically, PSKS alleged that (i) Leegin's no-discount policy was the result of a "consensus" among Leegin's independent retailers with Leegin as the alleged vehicle used to prevent discounting and price competition and (ii) Leegin discussed special occasion discounts with its retailers (*e.g.*, allowing a retailer to grant a discount to a consumer on his or her birthday). Both the district court and the Fifth Circuit held that these claims were barred by the "Mandate Rule."[21] The Mandate Rule precludes litigation of issues decided by the district court but forgone or waived on appeal, for example, because they were not raised in the district court.[22] Since PSKS did not allege any horizontal restraint claims in its original complaint, it was precluded from raising them on remand.[23]

Implications

Leegin I made new, albeit controversial, law. On remand, PSKS was not able to advance the RPM jurisprudence. In large part this can be attributed to PSKS's failure to plead properly. While the Supreme Court in *Leegin I* did not provide any structural rules for district courts to follow in implementing its opinion, it did advise the lower courts to consider the following factors in future cases to determine whether RPM is being used in an anticompetitive manner: (a) the number of suppliers using RPM in a given product category, and whether together they have market power; (b) whether a dominant, inefficient retailer or group of retailers is the impetus for the arrangement rather than a supplier acting independent of retailer pressure; and (c) whether a dominant supplier or retailer with market power is the source of the restraint.[24] PSKS's second amended complaint failed adequately to allege market power,[25] failed to allege that the

retailers agreed to the RPM among themselves[26] and failed to allege harm to interbrand competition.[27] In essence what Leegin did was simply reargue its original *per se* case without alleging the elements of a cause of action under the rule of reason. The result, therefore, should not be surprising. To the extent RPM law will be fleshed out at the district court level, per the Supreme Court's suggestion, it will be in other litigation.

1 *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412 (5th Cir. 2010), *cert. denied*, *PSKS Inc. v. Leegin Creative Leather Products, Inc.*, No. 10-653 (2011).

2 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), overruling *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 73 (1911).

3 *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. 2:03-CV-107, 2009 WL 938561 (E.D. Tex., April 6, 2009), aff'd *PSKS Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412 (5th Cir. 2010).

4 The enforcement authorities were likewise divided. The FTC and the DOJ advocated for the rule of reason, while 37 states argued that the Supreme Court should uphold the per se rule. Brief for the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480, 2007 WL 173650 (U.S. Jan. 22, 2007); Brief for the State of New York and 36 Other States as Amicus Curiae Supporting Respondent, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480, 2007 WL 621851 (U.S. Feb. 26, 2007).

5 Specifically, it was silent as to whether a manufacturer legally may require distributors to obtain minimum resale price maintenance agreements from their retailer customers.

6 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 898-99 (2007).

7 *PSKS Inc. v. Leegin Creative Leather Products, Inc.*, 498 F.3d 486 (5th Circuit 2007) (per curiam).

8 *See PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412, 417 (5th Cir. 2010).

9 *PSKS, Inc. v. Leegin Creative Leather Products., Inc.*, No. 2:03-CV-107, 2009 WL 938561 (E.D. Tex., April 6, 2009) at *2-*3; *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 417-19.

10 *See Aschroft v. Iqbal*, 2129 S.Ct 1937, 1949 (2009) ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

11 *See PSKS, Inc. v. Leegin Creative Leather Products., Inc.*, No. 2:03-CV-107, 2009 WL 938561 (E.D. Tex., April 6, 2009) at *1, *2-*3; *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 417, 418.

12 *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 418.

13 *Id.*

14 *Id.* at 418.

15 *Id.* at 418.

16 Plaintiff claimed its termination was an anticompetitive effect. The Fifth Circuit properly rejected this because a dealer termination may be harm to a competitor but not harm to competition, and a manufacturer may unilaterally terminate a distributor under *U.S. v. Colgate*, 250 U.S. 300 (1919). *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 419-20. Plaintiff also alleged that Leegin's RPM program raised prices to consumers. The Fifth Circuit rejected this claim as "def[ying] the basic laws of economics." *Id.* at 419. In fact, there is significant evidence that resale price maintenance does raise prices to consumers. *See, e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 926 (2007) (Justice Breyer Dissent); VII Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1640b, at 40 (2nd Ed. 2004) (RPM "tends to produce higher consumer prices than would otherwise be the case. The evidence is persuasive on this point."). Under *Leegin I*, however, a price increase on a particular brand is insufficient to show harm to competition.

17 *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 418-19.

18 *See PSKS, Inc. v. Leegin Creative Leather Products., Inc.*, No. 2:03-CV-107, 2009 WL 938561 (E.D. Tex., April 6, 2009) at *5-*6; *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 417.

19 *PSKS, Inc. v. Leegin Creative Leather Products., Inc.*, No. 2:03-CV-107, 2009 WL 938561 (E.D. Tex., April 6, 2009) at *6-*7;

20 *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 417.

21 *PSKS, Inc. v. Leegin Creative Leather Products., Inc.*, No. 2:03-CV-107, 2009 WL 938561 (E.D. Tex., April 6, 2009) at *5-*6; *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 420.

22 *Id.* citing *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004).

23 *PSKS, Inc. v. Leegin Creative Leather Products., Inc.*, No. 2:03-CV-107, 2009 WL 938561 (E.D. Tex., April 6, 2009) at *5-*6; *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 420. Similarly, the Supreme Court refused to address plaintiff's horizontal claims because it had not raised them in the lower courts. *Leegin*, 551 U.S. 907-08.

24 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 8 at 897.

25 *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 420.

26 *PSKS, Inc. v. Leegin Creative Leather Products., Inc.*, No. 2:03-CV-107, 2009 WL 938561 (E.D. Tex., April 6, 2009) at *8.

27 *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d at 420.

Google Buzz Settlement Re Privacy Controls Cautions Companies Engaged in Information Sharing

By Caitlin Somerman

On March 30, 2011, the Federal Trade Commission ("FTC") filed an administrative complaint against Google alleging that the company's launch of Google Buzz ("Buzz") in 2010 violated Section 5 of the FTC Act.[1] The FTC alleged that Google used "deceptive tactics" and "violated its own privacy promises to consumers."[2] On the same day, the FTC filed a proposed consent agreement with Google, which, subject to a 30-day comment period, will resolve its concerns.[3] While the FTC has frequently prosecuted consumer privacy violations (with cease and desist orders as the usual remedy), the case against Google charts new territory, as it is the first time an FTC settlement order has required a company to implement a comprehensive privacy program to protect consumer information.[4] This case also marks the first time the FTC has alleged substantive violations of the privacy requirements of the US-EU Safe Harbor Framework.[5] The case provides a warning that a "default" policy of sharing consumer information with third parties without providing clear warnings and instructions for changing consumer privacy settings may no longer be defensible.

Background

Google, the Internet search giant and provider of multiple free web products, such as Gmail (its email service), allows its users to create a "Google Profile," through which consumers can choose to make certain personal information (such as the user's name and location) public and available for indexing through search engines. On February 9, 2010, Google launched Google Buzz, a social networking service operating within Gmail. Buzz allowed users to share information – status updates, photos, videos, etc. – either publicly or privately with specific users. In some cases, Google used information gathered through its Gmail and Profiles databases to populate the newly launched Buzz.

