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Recent Activities

FTC ALJ Dismisses Standard Setting Complaint Against Unocal Based On *Noerr-Pennington* Doctrine

Relying largely on the *Noerr-Pennington* doctrine, an administrative law judge ("ALJ") of the FTC dismissed a complaint against the Union Oil Company of California (“Unocal”) brought by the Commission staff. In a 70-page opinion issued November 26, 2003, the ALJ held that alleged misrepresentations by Unocal to a government standard setting body about its patents were immune from antitrust scrutiny, and that similar allegations against Unocal with respect to private industry groups could not be adjudicated by the Commission since they involve substantial questions of patent law not within the Commission's jurisdiction. This decision represents a significant setback to the Commission's efforts to narrow the scope of the *Noerr-Pennington* doctrine, and its efforts to police alleged abuses of the standard setting process.

The background for the Commission's action is as follows: in the late 1980s and early 1990s, a California state agency, the California Air Resources Board ("CARB"), initiated rule making proceedings to determine regulations and standards for the composition of low emission gasoline. Participants in this proceeding included Unocal as well as other major oil refiners. CARB eventually adopted a standard that overlaps substantially with Unocal patents. The complaint alleged that during this rule making process, Unocal failed to disclose the existence of such patents and affirmatively misrepresented that it had no proprietary interest in the standard being promulgated. It allegedly was not until CARB and the other refiners had adopted the standard, and the other refiners had spent millions of dollars to comply with the new CARB regulations, that Unocal obtained and disclosed its patents. When the other refiners filed suit to declare the patents invalid or not infringed, Unocal counterclaimed against the other major refiners for infringement of the patents it allegedly failed to disclose in the standard setting process. The courts found that Unocal's patents were valid and infringed, and ordered the other refiners to pay royalties that collectively could exceed $500 million. The Commission alleged that this course of conduct by Unocal was an unfair method of competition under Section 5 of the FTC Act. Unocal filed a motion to dismiss based on *Noerr-Pennington* and other grounds in March 2003, and this ALJ decision granted that motion to dismiss.

The *Noerr-Pennington* doctrine is derived from two 1960s era Supreme Court decisions which essentially hold that "petitioning" conduct is immune from the antitrust laws for two reasons. First, the antitrust laws do not regulate political, as opposed to commercial, activity. Second, the First Amendment to the Constitution protects the right of parties to petition for redress of grievances, and imposing antitrust liability for such petitioning would conflict with the First Amendment. *Noerr* itself involved a publicity campaign by railroads to obtain the passage of legislation restraining competition from truckers, and *Pennington* was a joint effort by large coal companies and unions to persuade the Secretary of Labor to take steps to eliminate competition from non-union companies. *Noerr-Pennington* immunity was later extended by the Supreme Court to adjudicatory and administrative proceedings in the 1972 California Motor Transport decision. *Noerr-Pennington* immunity applies even though the clear purpose of the petitioning is to suppress or restrain competition.

The ALJ noted that the Supreme Court has a "broad view" of the *Noerr-Pennington* doctrine. While fraud and misrepresentations are protected by *Noerr-Pennington* immunity with respect to petitioning directed at a legislative body, misrepresentations are not condoned in adjudicatory proceedings and thus are not protected by *Noerr-Pennington*. *See Kottle v. Northwest Kidney Ctrs*, 146 F. 3d 1056, 1060 (9th Cir. 1998) ("the political arena has a higher tolerance for outright lies than the judicial arena does.") Here the staff complaint asserted that the CARB rule-making proceedings were adjudicatory, not legislative, and therefore Unocal's conduct was not immunized by the *Noerr-Pennington* doctrine.

The ALJ reviewed the California statutes creating and governing CARB, and concluded that it was a legislative rather than an adjudicatory body. The ALJ decision emphasized that CARB had discretion in formulating gasoline standards, had the authority to make policy, and, while CARB could conduct adjudicative proceedings, the rule making proceedings at issue in this case were not conducted in an adjudicatory fashion. Unlike adjudicatory proceedings where an agency is wholly dependent on the parties for truthful information, here CARB held workshops and hearings, solicited input from industry groups and otherwise conducted an independent investigation before issuing its standards. Thus, it was more analogous to a legislative proceeding where *Noerr-Pennington* immunity applies even though the alleged petitioning includes misrepresentations and deliberate deception.

The ALJ also rejected various other arguments asserted by complaint counsel as to why *Noerr-Pennington* immunity should not apply. The fact that the government agency is unaware that it is being asked to adopt or participate in a restraint of trade does not, according to the ALJ, cause the loss of *Noerr-Pennington* immunity. While the state action doctrine does require such knowledge and a conscious decision by a government agency to displace competition, no such requirement exists for *Noerr-Pennington*.

The fact that *Noerr-Pennington* immunity applies in the legislative context despite misrepresentations shows that, unlike the state action doctrine, the government officials need not know they were participating in a restraint of trade. The ALJ further held that the sham exception applies only when one uses a government process, as opposed to its outcome, as an anticompetitive weapon. Thus, the sham exception does not apply here since it is the CARB regulations themselves, not the process leading to them, that restrain competition by overlapping with the Unocal patents. The ALJ further distinguished the *Walker Process* case which imposes antitrust liability for fraud on the Patent and Trademark Office ("PTO") since PTO proceedings are adjudicative, and thus the misrepresentation exception does apply. *See Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp.*, 382 US 172 (1965). Finally, the ALJ held that *Noerr-Pennington* does apply to proceedings under Section 5 of the FTC Act, noting that in prior cases the FTC itself had urged that the doctrine applies to Section 5 proceedings, and case law holds that it applies to the antitrust laws generally.

