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# Antitrust Review

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**We are proud to annouce that Robert W. Doyle, Jr. has been nominated to the DC Bar's Antitrust and Consumer Law Steering Committee. Voting ends on June 4th.**

***In This Issue***



***Recent Activities***



## Out of the Rough: PGA "Scores" Antitrust Victory

An exhibitor of professional golf tournaments successfully defended its conduct in refusing to allow a media company to have access to real-time player scores from the PGA's tournaments unless the company agreed not to sell the information to Internet sites that compete with the PGA's Internet site. In a decision issued March 31, the 11th Circuit Court of Appeals held that even if the PGA has a monopoly over the real-time reporting of golf tournament scores, the exhibitor's desire to discourage "free riders" from posting the scores on their Internet sites without paying for such information constituted a lawful "business justification" for PGA's refusal to deal with media that would not agree to restrict access to the information. *Morris Communications Corp. v. PGA Tour, Inc.*, 2004 WL 627723 (March 31, 2004). The decision provides an example of where a presumed monopolist is permitted to engage in a refusal to deal its monopoly products or services in order to protect its economic investment in creating the monopoly.

**PGA's Real-Time Scoring System**

The nature of a professional golf tournament makes it impossible for one person to physically follow all the players at once. So, to provide golf scores during tournaments, PGA developed its "Real-Time Scoring System", an elaborate electronic relay scoring system that relies on state-of-the-art computer technology and equipment, as well as dozens of trained workers and volunteers. Because the PGA does not allow the media to use cell phones and hand-held devices on the course (as they might disrupt play), the Real-Time Scoring System provides the only source of compiled golf scores for all tournament players. The only physical location at which to obtain the PGA's compiled golf scores is the PGA media center.

For media organizations to have access to the PGA media center, they must obtain free press credentials from the PGA. To obtain these credentials, media organizations must agree to delay publication on their Internet websites of scoring information obtained by the Real-Time Scoring System until the earliest of (1) thirty minutes after the actual occurrence of the shot or (2) such information has become legally available in the public domain, which is after the scores are posted on the PGA's official website. In addition, the credentialed media organizations were prohibited from selling the scores to non-credentialed, third-party Internet websites without a license from PGA to do so. The plaintiff, a publisher of print and Internet newspapers, argued that this license requirement violated Section 2 of the Sherman Act because the PGA had a monopoly in PGA scoring information and was improperly abusing the monopoly by refusing to deal with plaintiff unless plaintiff agreed to the licensing rule.

**No Violation of the Sherman Act Section 2**

The offense of monopoly has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The first element, monopoly power, is the power to control prices in or to exclude competition from the relevant market. The second element requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market. In order for a practice to be exclusionary, it must harm the competitive process and thereby harm consumers. Harm to one or more competitors will not suffice for a Section 2 violation. The relevant inquiry is not whether a company's present attempt to exclude adversely impacts competition, but rather whether its acquisition of the power to exclude competitors has a sufficiently adverse impact on competition to constitute a Sherman Act violation.

Two theories exist upon which to predicate a unilateral refusal to deal claim under Section 2; the "intent test" and the "essential facility test". Under the intent test, it is unlawful for a monopolist to maintain or extend its monopoly power by intentionally engaging in conduct that unnecessarily excludes competitors and impairs competition. Under the essential facility test, a company that has exclusive control over a facility essential to effective competition may not deny potential competitors access to that facility on reasonable terms and conditions if to do so would create or maintain monopoly power in the relevant market. In the absence of any purpose to create or maintain a monopoly, however, a company may deal or refuse to deal with whomever it pleases. Even a company with monopoly power has no general duty to cooperate with its business rivals and may refuse to deal with them if valid business reasons exist for such a refusal.

In rejecting the plaintiff's claim that the PGA engaged in unlawful monopolization, the court held even if it assumed that the PGA possessed monopoly power in the relevant market (a determination it found no need to make), the PGA had a valid business justification for its actions - specifically, to prevent internet sport sites from enjoying the benefit of the PGA's real-time scoring system without paying for it. The court stressed that unlawful monopoly power requires anticompetitive conduct, which is conduct without a legitimate business purpose that makes sense only because it eliminates competition. Likewise, a refusal to deal designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition.

Because the PGA met its burden to show a valid business justification, the burden shifted to the plaintiff to show that the proffered business justification was pretextual. Plaintiff argued that the PGA's only justification for its refusal to deal with plaintiff on plaintiff's terms was economic - to make money and protect its Internet site which disseminated the scores, and that such a motivation was not a valid business justification. Plaintiff pointed to other cases in which the defendant's economic interests did not constitute an acceptable business justification for monopolistic conduct. The court distinguished those cases, asserting that they did not involve the prevention of "free-riding," and that such an objective constituted a valid business justification.