The FTC's Complaint

In its administrative complaint, the FTC alleged that Google's launch of Buzz misled consumers into thinking that they could easily choose whether to opt in or out of the service because the provided ways to opt out of the service were ineffective. The FTC asserted that the Gmail users who did not want to participate in Buzz and selected the option to "go to my inbox" rather than the option to "Check out Buzz" were nevertheless enrolled in some aspects of the Buzz network.[6] For those users who *did* choose to opt in to join Buzz, the FTC alleged that the methods that Google offered to limit the information shared were confusing and difficult to implement.[7]

The FTC asserted that, in many cases, Google automatically populated Buzz with information that consumers had provided Google when they opened accounts for other Google services and applications, such as contacts (from Google's Gmail service), pictures (from Google's photo sharing service, Picasa) and status messages (from Google's content sharing service, Blogger).[8] For example, contacts with whom Buzz users communicated most frequently on Gmail automatically became publicly listed on that user's public Google Profile through Buzz.[9] The FTC also alleged that a link labeled "Turn off Buzz" that was displayed on users' Gmail pages did not in fact erase all of their information from the Buzz network, misleading consumers into thinking that they could simply click this button to cease their participation in Buzz and stop sharing personal information.

In practice, Buzz's lax privacy settings led to privacy abuses. The FTC pointed to examples of abusive ex-husbands obtaining access to personal information, employers learning about an employee's contacts with job recruiters and clients of mental health professionals being made public.[10] Consequently, Google and its Buzz service found itself subject to severe criticism and ultimately the FTC determined to seek remedies under the FTC Act.

The FTC Act

Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."[11] To establish

deception under Section 5, the FTC pointed to Google's established privacy policies regarding its use of consumer information. According to the FTC, from approximately October 2005 through October 2010, Google's privacy policy advised consumers that when they signed up for "a particular service that requires registration, [Google would] ask [consumers] to provide personal information. If [Google] use[s] this information in a manner different that the purpose for which it was collected, then [Google] will ask for [consumer] consent prior to such use."[12] The FTC asserted that, during this same time frame, Google's stated use for information collected through the operation of Gmail was solely "to provide the service to [the user]."[13]

Since Google used consumer information from Gmail for purposes other than providing them with a web-based email service, Google's own privacy policy required Google to obtain consumer consent to use the information for Buzz. Because Google's default settings provided for the sharing of information on Buzz, and Google did not provide clear ways for consumers to consent, opt out or control the features on Buzz, the FTC alleged that Google misled and deceived consumers in violation of Section 5(a) of the FTC Act.[14]

The US-EU Safe Harbor Framework

This case also represents the first action against a company for substantive violations of specific provisions of the US-EU Safe Harbor Framework ("Safe Harbor"). Safe Harbor, enacted in 2000 following negotiations between the U.S. Department of Commerce ("DOC") and the EU, provides a means for US companies to transfer personal data out of the EU consistent with the EU's requirements for privacy and the protection of personal data. For US companies lawfully to transfer personal data from the EU to the US, a company must self-certify to DOC that its internal policies comply with the EU's privacy standards. These standards include, among other things, the requirement that companies give notice of any changes in privacy policies by "inform[ing] individuals about the purposes for which it collects and uses information about them, … the types of third parties to which it discloses the information, and the choices and means the organization offers individuals for limiting its use and disclosure … in clear and conspicuous language when individuals are first asked to provide personal information."[15] Under Safe Harbor, companies must also "offer individuals the opportunity to choose (opt out) whether their personal information is (a) to be disclosed to a third party or (b) to be used for a purpose that is incompatible with the purpose(s) for which it was originally collected… [in a] clear and conspicuous, readily available, and affordable [way]."[16]

Google's own privacy policy required Google to obtain consent to use the information for Buzz.

The FTC asserted that, since October 2005, Google has self-certified to DOC and appears on the list of companies that transfer personal data out of the EU in accordance with Safe Harbor.[17] By not giving consumers clear and conspicuous information about the types of information they were sharing and with whom they were sharing it and, further, not offering consumers a clear way to opt out of sharing their information, the FTC alleged that Google did not adhere to its obligations under Safe Harbor. Thus, Google misrepresented its compliance with Safe Harbor, thereby further engaging in false, misleading or deceptive acts or practices under Section 5(a) of the FTC Act. [18]

The Proposed Consent Agreement

Google agreed to a settlement that uses "broad strokes" to prevent Google from engaging in similar behavior in the future. The settlement prohibits Google from misrepresenting the way it protects the privacy or confidentiality of user information and its compliance with any privacy, security or other compliance program, including Safe Harbor.[19]

The FTC noted that the proposed settlement with Google is the first that requires a company to implement a comprehensive privacy program to protect consumer information.[20] The comprehensive program requires Google to:

- Designate staff to coordinate and be responsible for the program;
- Identify reasonably foreseeable, material risks that could result in Google's unauthorized collection, use or disclosure of its user's private information, as well as assess the sufficiency of the safeguards in place to control those risks;

- Design and implement reasonable privacy procedures to address the risks identified above, and regularly test or monitor the effectiveness of those procedures;
- Develop and use reasonable steps to select and retain service providers capable of protecting the privacy of user information they receive from Google, and require service providers, by contract, to implement and maintain appropriate privacy protections; and,
- Evaluate and adjust Google's privacy program in light of the results of the testing and monitoring, material changes to Google's business or any other circumstances that may have a material impact on the effectiveness of its privacy program.[21]

Google is also required to obtain independent audits to assess its privacy and data protection practices 180 days after the Order, and then every two years for a 20-year period.[22] Google must also for 20 years provide a copy of the Order to current and future principals, officers, directors and managers and to all current and future employees, agents and representatives in supervisory positions relating to the Order's subject matter and follow certain reporting and compliance provisions regarding the retention of materials related to Google's privacy provisions.[23]

Finally, before Google proposes to share any user information with a third party (i) in a manner different from Google's stated sharing practices at the time Google collected the information or (ii) that results from "any change, addition, or enhancement to a product or service" by Google, the settlement requires Google clearly and prominently to disclose to its users that their information will be shared, the purpose for sharing the information and identify certain information about the third party with whom the information will be shared.[24] Google must also obtain the "express affirmative consent" of Google users before sharing any of the user's information with the third party.[25]

The settlement with Google is the first to mandate a comprehensive privacy program.