The complaint also alleged that Unocal made false statements to private industry groups doing research on auto emissions who reported their findings to CARB. To the extent that such groups were part of Unocal's alleged scheme to induce CARB to act, the ALJ held that this was "indirect petitioning" likewise protected by the *Noerr-Pennington* doctrine. To the extent that such conduct was independent of CARB, the ALJ held these allegations involved substantial issues of patent law, mainly the scope of the patents. Since under 28 U.S.C. 1338(a) jurisdiction over patent law questions lies with the federal courts, the ALJ held that the Commission had no jurisdiction to adjudicate such issues in a Section 5 proceeding.

There is little doubt that the ALJ decision will be appealed to the full Commission, and eventually wind its way through the courts. Thus, we have not heard the last word on these issues. The ALJ decision certainly does adopt a broad view of the *Noerr-Pennington* doctrine but one that is consistent with many court decisions and consistent with the policy bases underlying *Noerr-Pennington*. The ALJ's conclusion that the Commission lacked jurisdiction to adjudicate patent law issues is questionable, at least where such issues arise in the context of the use of patents in an alleged scheme of anticompetitive conduct that may otherwise violate Section 5 of the FTC Act. The ALJ decision, however, may well have a substantial impact on the application of the *Noerr-Pennington* doctrine in standard setting cases, and more generally on the scope of the misrepresentation exception in other types of cases involving the *Noerr-Pennington* immunity.

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Diamonds are Forever, but Antitrust Standing is No Sure Thing: Two Recent Cases Highlight Obstacles Faced by Antitrust Plaintiff

Recent court decisions highlight the fact that would-be antitrust plaintiffs continue to be hampered by the chasm between instinctively believing that market participants are engaged in unlawful anticompetitive conduct, and achieving "antitrust standing" to seek legal redress for such behavior.

Diamonds and their importation into the United States served as the background for *Leider v. Ralfe*, 2003 WL 22339305 (S.D.N.Y. October 10, 2003), which denied "antitrust standing" to a class of diamond and diamond jewelry purchasers who claimed that diamond heavyweight DeBeers had improperly maintained its alleged monopoly on diamond importation in violation, *inter alia*, of the Sherman Act. Plaintiffs asserted that DeBeers refused to sell its diamonds to anyone in the United States other than designated "sightholders", who allegedly entered into restrictive agreements with DeBeers and that DeBeers was thereby able to unilaterally determine the size, quality, quantity, and price of the diamonds acquired by sightholders, and the price, supply and quantity of the diamonds they sold.

The court acknowledged that the alleged monopoly had been "rumored or known about for decades," but held that the plaintiffs lacked standing to seek damages for alleged overcharges by DeBeers because of the "indirect-purchaser rule" derived from the Supreme Court decision in *Illinois Brick Co. v. Illinois* (1977), which held that consumers lack antitrust standing to sue to recover on overcharges passed on to the consumers through intermediaries. The court reasoned that the policy behind *Illinois Brick* applied because of (1) the difficulty of calculating the cost of the increase in the price of diamonds and diamond jewelry and apportioning this increase between DeBeers and the intermediary sightholders, and (2) the risk of double liability to DeBeers if the sightholders also sued DeBeers for the alleged overcharges. The court further concluded that two possible exceptions to *Illinois Brick* did not apply. First, the exception for where the intermediary is alleged to be a co-conspirator could not apply because plaintiffs did not name the sightholders as defendants. Second, the plaintiffs did not establish the "ownership or control" exception, because there was no showing that DeBeers and the sightholders were functionally the same economic entity.

The court also denied standing to the members of the class who did not purchase diamonds or diamond jewelry from DeBeers (through the sightholders) but claimed they were injured by paying higher prices to competitors because of DeBeers' alleged refusal to deal. The court reasoned that the plaintiffs failed to make an adequate showing that they had, in fact, paid more for diamonds because of DeBeers' alleged conduct. Plaintiffs had relied on an affidavit from a finance professor, which contended that the diamond market was anticompetitive because from 1982 to 1999 the price of diamonds had risen while the price for sapphires, rubies and emeralds had fallen. The court rejected this theory as too speculative, refusing to accept the central hypothesis that prices of precious gems move in line with each other.

In another case decided by the 9th Circuit Court of Appeals on October 20, 2003, *Aviation Upgrade Technologies, Inc. v. Boeing Co.*, 2003 WL 22389466, the court held that a new firm attempting to enter the market of re-engining of commercial aircraft lacked standing to bring antitrust action against Boeing Co., Rolls-Royce and CFM International for allegedly conspiring to prevent the new entrant into the market. The court pointed to the fact that the plaintiff had a single employee (its promoter) who had no prior experience in the aviation industry, much less the re-engining business segment of that industry. The plaintiff had never (1) leased a facility, (2) purchased re-engining or any other mechanical equipment, (3) obtained insurance, (4) hired additional employees, (5) bought, sold or leased aircraft, (6) modified an aircraft, (7) applied for FAA certification, or (8) undertaken any test flights. Although the plaintiff had investigated the possibility of doing such things, it had done none of them and had no firm financing commitments - oral or written. The court had "no doubt that [the principal] was sincere," but concluded that the would-be market entrant "was little more than hope and hype," and therefore "did not suffer antitrust injury."