*For more information, please contact Roy Goldberg at (202) 218-0007 or rgoldberg@sheppardmullin.com.*

## Fashion Models Charge Price-Fixing: "Ha! Ha! Ha!"

The fashion modeling industry has never lacked excitement. Whether it is forecasting new trends in hemlines or reaching consensus on the status of stilettos, the modeling industry always generates interest. However, on June 1, the industry will generate interest of a different kind. It will not be the fashion models alone that will grace the stage in federal district court in New York. But rather, the defendant agencies themselves and the class plaintiff models, will perform side-by-side in a price-fixing lawsuit relating to fixed commission rates.

The case was initiated by Brian Rishwain, a model-turned-L.A. entertainment lawyer, who with others filed the complaint in June 2002. The complaint originally listed six named plaintiff models and was filed in the U.S. District Court for the Southern District of New York. *Masters v. Willhemina*, S.D.N.Y., No. 02 Civ. 4911 (MB). There are separate but related state law claims, but those claims will make their way through the New York state court system alone. The federal district court did not consolidate the state cases. The federal case focuses narrowly on allegations that the modeling agencies conspired with each other to maintain the commission rates since the 1970s. According to the complaint, the agencies routinely charge a "standard" 20 percent commission, and that the "standard" rate is the result of an agreement among the competing modeling agencies. Lower rates are charged to a few top models. The complaint alleges that the agencies also conspired to evade regulation by New York state agencies that would have limited commission rates. The complaint also states that the conspiracy was enabled by a consolidated modeling agency industry run by executives that wield significant power in the industry over models, and with each other.

Based on available press reports, the models' price-fixing conspiracy charges will be premised on lock-step raises in commission rates following trade association meetings. June 1 marks the first date of the jury trial, but news about the case has already sparked great interest, as "smoking gun" documents have come to light during the discovery process and found their way into press reports, even though presiding Judge Harold

Baer, Jr. instructed both sides not to speak to news agencies. The infamous "Ha! Ha! Ha!" memorandum was detailed in a New York Times article. The internal agency memorandum, written by an Elite Model Management executive, urged that the agencies all "stick together". The executive then dismissed the news of a model's informal allegations of a price-fixing conspiracy by writing "Ha! Ha! Ha!". Other agency executives have admitted in depositions to notifying competitors of commission rate increases, among other things.

The case has been limited to the class of models who worked since 1998, due to the statute of limitations. However, documents and testimony in prior litigation relating to the commission rates have been cited as evidence of a conspiracy that dates back to the 1970s, and therefore many models who were affected by these practices, if proven to violate Sherman Act Section 1, will not be able to share in the recovery. According to Rishwain, the Department of Justice is separately investigating the alleged conspiracy.

The class action lawsuit is not the first price-fixing allegation levied in the modeling industry. In 1995, the FTC settled price-fixing charges against the Council of Fashion Designers and the organization that produced two major fashion shows annually for the industry. The FTC charged that the defendants threatened to hire the models independently unless the modeling agencies agreed to accept the defendants' offered commissions. In the Matter of the Council of Fashion Designers of America, FTC File. No. 941-0007.

Prominent entertainment agency, IMG, settled the current class action charges, but the case proceeds against the other named defendants. The case may cause unexpected changes for the industry. Will Paris Fashion Week be held at the federal district courthouse in Manhattan? Are the courthouse steps ready for the Manolo Blahnik stiletto pumps? Antitrust enthusiasts and fashion *aficionados*, will no doubt both tune in for the outcome of this performance.

*For more information, please contact June Casalmir at (202) 218-0027 or jcasalmir@sheppardmullin.com.*

## JFTC on Raid Patrol

On April 8, investigators from the Japan Fair Trade Commission ("JFTC") raided three offices of Intel Corp. ("Intel"), including its Tokyo headquarters, its wholly-owned subsidiary, Intel K.K., and an office located in Tsukuba City, north of Tokyo. JFTC staff also searched the offices of some of Intel's customers (Toshiba Corp., Fujitsu Ltd., Sony Corp., NEC Corp.) and the offices of some electric appliance retailers (including Yodobashi Camera), asking them for cooperation. In addition, the investigators also visited the Japanese offices of Intel rivals Advanced Micro Devices Inc. ("AMD") and Transmeta Corp., which both plan to cooperate with the investigation.