Implications

The FTC voted in favor of the proposed consent agreement by a vote of 5-0.[26] Commissioner J. Thomas Rosch, however, expressed "substantial reservations" with the requirement that Google disclose to and obtain the express affirmative consent of its users when it engages in new or additional sharing with third parties of previously collected user information.[27] Specifically, Commissioner Rosch took issue with:

- the requirement that Google users *opt in* to new programs, which goes beyond Google's original promise to consumers that they would be able to opt out;
- the requirement that Google obtain user consent for any "new or additional sharing" of information, without limiting this to *material* changes. Commissioner Rosch asserted that since technology changes so rapidly, this requirement is "certain to apply (and with some frequency)"; and,
- its application to *all* Google services and products, not just to Google's social networking services and products.[28]

Commissioner Rosch expressed concern that Google may have agreed to these broad requirements, which "seem[ ] to be contrary to Google's self-interest," so that they "would be used as leverage in future government challenges to the practices of its competitors" or "to get the Commission off [Google's] back … [neither] consistent with the public interest."[29]

In short, in Commissioner Rosch's view, Google may have accepted these restrictive terms to try to saddle its competitors with similarly restrictive privacy provisions that may hurt competitors in the future more than they hurt Google now (perhaps by raising competitors' costs through regulatory compliance). Indeed, the FTC noted on its official Twitter feed that it "[w]ill continue aggressive law enforcement in privacy" and although the "[t]erms of the order apply only to Google … the best practices set forth in the order should serve as a guide to industry."[30]

1 Complaint, *In the Matter of* Google, Inc., File No. 102 3136 (Mar. 30, 2011) (hereinafter *Google Complaint*).

2 Press Release, Federal Trade Commission, *FTC Charges Deceptive Privacy Practices* in Google's Rollout of Its Buzz Social Network (Mar. 30, 2011) (hereinafter *Press Release*).

3 Proposed Consent Agreement, *In the Matter of* Google, Inc., File No. 102 3136 (Mar. 30, 2011) (hereinafter *Proposed Consent Agreement*).

4 *Press Release, supra* note 2, at 1.

5 *Id.*

6 *Google Complaint, supra* note 1, at 2-3.

7 *Id.* at 2-5.

8 *Id.* at 2, 4.

9 *Id.* at 3.

10 *Id.* at 5.

11 15 U.S.C. § 45.

12 *Google Complaint, supra* note 1, at 2.

13 *Id.* at 2.

14 *Id.* at 5-6.

15 *Id.* at 7.

16 *Id.*

17 *Id.*

18 *Id.* at 7-8.

19 *Proposed Consent Agreement, supra* note 3, at 4.

20 *Press Release, supra* note 2, at 1.

21 *Proposed Consent Agreement, supra* note 3, at 4-5.

22 *Id.* at 5-6.

23 *Id.* at 6-7.

24 *Id.* at 4.

25 *Id.*

26 Press Release, supra note 2, at 1.

27 Concurring Statement of Commissioner J. Thomas Rosch, *In the Matter of* Google, Inc., File No. 102 3136 (Mar. 30, 2011).

28 *Id.* at 1-2.

29 *Id.* at 2.

30 Transcript of #FTCpriv Twitter Q and A, *In the Matter of* Google, Inc. File No. 102 3136, Fed. Trade Comm'n (Mar. 30, 2011).

Eleventh Circuit Rejects Claims of Resale Price Maintenance and Horizontal Price-Fixing Against Dual Distribution

By Marie Mathews

A divided panel of the Eleventh Circuit Court of Appeals upheld the dismissal of a class action complaint alleging vertical and horizontal price-fixing by Tempur-Pedic North America, Inc. and its parent company ("Tempur-Pedic").[1]

Background

Tempur-Pedic manufactures visco-elastic foam mattresses and sells them to consumers indirectly through distributors as well as directly on its own website. Tempur-Pedic sets the minimum resale price that distributors may charge to consumers and adheres to the same prices in the sales it makes through the Tempur-Pedic website.

Plaintiffs purchased a mattress from a Tempur-Pedic distributor at or above the minimum price set by Tempur-Pedic, and subsequently (January 2007) brought suit on behalf of a nationwide class of purchasers in the Northern District of Georgia the suit alleged that mattress prices were artificially inflated as a result of vertical and horizontal price-fixing. Plaintiffs alleged that Tempur-Pedic had violated Section 1 of the Sherman Act by enforcing a vertical retail price maintenance agreement with its distributors, causing anticompetitive effects within an alleged submarket for "visco-elastic foam mattresses," within which market Tempur-Pedic was said to account for 80-90% of all sales.[2] Second, plaintiffs claimed that Tempur-Pedic, as a retailer selling mattresses directly to consumers on its website, engaged in *per se* illegal horizontal price-fixing with other distributor-retailers.

The district court dismissed the complaint holding that plaintiffs had failed properly to plead a rule of reason violation.[3] In particular, plaintiffs failed to allege sufficient facts to establish the alleged relevant submarket and harm to competition that would provide "plausible grounds" from which to infer a violation, as required by *Twombly*.[4] The district court opined that though "visco-elastic foam mattresses" may be distinct from other mattresses, such a market definition was too narrow because visco-elastic foam mattresses competed with all other types of mattresses. Therefore, the proper relevant market is a broader mattress market, and plaintiffs had failed to allege an anticompetitive effect in that market.[5]

The district court also determined (in an earlier unpublished order) that plaintiffs failed to plead a plausible horizontal price-fixing conspiracy.[6]

The dismissals of both vertical and horizontal price-fixing claims were appealed to the Eleventh Circuit, which affirmed, holding that the complaint's "bare legal conclusions" were insufficient.[7]

The Resale Price Maintenance Claim

The panel noted that pursuant to the rule of reason analysis required by *Leegin*, the plaintiff must allege an anticompetitive effect in a properly defined relevant market, and that those allegations, in turn, had to meet the pleading standard required by *Twombly*.[8] The court determined that the plaintiffs' "skimpy" allegations were insufficient. "The complaint alleges, without elaboration, that '[v]isco-elastic foam mattresses comprise a relevant product market, or submarket, separate and distinct from the market for mattresses generally, under the federal antitrust laws.' This conclusory statement merely begs the question of what, exactly, makes foam mattresses comprise this submarket."[9] The court held that plaintiffs were required to provide "factual allegations of the cross-elasticity of demand or other indications of price sensitivity that would indicate whether consumers treat visco-elastic foam mattresses differently than they do mattresses in general."[10]

Plaintiffs had argued that the market definition should not be rejected before discovery was had.[11] The court rejected this argument because it would "absolve [plaintiffs] of the responsibility under *Twombly* to plead facts 'plausibly suggesting' the relevant submarket's composition."[12] Plaintiffs "had the obligation under *Twombly* to indicate that [they] could provide evidence plausibly suggesting the definition of the alleged submarket."[13]

Plaintiffs failed to allege that Tempur-Pedic's alleged resale price maintenance had any anticompetitive effect in a proper relevant market.

The panel went on to examine the allegations of harm to competition, and held that plaintiffs had failed properly to plead either actual or potential harm. With regard to actual harm, the court reasoned that "beyond the bald statement that consumers lost hundreds of million of dollars, there is nothing establishing the competitive level above which [Tempur-Pedic's] allegedly anticompetitive conduct artificially raised prices."[14] With regard to potential harm, the court determined that plaintiffs had failed to allege a connection between Tempur-Pedic's alleged market power in the visco-elastic foam mattress market and harm to competition, such as restricted output or supra-competitive prices with regard to mattresses. The complaint simply alleged that Tempur-Pedic's conduct eliminated price competition, but according to the court, did not explain "*how* harm to competition results from [Tempur-Pedic's] agreements with its distributors (if such harm results at all)."[15]

The Horizontal Price-Fixing Claim

The complaint alleged that Tempur-Pedic entered into agreements with its distributors that permitted Tempur-Pedic to set retail prices, and that Tempur-Pedic also sold directly to consumers at the same prices. This "dual distribution" allegedly resulted in unlawful collusion by Tempur-Pedic and its distributors on mattress prices. Applying *Twombly*, the court determined that plaintiffs had failed to allege facts that could show that collusion was the most plausible explanation for how distributors had set their prices. The court explained that it was economically rational for each distributor to sell at or above the Tempur-Pedic minimum resale price. Further, there was no reason for Tempur-Pedic to undercut its distributors' prices as doing so would drive them out of business, depriving Tempur-Pedic of the distributors' showrooms and knowledgeable sales staff.[16] "Put another way, the potential costs of price-fixing with its distributors would outweigh any benefits that [Tempur-Pedic] would realize by doing so, particularly where independent economic activity would yield the same benefit with none of the costs."[17] The court did not address the question of whether distributor-retailers might also have an economic incentive to *discount* off the Tempur-Pedic set prices; clearly the court was reluctant to assume conspiracy solely from identical prices. To do so might condemn efficient dual distribution systems to *per se* unlawful treatment.