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DOJ/FTC To Jointly Review Horizontal Merger Cases

On November 18, the DOJ and FTC announced that the two agencies are jointly reviewing and analyzing data from the past five years regarding each agency's respective horizontal merger enforcement cases to assess the use of the Herfindahl-Hirschman Index ("HHI") calculations, which measure market concentration, and to evaluate the concentration levels that have prompted the government to challenge a deal. HHI calculations are a quick shortcut used by antitrust practitioners to determine if deals would warrant further investigation at the antitrust agencies. HHIs are calculated by squaring the market share for each participant in a relevant market and adding the scores together. The Horizontal Merger Guidelines, which are used by both antitrust agencies, carve out a safe harbor for mergers where the resulting HHI score is below 1,800 or inreased by less than 100 points. Accordingly, most antitrust practitioners will quickly compute HHIs when advising clients about the potential antitrust risks of a deal.

However, most antitrust practitioners realize that mergers either pose or do not pose a competitive problem based on the particular facts regardless of the results of an HHI computation. Nevertheless, the computation of HHIs is routine and standard because the HHI thresholds are outlined in the Guidelines. Therefore, the goal of the review is to offer businesses, antitrust practitioners, economists, international antitrust enforcement authorities, and other interested parties insight about the agencies' past merger enforcement efforts. The thought is that by focusing on past merger enforcement activity, a better understanding will emerge at the use of HHI calculations in U.S. merger reviews. By focusing on past experience, the agencies expect to make future merger enforcement decisions more transparent.

The joint initiative was undertaken for both the antitrust agencies' internal use as well as for the public at large. The data should be released in December 2003 and should provide useful information. It will focus on the level of the post-merger calculations measuring market concentration and the changes in the HHI levels for mergers that the DOJ or the FTC publicly opposed. Neither the Antitrust Division nor the FTC has ever examined how its actual merger enforcement compares with the HHI thresholds outlined in the Guidelines.

While most antitrust practitioners understand that the antitrust agencies base their enforcement decisions on a case-by-case analysis of competitive effects and do not necessarily challenge mergers just because the merging firms have large shares of a concentrated market, the joint study of about 200 merger reviews can still provide useful information that should lead to more clarity and possibly some change in the use of HHI calculations in U.S. merger reviews. For example, the study might lead to further discussions on whether the HHI thresholds should be increased or ignored in favor of other types of evidence of anticompetitive harm.

The antitrust agencies expect that they will hold public workshops sometime in February or March 2004. The panelists at the workshops will include antitrust practitioners, economists, and academics.

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Again, With Feeling: The EC Weighs In With Monopolization Claims Against Microsoft

On November 17, the European Commission ("EC") concluded its closed-door hearings on whether Microsoft's bundling of its Windows Media Player ("WMP") into the Windows operating system constituted anticompetitive abuse of the company's monopoly position. According to the EC, Microsoft embedded WMP into its omnipresent operating system in order to corner the market for media software.

Similar to other media players, WMP allows a user to play music and movie files on his or her PC. Microsoft's product automatically comes bundled with current versions of the Windows operating system, including Windows XP. More importantly, unless a user otherwise downloads and specifies another competing media software as such, Microsoft's Windows Media Player is automatically selected as the default media player. In order words, if a user inserts an audio CD into his PC, the PC will automatically launch WMP unless a user has downloaded Real Networks' RealPlayer or other competing media software programs, and has identified that option as its preferred method for playing CDs, music, movies, and other media files.

Rival Real Networks testified at the closed-door hearings that this particular practice has impeded its ability to compete. In practical terms, Real Networks must deal with a "catch-22" type of situation: companies that provide media files for download will most likely choose to encode the file in the Windows Media file format, because they know that everyone who uses a Windows operating system - and therefore WMP - can play the file. However, these providers of media files may exercise this preference to the detriment of other competitors, such as Real Networks, by not encoding media files in file formats that are compatible with competitors' media software.

In addition, the EC's hearings also dealt with Microsoft's alleged abuse of its Windows operating system market position to unfairly disadvantage competitors of Microsoft's server applications business. Server application competitor Sun Microsystems ("Sun") alleged that Windows has been engineered to work ineffectively with rival server applications, which would have the effect of forcing companies to use Microsoft server software if they want problem-free interaction between the Windows operating system and server applications. Sun publicly stated its support for the EC's efforts to force Microsoft to disclose enough information about Windows to allow server application rivals to develop software that works well with Windows.

These claims are similar to the claims alleged by the DOJ in its infamous suit against Microsoft for tying its Internet Explorer web browser to the Windows operating system. In particular, claims of Microsoft's automatic "packaging" of WMP with the Windows operating system appear to have the same potential effects as the bundling of Internet Explorer, only on different software markets. However, the claim relating to the lack of interoperability between rival server applications and the Windows operating system deals with compelling, fact-specific questions as to how Microsoft may have engineered its Windows software to the detriment of rivals in other related lines of business.

According to reports, the EC is likely to begin preparing a formal action against the company at the beginning of 2004, however, Microsoft is likely to try and settle the matter. The EC has stated that the company's settlement with the DOJ failed to address the specific concerns at issue in this matter. Regardless of whether the matter is settled, software providers should keep tabs on these developments in order to determine whether antitrust regulators allow Microsoft to continue using its operating system as leverage.