The Dissent

Judge Kenneth L. Ryskamp of the Southern District of Florida, sitting by designation, dissented from the panel's opinion, arguing that *Twombly* had been misapplied. "The majority goes too far in its application of *Twombly* and

essentially requires Jacobs to prove his case in his complaint."[18] Judge Ryskamp pointed out the complicated nature of product market analysis, stating that "[t]he relevant market simply cannot be determined on a motion to dismiss."[19] In Judge Ryskamp's view, plaintiffs should not be expected to provide factual allegations of cross-elasticity of demand or other indications of price sensitivity, absent discovery.[20] "While *Twombly* was a sea change in the standards governing pleading in federal court, the majority goes too far when it interprets *Twombly* to require a plaintiff to include actual evidence in the complaint."[21]

Implications

In this case, the combination of *Leegin* and *Twombly*, as applied, made it impossible for plaintiffs successfully to assert a Section 1 violation based on resale price maintenance, even in circumstances where there are horizontal aspects (*i.e.*, dual distribution). Decisions like this one may further spur plaintiffs to use state antitrust statutes rather than take on the pleading burdens required for a rule of reson case under Sherman Act.

1 *Jacobs v. Tempur-Pedic Int'l Inc.*, 626 F.3d 1327 (11th Cir. 2010).

2 *Id.* at 1331-32.

3 Under the Supreme Court's *Leegin* decision, the rule of reason is applicable.

4 *See Jacobs v. Tempur-Pedic Int'l*, No. 4:07-CV-02-RLV, 2007 U.S. Dist. LEXIS 91241, *7 (N.D. Ga. Dec. 11, 2007) (citing *Bell Atlantic v. Twombly*, 127 S.Ct. 1955 (2007)).

5 *See Jacobs*, 2007 U.S. Dist. LEXIS 91241 at *12.

6 *See id.* at *4.

7 *Jacobs*, 626 F.3d at 1330.

8 *Id.* at 1336.

9 *Id.* at 1338.

10 *Id.*

11 Plaintiffs noted that the *du Pont* cellophane market definition decision (cited by the District Court) came after a full discovery record. *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 1339.

15 *Id.* at 1340 (emphasis in original).

16 *Id.* at 1342. The court also noted that tacit collusion by itself is not unlawful. Plaintiffs would have had to allege that Tempur-Pedic and the distributors signaled each other on how and when to maintain or adjust prices. Such allegations were absent from the complaint. *Id.* at 1343.

17 *Id.* at 1342.

18 *Id.* at 1345.

19 *Id.* at 1346.

20 *Id.*

21 *Id.*

Hospital Prohibited from Entering into Exclusionary Contracts with Health Insurers

By Kristina A. Sadlak

In yet another case demonstrating the Obama Administration's interest in vigorously enforcing the antitrust laws in the health care industry and in renewing the vitality of Section 2 of the Sherman Act, the U.S. Department of Justice and the Texas Attorney General filed a complaint and proposed settlement on February 25, 2011 against United Regional Health Care System of Witchita Falls, Texas. The complaint alleged that United Regional Health Care System ("United Regional") violated Section 2 of the Sherman Act by entering into contracts with commercial health insurers that prohibited the insurers from contracting with competing health care providers.[1] The Proposed Final Judgment, filed simultaneously with the Complaint, forbids United Regional from (a) conditioning any discounts to insurers on exclusivity and (b) preventing insurers from entering into contracts with United Regional's competitors.[2]

The government alleged that the exclusionary contracts that United Regional entered into with insurers in effect required the insurers to pay a pricing penalty of 13% to 27% more for its services if the insurer also contracted with any of United Regional's competitors.[3] Although the precise terms of the contracts varied, they generally offered large discounts off of billed charges (e.g., around 25%) if United Regional was the exclusive local hospital or outpatient provider in the insurer's network.[4] If the insurer contracted with one of United Regional's competitors, the contracts provided for significantly smaller discounts.[5] The Complaint alleged that these contracts reduced competition and enabled United Regional unlawfully to maintain its monopoly power in the relevant product and geographic markets in violation of Section 2 of the Sherman Act.[6]

Background

United Regional, formed by a merger in 1997, is a general acute-care hospital located in Wichita Falls, Texas. It is the largest hospital in the region with 369 beds and is the only local provider of certain "essential" healthcare services, such as cardiac surgery, obstetrics, and high-level trauma care.[7] In 1999, a group of doctors opened a competing hospital, Kell West Regional Hospital ("Kell West"), approximately six miles from United Regional.[8] Kell West is a 41-bed hospital that offers a range of inpatient and outpatient services but does not provide some of the "key" services provided by United Regional (cardiac surgery, obstetrics, and high-level trauma care).[9]

According to the government, to respond to the competitive threat posed by Kell West and other outpatient surgery facilities, United Regional began entering into exclusionary contracts with commercial health insurers in 1998.[10] Within three months after Kell West's opening, United Regional sought and obtained exclusionary contracts with five commercial health insurers. By 2010, United Regional had entered into such contracts with eight insurers.[11] The exception was the largest insurer in Wichita Falls, Blue Cross Blue Shield of Texas ("Blue Cross").[12]

The Complaint

The Relevant Geographic Market

The Complaint defined the relevant geographic area as the Wichita Falls MSA.[13] The Complaint alleged that Wichita Falls is the largest city in the Wichita Falls MSA, with a population of around 100,000. The MSA is comprised of the Archer, Clay, and Wichita counties, and has a total population of about 150,000.[14] Wichita Falls is located in north central Texas, and is a two-hour drive from Dallas-Fort Worth, Texas and Oklahoma City, Oklahoma.[15]

Hospitals and health-care facilities outside of the MSA allegedly do not compete with health-care providers located within the MSA, and competition for inpatient and outpatient services outside of the Wichita Falls MSA is not sufficient to prevent a hypothetical monopolist from maintaining supra-competitive prices for such services within the Wichita MSA.[16] Commercial insurance carriers contract with hospitals in the geographic area in which their health plan beneficiaries are likely to seek medical care, and such beneficiaries generally seek

medical care close to their homes or workplaces.[17] Further, according to the Complaint, very few plan beneficiaries who live in the Wichita Falls MSA travel beyond the MSA borders to seek medical care.[18]

The Relevant Product Markets

The DOJ alleges that the relevant product markets consist of the sale of (a) inpatient hospital services and (b) outpatient surgical services to commercial health insurers. Inpatient hospital services include a range of medical and surgical diagnostic and treatment services that include an overnight stay by the patient.[19] Outpatient surgical services include a range of surgical diagnostic and treatment services that do not require an overnight stay in a hospital. Outpatient surgical services are usually performed in a hospital or other specialized facility licensed to perform outpatient surgery, but are separate from procedures routinely performed in a doctor's office.[20] Commercial health insurers are defined in the Complaint as managed-care organizations (such as Blue Cross Blue Shield, Aetna, United Healthcare, CIGNA, Accountable, etc.), rental networks (e.g., Beech Street, Texas True Choice, Multiplan, and PHCS) and self-funded employer plans.[21]

The Allegations

The Complaint alleges that the exclusionary contracts reduced competition and enabled United Regional unlawfully to maintain its monopoly power in the provision of inpatient hospital services and outpatient surgical services in the Wichita Falls MSA.[22]

The Complaint cites both circumstantial and direct evidence of United Regional's monopoly power. The allegations of monopoly power include: (i) United Regional has an approximately 90% share of the market for inpatient hospital services sold to commercial health insurers and more than 65% share of the market for outpatient surgical services sold to commercial insurers;[23] (ii) all health insurance companies in the MSA consider United Regional a "must have" hospital as it is "by far the largest hospital in the region and the only local provider of certain essential services;"[24] and (iii) United Regional's prices are almost 70% higher than Dallas-Fort Worth hospitals for inpatient hospital services, and about 70% higher than Kell West's prices.[25]

The DOJ Competitive Impact Statement describes United Regional as foreclosing its competitors from access to the most profitable sources of income from commercial insurers.[26] Citing *United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005), the DOJ argues that United Regional's contracts foreclosed its competitors from "significant sources of input or distribution" by foreclosing them from the benefit of contracts with commercial insurers because commercial insurers pay significantly more than government plans.[27] Along these lines, the DOJ argues that profits from government plans (such as Medicare and Medicaid) are not an adequate substitute for the lost profits from commercial insurers because in the Wichita Falls MSA, with the exception of Blue Cross, all of the commercial health insurers pay more than triple the Medicare payment rate.[28] The payments from commercial health insurers with exclusionary contracts represent approximately 30-35% of all payments United Regional receives from all payers, including government payers.[29] Accordingly, the DOJ alleges that this makes the excluded payers "significant sources of input or distribution" for United Regional's competitors.[30]

Consequently, according to the DOJ, these exclusionary contracts have raised prices and reduced quality by (1) delaying and preventing the expansion and entry of United Regional's competitors (primarily Kell West), likely leading to higher health-care costs and higher health insurance premiums; (2) limiting price competition for price-sensitive patients, likely leading to higher health-care costs for those patients; and (3) reducing quality competition between United Regional and its competitors.[31]

The DOJ also maintained that the exclusionary contracts closely resemble *de facto* exclusive dealing arrangements because even though insurers had a choice between the exclusive and non-exclusive rates, the non-exclusive rates were not a commercially feasible or realistic option for insurers.[32] Although the government noted that discounts tied to exclusivity can be procompetitive if they result from "competition on the merits," they can also be anticompetitive if they prevent equally or more efficient rivals from attracting additional consumers.[33]

The government used a price-cost test to examine the discounted prices, as set forth by *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008). This test, known as the discount-attribution test, applies when a defendant faces competition for

a portion of the services it sells, but offers a discount on all of its services.[34] In a bundled discount situation, the test requires that the full amount of the discounts given by the defendant on the bundle should be allocated only to the competitive products.[35] After the discount is applied to the competitive products, if the resulting prices are still above the defendant's incremental cost for providing those services, the discount is likely to be procompetitive.[36] The DOJ alleged in this case that the United Regional prices were below incremental cost, thus tending to exclude an equally efficient competitor for those services.[37] The DOJ methodology was to attribute the entire discount only to the patients that United Regional would be at risk of losing in the absence of the exclusive contracts (the "contestable volume").[38] The DOJ concluded that the contestable volume likely represented around 10% of the patient volume that United Regional receives from the insurers with exclusionary contracts and applied the discount to the contestable volume.[39] The DOJ found that the resulting price was below United Regional's incremental costs and would therefore exclude an equally efficient competitor.[40]

The Proposed Final Judgment

The Proposed Final Judgment was filed simultaneously with the Complaint, and is open for comments for 60 days before it is entered. It prohibits United Regional from (a) conditioning prices or discounts it offers to commercial health insurers on whether those insurers contract with other health-care providers, and (b) preventing insurers from entering into agreements with United Regional's competitors.[41] Additionally, United Regional is prohibited from offering market share discounts or "conditional volume discounts" that would have the same effect as the exclusionary contracts.[42] However, United Regional may sell its hospital services at any discount (provided they do not violate the other provisions of the Final Judgment), and may offer incremental discounts that apply solely to purchases above a specified threshold, but only if those discounts are above cost.[43] United Regional may renegotiate or terminate its contracts with insurers but until such contracts are terminated or renegotiated, United Regional must honor its current discounts for at least 270 days.[44]

Finally, United Regional is required to designate an antitrust compliance officer and provide the DOJ and the State of Texas access upon reasonable notice to United Regional's records and documents relating to matters contained in the Final Judgment.[45] For one year after the Final Judgment is entered, United Regional must provide the DOJ with executed copies of all new or revised agreements with insurers within 14 days of those agreements being executed.[46]

1 *See* Complaint, *United States of America and State of Texas v. United Regional Health Care System*, Civ. No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011) (herinafter "Complaint").

2 *See* Proposed Final Judgment, *United States of America and State of Texas v. United Regional Health Care System*, Civ. No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011) (hereinafter "Proposed Final Judgment").

3 Complaint ¶ 2.

4 Competitive Impact Statement, *United States of America and State of Texas v. United Regional Health Care System*, Civ. No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011), at 3 (hereinafter "Competitive Impact Statement").

5 *Id.* at 3.

6 Complaint ¶ 1.

7 Competitive Impact Statement, at 2.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 MSA stands for "Metropolitan Statistical Area." MSAs are geographic areas defined by the U.S. Office of Management and Budget. Complaint ¶ 21.

14 According to the 2008 estimates of the Census Bureau. Complaint ¶¶ 21-22.

15 *Id.*

16 Complaint ¶¶ 21-25.

17 Complaint ¶ 23.

18 *Id.*

19 Complaint ¶ 11.

20 *Id.* ¶ 18.

21 *Id.* ¶ 13.

22 *Id.* ¶ 21.

23 *Id.* ¶ 1.

24 *Id.*

25 *Id.* ¶ 40.

26 Competitive Impact Statement, at 10.

27 *Id.*

28 However, Blue Cross does pay at least double the Medicare payment rate. Competitive Impact Statement, at 10-11.

29 Competitive Impact Statement, at 11.

30 *Id.*

31 Complaint at ¶ 3.

32 Competitive Impact Statement, at 13.

33 *Id.* at 14.

34 *Id.* at 14.

35 *Id.*

36 *Id.*

37 *Id.* at 14-15.

38 *Id.*

39 Competitive Impact Statement, at 16.

40 *Id.*

41 Proposed Final Judgment § IV.

42 *Id.* § V.