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Airlines Defeat Price Fixing Claim

Evidence of an agreement or conspiracy is pivotal for a Sherman Act price fixing claim. In cases where there has been direct communication about prices among the alleged price fixers followed by uniform price changes, the conspiracy element of a Section 1 claim is readily inferred. Where, however, there are no direct communications relating to prices but competitors have the same prices and move parallel with one another, inferring a conspiracy is more complex and varies depending on the specific facts and nature of the industry. It has long been the rule that conscious parallelism alone is insufficient to show an agreement to fix prices, and that certain "plus" factors must be present to infer a conspiracy. The latest court to grapple with this issue is *Hall v. United Airlines*, 2003 WL 22534443 (EDNC 2003). In *Hall*, the plaintiff alleged a conspiracy among airlines to reduce base commissions paid to travel agents for booking flights. Plaintiff alleged a seven year conspiracy beginning in 1995, when airlines imposed caps of $25 per booking on domestic one-way fares and a $50 cap for round trip fares. In the following years, there were further reductions, culminating in the elimination of base commissions entirely by several major airlines in 2002. The defendants argued that all their actions were independent and unilateral, while plaintiffs alleged that they were the result of an agreement or conspiracy. The court had earlier denied a motion to dismiss the price fixing claims, and this ruling was on defendant's motion for summary judgment.

The court noted that as early as 1981-1982, some airlines had announced cuts in base commissions for travel agents, but withdrew them when the cuts were not matched by other airlines. It further stated, however, that in more recent years, many airline tickets are distributed outside the travel agent chain, including through websites such as Priceline.com, and that automation advances such as electronic ticketing had reduced costs of distribution for airlines and travel agents.

The court began by stating that the application of Rule 56 to antitrust cases was "unique" in that the antitrust law limits the range of inferences that could be drawn from ambiguous evidence. Conduct that is as consistent with permissible competition as with an illegal conspiracy does not, standing alone, support an inference of an antitrust conspiracy. Relying on *Matsushita Electric Industrial Co. v.*

Zenith Radio Corp., 475 U.S. 574 (1986), the court held that the antitrust plaintiff in a conspiracy case must discharge a two-fold evidentiary burden. First, it must establish that each defendant had a conscious commitment to a common scheme designed to achieve an unlawful objective. Second, the plaintiffs must produce evidence that "excludes the possibility" that the alleged conspirators acted independently or based on legitimate business purposes.

The court initially reviewed the evidence as it pertained to the individual summary judgment motions of several airlines, concluding in each case that plaintiff's evidence was insufficient under the *Matsushita* standard. In doing so, the court held that the fact that some executives of particular airlines were former executives of other airlines, that some airlines were members of trade associations, and that airlines had "matched" base commission cuts of other airlines, were likewise not sufficient under the *Matsushita* standard. The court emphasized that mere membership in a trade association is neither condemned nor discouraged under the antitrust laws, and it is "perfectly legitimate" for an airline to consider publicly available information about what a competitor is paying travel agents in setting one's own commissions for travel agents. As to two airlines, KLM and Northwest, the Court found that approval of their joint operating agreement by the Department of Transportation (“DOT”) included the joint setting of commissions, and thus they had antitrust immunity under the DOT order.

In dealing with the Joint Motion for Summary Judgment by defendants, the court stated that, while there was evidence that some airlines assumed the base commission cut was not sustainable without competitor matching, the defendants had offered "overwhelming evidence" that the cuts were just as likely the result of competitive conduct and natural changes in the markets as an illegal conspiracy. The “most compelling” of such evidence, said the court, is the economic state of the airline business, with several airlines going into bankruptcy and others out of business entirely. The court also noted that one defendant, Delta Airlines, had required its employees dealing with the base commissions to sign nondisclosure agreements, a fact it found to be inconsistent with any conspiracy.

Price signaling through trade press articles was also found insufficient to show a conspiracy since in competitive markets competitors will monitor price communications of others and dissemination itself is not an antitrust violation. Picking up on its earlier theme from some of the individual motions, the court reiterated that membership in trade associations, absent any showing of base commissions being discussed in such meetings, does not “exclude the possibility that defendants acted unilaterally”. Finally, it emphasized that the exchange of base commission prices by defendants' publication of base commissions on computer reservations systems is as consistent with competition as conspiracy, and the dissemination of such information may actually render markets more, not less, competitive.

The declining economic condition of airlines generally as well as the technological changes in airline ticketing, such as electronic ticketing and obtaining tickets through Internet websites, played a significant role in the court's decision. Nonetheless, the *Hall* decision again demonstrates the high hurdle posed by *Matsushita* to conspiracy claims and its requirement that plaintiff produce evidence that "excludes the possibility of independent action".

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White Collar Crime Continues as a Priority for the Antitrust Division

The Antitrust Division continues to send a strong message to all persons engaged in price-fixing and market allocation schemes. Recent investigations have resulted in new criminal indictments. These indictments demonstrate the Antitrust Division's resolve to prosecute individuals and corporations that harm American consumers by choosing to collude rather than to compete.

College Bookstore Managers Indicted for Price Fixing

Two former managers of competing college bookstores serving the Indiana University Purdue University Indianapolis ("IUPUI") joint campus were criminally indicted on November 13 for participating in a price-fixing conspiracy involving the sale of college textbooks.

Harold E. Vogel, the former manager of IUPUI's textbook stores, and Dennis L. Saner, the former manager of a competing off-campus bookstore, allegedly conspired to eliminate competition in the markets for medical and other textbooks sold on or near the IUPUI campus from approximately April 2001 through November 2002. According to the charge, Mr. Vogel and Mr. Saner organized and participated in a meeting to discuss competition between their bookstores on or near the IUPUI campus. At that meeting, they allegedly agreed to eliminate discounts on medical textbooks and to increase their profit margins for new textbooks from 25 percent to 27 percent. Both bookstore managers were charged with illegal price fixing.

The ongoing investigation of the retail textbook industry is being conducted by the Antitrust Division's Chicago Field Office.