43 *Id.*

44 *Id.* § VI.

45 *Id.* § VII.

46 *Id.*

European Commission Imposes Heavy Fines in Washing Powder Cartel

By Doug Nave and Neil Rigby

On April 13, 2011, the European Commission imposed fines totalling €315.2 million on Procter & Gamble and Unilever, two suppliers of washing powder that were found to have engaged in a cartel lasting three years and covering eight countries in the EU. A third participant, Henkel, received full immunity after disclosing the existence of the cartel to the Commission. The cartel allegedly was spawned out of trade association discussions on how to improve the environmental impact of washing powder by reducing the weight of detergent and the volume of packaging.

The decision was reached using the Commission's settlement procedure – the third time this has been used since the EC Settlement Notice was adopted in 2008. The overall duration of the investigation in this case – less than three years – was much shorter than would typically be the case, and highlights some of the benefits of this streamlined administrative process.

As noted, the infringement arose in conjunction with legitimate trade association meetings. The environmental discussions were appropriate but the three cartel participants – all major manufacturers of washing powder– also agreed on mechanisms to stabilise their prices and market positions so as to ensure that the environmental initiatives and related product changes could not be used by any company to gain a competitive advantage. Henkel was the first participant to disclose the existence of the cartel and apply for immunity, and Procter & Gamble and Unilever applied for leniency following the Commission's "dawn raids" in June 2008. The infringement was found to have lasted from at least January 2002 to March 2005

In the latter half of 2010, the Commission agreed to open settlement discussions after the parties indicated that they would be prepared to consider a possible settlement under the Commission's settlement procedure, which grants companies a 10% reduction in fine if they acknowledge liability for a defined infringement, agree that they have been informed of the Commission's case against them and have had the opportunity to be heard, and agree that they will not request access to the Commission's case file or an oral hearing. Following settlement discussions, the case proceeded rapidly: in January 2011, the participants acknowledged liability; in February 2011, the Commission issued a streamlined statement of objections, which was accepted by the parties; and in April 2011, the Commission adopted its infringement decision. Procter & Gamble was fined €211.2 million and Unilever was fined €104 million, taking into account the 10% reduction in fine under the Settlement Notice and reductions under the Leniency Notice (50% and 25%, respectively).

This matter yet again highlights the sensitivity of trade association meetings and the need to monitor discussions at such meetings so as to stay within permissible competition law bounds.

Progress Continues on China's Merger Review System

By Suat Eng Seah and Kevin B. Goldstein

The fine-tuning process continues for China's Anti-Monopoly Law ("AML"), in force since 2008. With major components in place and merger reviews proceeding, China's State Council and the Anti-Monopoly Bureau of the Ministry of Commerce ("MOFCOM") have turned their attention to filling gaps in the implementation of the AML and to honing the merger review process.

One of the more recent developments in this area is the introduction of a new national security review system for foreign-funded mergers and acquisitions. In addition, In the second half of 2010, China implemented new guidelines to outline divestiture procedures to be used in merger remedies. Piece by piece, a fuller picture of China's merger review system continues to emerge.

National Security Review

On March 5, 2011, a new national security review system for domestic mergers and acquisitions by foreign investors ("Security Review System") went into effect. We wrote about this in detail in Weil's February 2011 *Asia Alert*, available here: http://www.weil.com/news/pubdetail.aspx?pub=10190.[1]

The Security Review System consists of an interdepartmental joint conference led by the National Development and Reform Commission and MOFCOM, with guidance from the State Council. The system appears loosely to follow the US model of the Committee on Foreign Investment in the United States ("CFIUS").

Subsequent to our February 2011 *Asia Alert*, MOFCOM announced *Interim Provisions on Implementation Matters Related to the Security Review System for the Merger* and *Acquisition of Domestic Enterprises by Foreign Investors* (商务部实施外国投资者并购境内企业安全审查制度有关事项的暂行规定) ("Interim Provisions"). The Interim Provisions were announced on March 4, one day before the Security Review System came into force, and are set to expire on August 31, 2011.

As expected, the Interim Provisions encourage pre-filing a consultation with MOFCOM. Parties are encouraged to discuss transactions with MOFCOM prior to formally notifying the transaction in order to identify potential security concerns that need to be addressed.

The Interim Provisions lay out what information and documents must be included in a Security Review System application. The list of required information is largely similar to documents already required for AML and other foreign investment approval purposes.

The Interim Provisions primarily impact filing procedure and leave open many questions about the substance and breadth of security reviews. Though additional regulations on the Security Review System can be expected in the future, given the sensitive nature of national security topics, many details of the review may remain non-public.

Divestiture Guidelines

Turning to competitive analysis of mergers, MOFCOM has continued to develop procedures for discrete issues arising under the AML. Most recently, MOFCOM addressed the process that will apply in cases where the Anti-Monopoly Bureau orders a divestiture remedy in a merger review. The *Interim Provisions on Implementation of Asset or Business Divestitures in Concentrations of Business Operators* (关于实施经营者集中资产或业务剥离的暂行规定) ("Divestiture Provisions") were promulgated July 5, 2010 and made immediately effective.

According to the Divestiture Provisions, when a MOFCOM review decision requires a party to divest its assets or business (the "Divesting Party"), the Divesting Party shall, within 15 days after the date of such review decision, submit to MOFCOM a candidate for the position of "supervising trustee". The supervising trustee is responsible for monitoring the entire divestiture process (including scrutinizing potential buyers, which must meet certain requirements set forth in the Divestiture Provisions).

Should the Divesting Party fail to sell off the necessary assets or business within the time period set by MOFCOM in its review decision, the Divestiture Provisions then call for the Divesting Party to appoint a "divestiture trustee" to find a suitable buyer and effect the sale on behalf of the Divesting Party. Subject to MOFCOM's approval, the supervising trustee may also act as the divestiture trustee. But both types of trustees are accountable to MOFCOM.

To date, the Divestiture Provisions have not been utilized, so it remains to be seen how they will be implemented in practice.

In the only published merger review decision since the Divestiture Provisions were adopted, MOFCOM agreed to a behavioral remedy short of divestment. MOFCOM's conditional approval of Novartis AG's acquisition of Alcon, a company specializing in eye care products, from Nestlé S.A. was the seventh time the Anti-Monopoly Bureau has blocked or conditioned a merger under review.

In its August 2010 decision, MOFCOM required two behavioral conditions.[2] First, due to Alcon's dominant share in ophthalmologic anti-inflammation and anti-infection products, Novartis was prohibited from selling its competing products in China for five years. MOFCOM found that, within China, Alcon held an approximately 60% market share for these products and Novartis held less than 1%. Second, Novartis was required to terminate its distribution arrangement with China's market leader for contact lens care products, Taiwan's Ginko International. MOFCOM found that Ginko International's share of the Chinese market for contact lens care products exceeded 30% and post-merger, Novartis would have a 20% share; MOFCOM was concerned that the distribution arrangement between Novartis and Ginko International would lead to coordination in prices, quantity and sales regions between them.

Given Novartis's insignificant premerger market share, the five-year restrictions on its anti-inflammation and anti-infection seem to be calculated to buy time for other eye care companies entering the market to build a presence. Whether China anticipates further foreign investment in the market or foresees domestic growth in the sector is unclear.

MOFCOM has shown a willingness to experiment with behavioral remedies.

MOFCOM's willingness to experiment with behavioral remedies had previously been shown in the InBev/Anheuser-Busch merger, where MOFCOM restricted the merged company from increasing its minority interest in two Chinese breweries, and in GM/Delphi, where the parties were required to continue supplying Chinese automakers and were prohibited from sharing information related to those automakers.

Other decisions have utilized divestitures without meaningful behavioral restrictions. MOFCOM required divestitures in back-to-back decisions in the autumn of 2009 (prior to the introduction of the Divestiture Provisions). In Pfizer/Wyeth, MOFCOM required Pfizer to divest a line of swine mycoplasmal pneumonia vaccines within China, and in Panasonic/Sanyo, divestitures were required in three battery product categories.

According to the most recent AML anniversary press conference given by the Director-General of MOFCOM's Anti-Monopoly Bureau, MOFCOM has approved 95% of mergers without conditions.[3] However, Director-General Shang Ming also noted that a higher percentage of cases enter a second phase review in China than in the US or EU.

More to Come

With more and more regulations and systems being put into place, what remains to be seen is how the system will operate in practice. As we approach three years since the AML came into force, few published decisions are available. The small number of merger transactions that have been blocked or made conditional reflects at least some restraint by MOFCOM. However, the small number of published decisions also leaves many questions unanswered. Each future decision will likely be scrutinized as the international legal and business community watch closely to see how China's merger review system evolves.

1 *See* Suat Eng Seah & Kevin B. Goldstein, "China Adopts National Security Review System for Foreign Investment", Weil *Asia Alert*, Feb. 2011, *available at* http://www.weil.com/news/pubdetail.aspx?pub=10190.

2 See MOFCOM Notice no. 53 (2010), *Anti-Monopoly Review Decision Notice on the Conditional Approval of the Acquisition of Alcon, Inc. by Novartis AG* (关于附条件批准诺华股份公司收购爱尔康公司反垄断审查决定的公告) (Aug. 13, 2010), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/201008/20100807080639.html.

3 Transcript of MOFCOM Anti-Monopoly Bureau Special Press Conference (商务部召开反垄断工作情况专题新闻发布会) (Aug. 12, 2010).

Canada: 2010 Competition Law Year in Review

*By Anthony F. Baldanza and Mark D. Magro**

Although it lacked the drama of 2009 (which witnessed major changes to Canada's competition legislation), 2010 was nonetheless another year of significant developments in Canadian competition law.

Mergers

New Merger Policy and Guidance Documents

In October 2010, the Competition Bureau ("Bureau") released several policy documents to update previous guidance pertaining to procedural matters for merger review.[1] Most notably, the documents set out the Bureau's new non-statutory complexity designations and service standard periods (*i.e.* the maximum amount of time in which the Bureau strives to make a substantive decision with respect to a proposed merger). The "non-complex" classification and its service standard period of 14 days remains unchanged. The previous "complex" and "very complex" classifications, with service standard periods of 10 weeks and 5 months, respectively, have been replaced by a single "complex" classification, which has a service standard period of 45 days, or where a supplementary information request ("SIR") is issued, 30 days from the day the SIR is complied with.

Amended *Notifiable Transactions Regulations* Come into Force

Amendments to the *Notifiable Transactions Regulations*[2] came into force on February 2, 2010.[3] The amendments were necessary because of earlier amendments to the pre-merger notification provisions of the *Competition Act*[4] ("Act") in March 2009, which, among other things, replaced the "short form" and "long form" notification information requirements with a single notification form. Notably, one of the requirements in the regulations is that a notification must include studies, surveys, analyses and reports prepared or received by an officer or director of the notifying party for the purposes of assessing the proposed transaction. This requirement is similar to item 4(c) of the Notification and Report Form for the U.S. *Hart Scott Rodino Antitrust Improvements Act of 1976*.[5]

Revisiting Merger Enforcement Guidelines

In September 2010, the Bureau announced that it would hold consultations with the public to obtain input on whether its 2004 *Merger Enforcement Guidelines*[6] ("MEGs") should be revised, having regard to legal and economic developments since the 2004 MEGs and the recent publication of revised *Horizontal Merger Guidelines*[7] by antitrust authorities in the US The Bureau asked for comments by December 31, 2010. A Discussion Paper for the consultations can be found on the Bureau's website.[8] We understand that the Bureau is aiming to publish final new guidelines by the Fall of 2011.

Merger Enforcement

In 2010, the Bureau secured consent agreements in respect of a number of mergers, including, among others, the acquisition of Alcon, Inc. by Novartis AG, and the merger between Ticketmaster Entertainment, Inc. ("Ticketmaster") and Live Nation, Inc. With respect to the Ticketmaster transaction, the Bureau and the U.S. Department of Justice Antitrust Division worked closely together in their respective reviews of the merger, and each secured effectively the same remedy.[9]

Also, in June 2010, after roughly 18 months of investigation, the Bureau and the U.S. Federal Trade Commission ("FTC") completed their examination of the March 2008 acquisition of AH Marks Holding Limited by Nufarm Limited. The investigation was commenced some time after the transaction had closed.[10] Working in cooperation with the FTC, the Bureau concluded that a separate remedy for Canada was not necessary; instead, to resolve competition concerns in Canada, the Bureau relied on commitments made to it by Nufarm and a consent decree Nufarm had entered into with the FTC.

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Pre-Merger Notification Size-of-Transaction Threshold Increased

Pre-merger notification under the Act is required where both size-of-parties and size-of-transaction thresholds are exceeded. The size-of-parties threshold is exceeded where the parties, including their respective affiliates, together have assets in Canada or gross revenues from sales in, from or into Canada that exceed C$400 million. The size-of-transaction threshold varies with the type of transaction involved (e.g., acquisition of assets, acquisition of shares, amalgamation, etc.), but generally includes a monetary threshold in terms of the gross book value of assets in Canada or the value of annual gross revenues from sales in or from Canada generated from those assets. The size-of-transaction threshold for 2011 is C$73 million (up from C$70 million for 2010).

Cartels and Other Criminal Prohibitions

Cases

Cartels continued to be an enforcement priority for the Bureau, and 2010 saw a number of charges laid and convictions through guilty pleas, including in the retail gasoline and air cargo industries.

Policy Developments

The Bureau released several revised bulletins in 2009, including bulletins on *Corporate Compliance Programs*[11] and its *Leniency Program*.[12]

Dual-Track for Agreements Among Competitors Comes into Force

Amendments to the Act in March 2009 that establish a dual-track (criminal/civil) regime for the treatment of agreements between competitors came into force on March 12, 2010. Subject to an ancillary restraints defense (among other defenses), cartel-type agreements that fix prices, allocate markets and/or restrict output are now prosecuted under a criminal *per se* provision,[13] while other agreements between competitors (e.g., legitimate joint ventures or strategic alliances) that are likely to substantially prevent or lessen competition may be civilly reviewed by the Competition Tribunal on an application by the Commissioner of Competition ("Commissioner").

Several decisions have made it easier to assert civil claims in class actions.