Military Moving and Storage Industry

On November 13, Gosselin World Wide Moving, N.V., a moving and storage company, and Mr. Smet, its managing director, were indicted for allegedly participating in a conspiracy to rig bids and to defraud the United States government in connection with a scheme to raise rates charged to the Department of Defense ("DOD") to move household goods belonging to military and civilian DOD personnel from Germany to the United States.

A criminal complaint, which was filed under seal in U.S. District Court in Alexandria, Virginia, on October 8, was made public at Mr. Smet's initial appearance before a U.S. Magistrate Judge in Honolulu on October 15. The charges in the two-count indictment complaint were the first to arise from an ongoing federal antitrust investigation of bid rigging, fraud, bribery, and tax-related offenses by companies participating in the military moving and storage industry.

Allegedly, Gosselin and Mr. Smet conspired with others to eliminate competition, fix prices, and rig bids for the transportation of military household goods from Germany to the United States during a six-month period in 2002. Moreover, Gosselin and Mr. Smet are charged with eliminating competition, fixing prices, and rigging bids in violation of the Sherman Act. The ongoing investigation is being conducted by the Antitrust Division's National Criminal Enforcement Section.

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Recent Activities

DOJ ANTITRUST HIGHLIGHTS

- The Antitrust Division is continuing with its preparation for trial in opposition to First Data Corporation's acquisition of Concord EFS. The trial is scheduled to commence on December 15. The Antitrust Division argues that combining two of the three largest U.S. networks for online debit cards that use personal identification numbers would lead to higher fees to merchants. The latest dispute with regards to preparation of trial is focused on efficiencies. The Antitrust Division lawyers have urged U.S. District Judge Rosemary Collyer to prohibit the parties from using an efficiency defense because the parties have been less than forthcoming with respect to providing underlying cost savings data or information to the government. Judge Collyer has indicated to First Data and Concord that they must respond to the Division's request for the underlying cost savings information and that if she finds that the parties have been less than fair, the Division's motion to prohibit First Data and Concord from using an efficiency defense will be granted.

- The Antitrust Division is still reviewing Oracle's hostile offer for PeopleSoft. Oracle has indicated that it still has not fully complied with its second request for additional information, however, Oracle has noted that it is attempting to do so quickly and hopes to gain approval in the first quarter of 2004. The Antitrust Division is reportedly investigating the impact of the transaction on the markets for business applications software used by large companies to coordinate a company's critical business functions such as financial planning and reporting, human resources, relationships with customers and supply chain management. These applications are particularly critical to large Fortune 500 companies. Oracle and PeopleSoft are two of the three largest sellers of business applications software and they compete with SAP of Germany, the largest player in the business application software market. PeopleSoft is opposed to the takeover attempt and has reportedly helped the Antitrust Division conduct its investigation. If the deal is approved, the number of players would allegedly be reduced from three to two -- Oracle and SAP -- in certain applications software markets. The Antitrust Division is closely cooperating with the EC in the review of this merger.

- On October 30, Assistant Attorney General R. Hewitt Pate briefed the Senate Judiciary Committee on antitrust enforcement in the agricultural marketplace. Mr. Pate stated that the Antitrust Division is serious about antitrust enforcement in the agricultural sector. Indeed, he noted that the Antitrust Division has undertaken a special outreach effort in agriculture, meeting with producers and producer groups in Washington, D.C. and other parts of the United States. Mr. Pate indicated that the Division has monitored the concentration that has taken place in certain agricultural markets. For instance, Mr. Pate reported that the Antitrust Division is well aware that the steer-heifer side of the cattle slaughter market is highly concentrated with four meatpacking firms now in control of over 80 percent of the market, and

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DOJ Antitrust Highlights *(Continued)*

that hog slaughter, and the processing of crops such as corn, wheat, and soybeans businesses are all moderately concentrated markets. Mr. Pate concluded that the Division is committed to halting anticompetitive mergers or conduct that harms the U.S. agricultural markets.

For more information on any of these activities, please contact Andre Barlow at (202) 218-0026 or abarlow@sheppardmullin.com.

FTC ANTITRUST HIGHLIGHTS

- In an initial decision filed on November 25 and released on November 26, FTC Administrative Law Judge D. Michael Chappell dismissed a complaint brought in early 2003 that charged Union Oil Company of California ("Unocal") with committing fraud in connection with regulatory proceedings before the California Air Resources Board regarding the development of reformulated gasoline. The ALJ stated, among other things, that Unocal's conduct constituted "petitioning" of a governmental authority and was therefore entitled to antitrust immunity under the *Noerr-Pennington* doctrine. Administrative Law Judge Chappell also ruled that there were no set of facts that FTC counsel could introduce that would establish that the Commission has jurisdiction to resolve the substantial patent issues alleged in the complaint. *See* p. 1 of this *Sheppard Mullin Antitrust Review* for a more complete discussion of the decision.

- On November 25, a Houston based physicians' group entered into a proposed consent order with the FTC and agreed to remedy the group's allegedly anticompetitive price fixing practices that resulted in higher prices for the group's services in the Houston area. About 3,000 Houston physicians are members of the Memorial Hermann Health Network Providers ("MHHNP"), which is a non-profit corporation designed to advance the economic interest of MHHNP members. MHHNP negotiates non-risk contracts with payors for its physicians and seeks to obtain higher fees and other more advantageous terms than members could have obtained negotiating unilaterally. MHHNP has refused to accept payor offers that do not conform to MHHNP fee standards and will not deal with payors except on collectively agreed upon terms.