Abuse of Dominance and Other Reviewable Practices

In February 2010, the Commissioner initiated proceedings before the Competition Tribunal ("Tribunal") against the Canadian Real Estate Association ("CREA") under the abuse of dominance provision of the Act, alleging that by adopting and enforcing certain rules restricting access to the multiple listing service ("MLS") system and trademarks, CREA had, through its members, lessened or prevented competition substantially in the market for residential real estate services in Canada.[14] The Commissioner took issue with the minimum service requirements imposed on all brokers as a condition of access to the MLS system and trademarks, including the prohibition against offering listing-only services. The proceeding was concluded by a registered consent agreement filed with the Competition Tribunal on October 25, 2010. Under the Consent Agreement, which has a term of 10 years, CREA has agreed not to adopt, maintain or enforce any rules that prevent members from providing or offering to provide listing-only services or that discriminate against members that offer such services. CREA has also agreed not to license MLS trademarks to any real estate board member that adopts or enforces rules that are inconsistent with the requirements of the consent agreement. The case reconfirms the Bureau's willingness to challenge rules restricting access to proprietary networks, whether or not protected by intellectual property rights.

In December 2010, the Commissioner filed an application under the new civil price maintenance provision seeking to strike down Visa and MasterCard rules that impede or limit the ability of merchants to (i) discriminate against or discourage the use of particular credit cards in favor of any other credit card, or any other method of payment; (ii) impose a surcharge on the use of particular credit cards or set prices for customers based on the particular credit card used; and (iii) refuse to accept particular credit cards.[15] The Commissioner alleges that these rules result in higher prices for consumers, as merchants are forced to pass on higher Visa and MasterCard fees than would otherwise prevail. The Commissioner is seeking an order from the Tribunal to prohibit Visa and MasterCard from engaging in behavior that restrains merchants in the manners described above.

Merchant rules imposed by Visa, MasterCard and American Express are also the subject of a civil antitrust suit filed by the U.S. Department of Justice and several US states in a U.S. District Court in October 2010.[16] In that case, the US plaintiffs allege that merchant restraints imposed by the defendants constitute agreements that unreasonably restrain competition in markets for general purpose network card services provided to merchants, contrary to section 1 of the *Sherman Act.*[17] Visa and MasterCard have agreed to settlement terms, but American Express continues to contest the suit. Generally, the proposed settlement enjoins Visa and MasterCard from imposing certain rules that restrict merchants from: offering incentives for, or promoting the use of, other credit cards or forms of payment; expressing a preference for a particular credit card or form of payment; and communicating the costs incurred by the merchant when a particular credit card is used.[18]

Private Actions for Damages and Class Action Certification

In 2010, courts continued to expand the availability of civil remedies to plaintiffs in competition-related litigation. In *Irving Paper Ltd., et al. v. Atofina Chemicals, et al.*,[19] leave to appeal was denied in 2010 in respect of a 2009 decision that certified a class of direct and indirect purchasers of hydrogen peroxide in Canada. The court found that the certification judge is not required to engage in any merits analysis of the evidence including the expert evidence. Rather, the expert evidence must demonstrate a "viable methodology" for proving loss on a class-wide basis. Also, in 2010 the Supreme Court of Canada dismissed an application for leave to appeal in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*.[20] In *Pro-Sys*, the British Columbia Court of Appeal reversed a lower court decision that had refused to certify a class of direct and indirect purchasers of DRAM products. In reasoning similar to *Irving Paper*, the Court of Appeal found that only a minimum evidentiary basis was necessary to establish harm on a class-wide basis and that only a "plausible" methodology needs to be presented by expert opinion evidence at that stage. The *Irving Paper* and *Pro-Sys* decisions have served to substantially lower the threshold for the acceptance by Canadian courts of class action treatment for actions involving competition law violations.

As a postscript, we note that in April 2011, the British Columbia Court of Appeal issued two decisions, *Pro-Sys Consultants Ltd. v. Microsoft Corporation*[21] and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company,*[22] wherein the Court of Appeal overturned lower court decisions that certified indirect purchaser class action claims for damages under the Act, on the basis that indirect purchasers do not have a cause of action in such cases. According to the Court of Appeal, as Canadian jurisprudence does not permit a defendant to rely on a passing-on defense, it follows that defendants should also not be liable for what may have been passed on by direct purchasers. These decisions are also significant because the Court of Appeal determined the invalidity of indirect purchaser claims at the class certification stage, rather than at a trial stage with a full evidentiary record (as some courts have suggested should be done). If these decisions are to be appealed, leave from the Supreme Court of Canada will be required.

1 Such documents include the following: *Fees and Service Standards Policy for Mergers and Merger-Related Matters*, Competition Bureau, *available at* www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03299.html; *Fees and Service Standards Handbook for Mergers and Merger-Related Matters*, Competition Bureau, *available at* www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03295.html; and *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act*, Competition Bureau, *available at* www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03302.html.

2 SOR/87-348.

3 SOR/2010-22.

4 R.S.C. 1985, c. C-34.

5 15 U.S.C. § 18a.

6 Competition Bureau, *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/$file/2004%20MEGs.Final.pdf.

7 Federal Trade Commission, *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf.

8 Competition Bureau, *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03296.html.

9 In both Canada and the US, Ticketmaster was required to sell its subsidiary ticketing business, Paciolan, to either Comcast–Spectacor or another approved buyer, and was required to license its ticketing system for use by Anschutz Entertainment Group ("AEG"), the second largest promoter of live events in Canada and the US. Within five years, AEG can purchase the Ticketmaster ticketing software, create its own software or partner with a ticketing company

other than Ticketmaster. Ticketmaster will also be forbidden from retaliating against any venue owner who chooses to use another company's ticketing services, or another company's promotional services, and will be subject to restrictions on anti-competitive bundling.

10 The transaction was also examined by the U.K. Office of Fair Trading and the Australian Competition & Consumer Commission.

11 Competition Bureau, *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03280.html.

12 Competition Bureau, *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html.

13 Prior to the March 2009 amendments that came into force in March 2010, the conspiracy provision of the Act required that prosecutors establish an "undue" lessening of competition to prove the offense. There was not a companion civil provision dealing specifically with agreements between competitors.

14 *The Commissioner of Competition v. The Canadian Real Estate Association*, CT-2010-002.

15 *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, CT-2010-010.

16 *United States of America, et al. v. American Express Company, et al.*, Civil Action No. 1:10-CV-04496 (E.D.N.Y. filed Oct. 4, 2010), *available at* U.S. Department of Justice, Antitrust Division, http://www.justice.gov/atr/cases/f262800/262864.htm and http://www.justice.gov/atr/cases/f265400/265401.htm (E.D.N.Y. filed Dec. 21, 2010) (Amended Complaint).

17 15 U.S.C. § 1.

18 *United States of America, et al. v. American Express Company, et al.*, "[Proposed] Final Judgment as to Defendants MasterCard International Incorporated and Visa, Inc.," Civil Action No. CV-10-4496 (E.D.N.Y. filed Oct. 4, 2010), *available at* U.S. Department of Justice, Antitrust Division, http://www.justice.gov/atr/cases/f262800/262875.htm, at Part IV, Section A.

19 2010 CarswellOnt 3898.

20 2010 CarswellBC 1361.

21 2011 BCCA 186.

22 2011 BCCA 187.

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