  According to the proposed consent order, MHHNP must cease and desist from:

  - entering into any agreement between physicians to negotiate with a payor on behalf of any physician, to deal or refuse to deal with any payor based on price or other competitively significant terms, or not to deal individualy with any payor;

  - exchanging information among physicians about any physician's willingness to deal with a payor or the terms on which he or she is willing to deal with a payor; and

  - pressuring any person to engage in such action.

Recent Activities

FTC Antitrust Highlights *(Continued)*

- On November 18, R. Hewitt Pate, Assistant Attorney General of DOJ's Antitrust Division, unveiled a DOJ/FTC joint initiative concerning the review of data from each agency's respective horizontal merger enforcement cases. The data, which is expected to be made public in December 2003, will analyze each agency's merger enforcement cases over the past five years. The goal of the joint project is to make merger decisions more transparent to the business and legal communities and to offer insight about the agencies' merger enforcement efforts. The agencies plan to release their initial findings in December 2003. Additional public workshops, including panelists of antitrust practitioners, economists and academics, are planned during 2004. An initial focus of the joint initiative will be to examine how the agencies' actual merger enforcement compares to the HHI standards in the Horizontal Merger Guidelines. *See* p. 5 of this *Sheppard Mullin Antitrust Review* for a more complete discussion of the proposed project.

- On November 14, the FTC issued its staff report to Congress providing new information from the staff's case studies about slotting allowances paid to certain retailers in certain geographic areas for five product categories; fresh bread, hot dogs, ice cream and frozen novelties, shelf-stable pasta, and shelf-stable salad dressing. The FTC compiled the study based on the September 2000 requests by Sens. Christopher S. Bond (R-Mo.) who then chaired the Small Business and Entrepreneuring Committee, and John F. Kerry (D-Mass.) who still serves as the ranking minority member of the Committee. Slotting allowances, the FTC explained in its report entitled "Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories," constitute one-time payments made by a supplier to a retailer as a condition for the initial placement of the supplier's product on the retailer's store shelves or for initial access to the retailer's warehouse space. Key findings from the selected case studies include:

  - that there is considerable variability across product categories, both in the likelihood of paying fees and in the magnitude of fees paid;

  - that slotting fees can make up a large fraction of the revenues earned by some products in their first year;

  - that most surveyed retailers reported that slotting allowances help defray costs associated with new product introductions; and

  - that slotting allowances were less frequent and in lower amounts for products that did not go through retailers' warehouses because suppliers delivered them directly to the retailers' stores.

- On November 12, following the requisite public comment period, the Commission approved a final consent order in the matter concerning Nestle Holdings, Inc.'s acquisition of Dreyer's Grand Ice Cream.

- On November 6, a group of House Democrats urged the FTC to "thoroughly investigate" the potential impact of the proposed merger of Anthem Inc. and WellPoint Health Networks on the health insurance market. The merger was

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FTC Antitrust Highlights (*Continued*)

announced on October 27 and is expected to form the largest health insurer in the United States. The letter was released by the office of the Rep. Fortney Stark (D-Cal.); other signers of the letter were Reps. Charles Rangel (D-N.Y.), Jim McDermott (D-Wash.) and Max Sandlin (D-Tex.). The letter addressed several issues including the trend toward consolidation of the health insurance industry that began in the late 1990's. The letter also cited recent data from the American Medical Association that over half of all commercially insured Americans are covered by the 10 largest insurers. The Democrats expressed concern that the combined Anthem/WellPoint entity would make it even more difficult for individuals to have access to affordable health insurance.

- On November 4, the staff of the FTC advised Medical Group Management Association ("MGMA") that it did not intend to recommend that the Commission challenge MCMA's plan to conduct and publish the results of a Colorado physician survey relating to various aspects of physicians' relationships with health insurers. MGMA is a professional association that represents approximately 19,000 medical practice administrators, who manage physicians' practices containing 220,000 doctors throughout the United States. MGMA plans to conduct a survey of insurers' payments to medical groups and of medical groups' satisfaction with certain aspects of their relationships with insurers, including adequacy of speciality networks insurers' rate of denial of claims, distribution of payments by insurers, and length of time it takes insurers to pay for services provided. The survey will be limited to family practitioners in Colorado. At the conclusion of the survey, MGMA will publish only aggregated information relating to prices paid by all insurers surveyed. Though the FTC staff acknowledged in the advisory letter that the survey of insurer payments is similar to the exchange of physician price information, certain safeguards imposed by MGMA provided significant protection against the use of the information to restrict competition. In particular, MGMA's plan to collect and disseminate aggregated data is not likely to promote anticompetitive conduct.

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FTC CONSUMER PROTECTION HIGHLIGHTS

- The FTC has provided guidance on the agency's website for giving to charitable causes in order to prevent consumers from being defrauded by fake organizations or having their confidential financial information end up in the wrong hands during the holiday season. Among other things, the agency cautions people to ask for the name of the charity if the telemarketer does not provide it promptly, avoid cash gifts (which may be lost or stolen), discuss the donation with a trusted family member, and refrain from providing any credit card or bank account information without thoroughly reviewing information provided by the charities. Additional information can be found at http://www.ftc.gov/charityfraud.

- On November 25, 2003, the FTC's Bureau of Consumer Protection announced a settlement with marketers of fake international driver's permits, college and university diplomas, transcripts, and related materials that would prohibit Mountain View Systems, Ltd., Wheelie International, S.C. Hyacinth S.R.L., and related individual defendants from

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FTC CONSUMER PROTECTION HIGHLIGHTS

promoting or selling such false identification documents, even as novelty items. The settlement also requires the disgorgement of $57,000, which could be expanded to $5 million if it is discovered that the defendants misrepresented their financial condition.

- The FTC filed a lawsuit announced on November 19 against prominent credit counseling agency, Ameridebt, for engaging in deceptive practices relating to the provision of credit card counseling services. Among other things, the agency charged that Ameridebt misrepresented that it was operating as a non-profit organization, when in reality it functioned to make money for affiliated for-profit companies and individuals. The FTC also charged that Ameridebt and affiliated defendants misrepresented not charging an upfront fee, when in fact, they urged enrollees to make "initial payments" that they kept instead of transferring to the creditors. The FTC also alleges violations of the Gramm-Leach-Bliley Act relating to the organizations failure to provide key privacy notices. The complaint, filed in the District Court of Maryland, requests a permanent injunction, consumer redress, and other behavioral relief.

- On November 17, 2003, the FTC announced that it had granted Rolls-Royce and Paccar, Inc. an exemption from the Franchise Rule. In brief, the rule requires a franchisor to provide a basic disclosure statement containing detailed information about the nature of its business and the proposed franchise relationship. The FTC found that franchisees of both Rolls-Royce and Paccar (who manufactures heavy- and medium-duty trucks and accessories under the names "Kenworth" and "Peterbilt") were generally highly sophisticated and experienced businesspeople that usually took adequate time to analyze the investments made into the respective franchises. Consequently, the usual dangers due to lack of information in the franchise relationship did not exist. The Commission voted unanimously to approve the exemptions.

- Fairbanks Capital settled claims by the FTC that it engaged in illegal subprime lending practices as well as violations of other laws, such as the Fair Credit Reporting Act and the Real Estate Settlement Procedures Act. Fairbanks is required to pay $40 million to be used for consumer redress, and its founder and former CEO Thomas D. Basmajian is required to pay $400,000 in redress. The settlement also requires the defendants to stop forcing unnecessary insurance on consumers (who are already covered under another policy), to acknowledge, investigate, and resolve consumer disputes in a timely manner, and to provide billing information promptly.

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INTERNATIONAL ANTITRUST HIGHLIGHTS

- The EC unveiled a proposal on November 18 that was aimed at easing cross-border mergers for small and medium-size companies. Under the legislation sought by the European Union's ("EU") executive arm, cross-border mergers in its member states would be governed by rules applicable to domestic mergers. The measure would apply to companies that wish to do business in more than one EU member state without creating a so-called European Company, as allowed under the European Company Statute. As it stands now, companies merging in certain countries are forced to form a new corporate structure, a process that is time-consuming and expensive. The reform, which covers all companies with share capital, requires the approval of a qualified majority of EU member states and the European Parliament.

- Documents released on November 14 revealed that Italy's antitrust authority opened a preliminary investigation into the Italian banking sector to examine the way fees are charged in relation to debit cards and credit cards issued by Italian banks. Officials with the Autorità Garante della Concorrenza e del Mercato stated that they are working with investigators from the Bank of Italy to determine whether the Italian Banking Association (Associazione Bancaria Italiana ("ABI")) abused its dominant position to develop a uniform fee structure that results in higher fees. The probe was undertaken because some documents indicate that the ABI may have taken advantage of its dual role as the banking sector's leading trade association and the entity that develops the fee structure used by banks for contracts with private clients. The preliminary probe was opened after a series of consumer complaints about debit card and credit card fees that are higher in Italy than in most other Member States of the EU. Since the credit card sector is one that competition officials have not examined in the past, the preliminary investigation is being used to gather facts and determine whether the authority should conduct a full-fledged investigation. The deadline for such a decision would be February 1, 2004.

- On November 10, Canada's Minister of Industry, Allan Rock, appointed Sheridan Scott as Commissioner of Competition. Ms. Scott was most recently the chief regulatory officer with Bell Canada and has previously served as staff attorney with the Canadian Radio-television and Telecommunications Commission and vice president of planning and regulatory affairs with the Canadian Broadcasting Corp. She replaces Gaston Jorre, who had held the position in an acting capacity since former Commissioner Konrad von Finckenstein resigned to accept an appointment as a judge of the Federal Court of Canada.

- According to a statement of objections sent November 5 by the EC, the Belgian Architects' Association's ("BAA") recommended minimum fee scale could constitute an infringement of EU competition rules. The association, Ordre des architectes Orde van architecten, was notified in the EC's statement of objections that its recommended minimum fee scale may violate Article 81 of the EC Treaty because it likely provides a price floor that prevents efficient service providers from competing on price if their efficiency enables them to produce the service at a lower cost. This may offend Article 81 because such price floors tend to protect less efficient competitors and reduces the incentive to improve quality and price of professional services. The recommended fee scale used by the BAA lays down the architects' fees as a percentage of the value of the works realized by the entrepreneur. Such fees, the EC contended, should reflect the

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International Antitrust Highlights *(Continued)*

architect's skills, efficiency, and costs, in addition to the fame or notoriety of the architect and should not depend solely on the value of the work or the price of the entrepreneur. In any event, the EC stated that an architect's fees should be determined independently of competitors and in agreement with the client only.

- The proposed acquisition of Swiss Life plc's employee benefits business by Unum Ltd might result in a substantial lessening of competition in the supply of group income protection, group life, and group critical illness insurance products and services, according to an October 31 Office of Fair Trading ("OFT") announcement. In particular, the OFT is concerned that barriers to expansion for smaller companies may exist after the proposed acquisition. As a result, the OFT referred the merger to the UK Competition Commission ("CC"). The CC is expected to report on the transaction by April 16, 2004. The Enterprise Act 2002 empowers the OFT to refer actual or proposed mergers for investigation to the CC. Then, the CC is charged with the responsibility of reporting what transactions create or enhance a 25 percent share of supply in the UK, or a substantial part thereof, or which involve the acquisition of turnover in the UK of over £70 million.

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FCC ANTITRUST HIGHLIGHTS

- On Tuesday, December 2, FCC staff recommended approval of NewsCorp.'s $6.6 billion acquisition of DirecTV Inc. This recommendation was sent to the Commissioners for review, strongly indicating that the agency will complete its review of the transaction by year's end. News Corp. and DirecTV's parent company - Hughes Electronics Corp. - is eager to finalize the deal before the end of 2003 because the stock-and-cash transaction would boost the sagging pension fund of General Motors Corp., Hughes's parent company, which would like to record the cash on this year's balance sheet. FCC sources said the staff report recommends requiring News Corp. to enter into arbitration with a cable provider if it fails to resolve a dispute over the distribution or pricing of its programming. Agency staffers worry that the Sydney-based media giant could withhold vital programming from cable companies in order to drive consumers to DirecTV, which offers competing paid programming via satellite. In addition to FCC scrutiny, the merger is being examined by the Justice Department, which is considering possible antitrust implications. U.S. national security officials have given a conditional green light for the proposed merger. The merger would give Rupert Murdoch's News Corp. a controlling 34 percent interest in DirecTV, the nation's No. 1 satellite company with more than 12 million subscribers.

- House Judiciary Committee members on November 19 questioned witnesses on the apparent weakening of the 1996 Telecommunications Act's savings clause and examined whether antitrust policy, as currently advocated by the

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FCC ANTITRUST HIGHLIGHTS

government, continues its preemptive role as prescribed in the 1996 Act. In light of recent case law, the Committee held a hearing entitled, "Saving the Savings Clause: Congressional Intent, the Trinko Case, and the Role of the Antitrust Laws in Promoting Competition in the Telecom Sector." Judiciary Committee Chairman F. James Sensenbrenner explained that the Committee decided to hold the hearing to "ensure that the antitrust laws continue their preemptive role" in the telecom sector, as enunciated in the 1996 Act. The savings clause of the Act, he noted, is "very clear: antitrust laws trump" the Telecom Act. Section 271 of the Act was created to promote competition and "reaffirms the centrality of the antitrust role in the telecommu-nications sector." Congress "emphatically did not create a safe harbor" for anticompetitive conduct in the Act, Chairman Sensenbrenner stated. Assistant Attorney General R. Hewitt Pate, Chief of the Justice Department's Antitrust Division, however, argued that the Telecommunications Act imposes requirements outside the realm of antitrust and that, therefore, it "is important to preserve the distinction between a violation of the Telecommunications Act and a violation of the Sherman Act."

- On November 6, California Attorney General Bill Lockyer (D) filed the first enforcement action in the country against a company that allegedly violated the new national Do-Not-Call registry by calling dozens of people whose names were on the list (*California v. American Home Craft Inc.*, N.D. Cal., No. C-03948, filed 11/6/03). He is seeking at least $100,000 in damages from American Home Craft Inc., a home improvement company based in Hayward, Calif., for violating the Telephone Consumer Protection Act. The complaint also alleges the company violated California Business and Professions Code Section 17200, which deals with unfair competition. Once California's own Do-Not-Call law takes effect January 1, 2004, the state can file suit under that law seeking penalties up to $11,000 per violation, Lockyer said.

- House opponents of a new rule by the FCC that would ease media ownership curbs sent a letter to House Speaker J. Dennis Hastert (R-Ill.) on November 5 signed by 205 members requesting a vote on a resolution that would completely overturn the new rule. The number falls just short of the 218 members that would be needed to sign a discharge petition and force a vote on the issue. The resolution would completely overturn the FCC's new rule that governs how many and what type of media outlets any one entity may own. The rule is broad, covering national and local television ownership, radio ownership, and newspaper/broadcast station cross-ownership. In their letter to the speaker, opponents of the rule said, "The resolution would nullify the highly contentious FCC rules that would allow increased concentration of media owner-ship in broadcasting and permit cross-ownership of newspapers and TV stations in most communities." In contrast, the owners of CBS, NBC and Fox asked a federal court to throw out the new broadcast-ownership rules, claiming restrictions on speech that violate the First Amendment and run contrary to deregulatory provisions of a 1996 law passed by Congress. Specifically, they took aim at a rule that limits the reach of their signals to 45 percent of all U.S. households and called for greater ownership deregulation in a joint brief filed with the U.S. Third Circuit Court of Appeals in Philadelphia. The Third Circuit has scheduled oral arguments for February 11, with a decision expected later in the year. On September 3, the court stayed the new rules.

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FCC Antitrust Highlights *(Continued)*

- In addition to the Do-Not-Call list, the FTC's telemarketing sales rule addresses marketing abuses using pre-acquired account information, abandoned calls, and caller identification, FTC staff attorney Catherine Harrington-McBride told privacy professionals October 30. At a meeting of the International Association of Privacy Professionals, Ms. Harrington-McBride said the FTC was targeting "free trial offers" in the telemarketing sales rule. Free trial offers, where a marketer has pre-acquired account information and the consumer agrees to be charged at some point in the future, were subject to a large number of consumer complaints, Ms. Harrington-McBride said. The telemarketing sales rule creates a whole new scheme for obtaining express informed consent for free trial offers. Ms. Harrington-McBride said the rule requires express informed consent and authorization to the charges as well as that the entire call be recorded. On that recording, Ms. Harrington-McBride said, the customer must authorize the charge by providing at least the last four digits of the account number to be charged.

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