The JFTC decided to investigate the semiconductor manufacturer on allegations that the company had pressured personal computer ("PC") manufacturers to install Pentium® series central processing units ("CPUs") and, in some cases, told them not to install rival makers' CPUs, such as AMD's Athlon series. AMD, based in Sunnyvale, CA, has stated in public filings that Intel provides special incentives to persuade customers to buy only from Intel, and disciplines customers that do business with AMD. An official of one company asked to cooperate with the JFTC indicated that Intel had applied pressure to PC makers to avoid using competing products.

The JFTC is looking into the case as an act of private monopoly or unfair transactions, both of which violate Japan's Antimonopoly Law. Japan's CPU market generates more than $1.5 billion in revenue, of which Intel products allegedly command over an 80 percent market share. Intel allegedly accounts for more than 90 percent of the worldwide revenue from microprocessors - the chips that act as the brains of PCs. Six weeks before raiding Intel, the JFTC raided Microsoft Japan for its bundled sales of Windows® software. The Japanese agency was investigating a clause in Microsoft's contracts that prevented computer makers who license Microsoft Windows from asserting patent claims against the company. Microsoft denied any wrongdoing, but later deleted the clause in future contracts.

The U.S. Federal Trade Commission and European antitrust authorities have periodically examined allegations that Intel uses illegal tactics against competitors. According to Intel, European investigators are no longer following up on AMD's complaints. However, the case against Intel in Europe remains open pending an April 20 U.S. Supreme Court hearing on an AMD motion that sought to give European regulators information from separate proceedings involving Intergraph Corp., a company that filed antitrust charges against Intel that have been settled.

Intel did not comment on the raid because the JFTC's investigations are in progress, but did state it was cooperating with the investigation in Japan. The company also rejected AMD's assertions and stated that it did not know the issues the JFTC was investigating.

*For more information, please contact Camelia Mazard at (202) 218-0028 or cmazard@sheppardmullin.com.*

## *Gaming Corp. v. Black Hawk Casino Owners Ass'n*: All Roads Lead to Black Hawk

The District Court of Colorado recently found that a complaint alleging anticompetitive government petitioning and injury to competitors, without more, did not survive a motion to dismiss. Judge Wiley Y. Daniel, dismissed plaintiffs' Second Revised Third Amended Complaint on the grounds that the alleged conduct was protected by the *Noerr-Pennington* doctrine and that the plaintiffs lacked standing.

In *Gaming Corp. v. Black Hawk Casino Owners Ass'n*, D. Colo., No. 01-D-0964 (MJW) (Mar. 25, 2004), casinos in Central City, Colorado alleged that casinos in neighboring Black Hawk, Colorado conspired to block competition from Central City casinos and attempted to monopolize the gaming industry in Gilpin County.

The road to Central City passes through Black Hawk. Plaintiffs alleged that many tourists believe that Central City and Black Hawk are the same town. As a result, few tourists pass through Black Hawk to go to Central City. Plaintiffs' action focused on the construction of the Southern Access Road, which would provide more direct access to Central City, bypassing Black Hawk.

Black Hawk allegedly defeated Central City's attempt to obtain land for the road by buying mining claims located on a necessary parcel of land. Black Hawk allegedly sold mining share claims to increase the number of voters eligible to block Central City's annexation of the land. A second parcel of land owned by H. Thomas Winn was necessary to build the road. Winn petitioned Central City to include his land in the construction of the Southern Access Road. At the same time, Winn was allegedly negotiating with Black Hawk city officials to open a casino in Black Hawk. Plaintiffs alleged that the Black Hawk officials conditioned their approval of Winn's casino on Winn's withdrawal of the petition to participate in construction of the road. Winn withdrew his land, and the voters defeated Central City's building proposal. As a result, Central City purchased $45 million in municipal bonds to build the Southern Access Road. Central City did not name the City of Black Hawk as a defendant and did not allege that defendants made access to Central City more difficult on existing roads.

Defendants argued that any attempts to influence the City of Black Hawk were protected by the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine protects legitimate attempts to petition government entities under the First Amendment, even if such petitioning may result in anticompetitive effects. In analyzing the *Noerr-Pennington* defense, the court divided the defendants into three classes: "(1) private casinos and other companies who lobbied Black Hawk officials to sell mineral interests to private purchasers; (2) Black Hawk city officials […]; and (3) private purchasers of the land."

The court found that Central City's casino's claims amounted to "little more than nebulous claims" that private parties "may have lobbied Black Hawk and its officers to block the construction of the Southern Access Road in order to gain a competitive advantage over Plaintiffs, and that the remaining Defendants either intentionally or unintentionally participated in that effort." The court found, however, that plaintiffs did not allege how the conspiracy worked. There were also no allegations of bribery or corruption by any defendant. Thus, the court held that defendants' petitioning "is precisely" the conduct "that the *Noerr-Pennington* doctrine immunizes."

"So long as the private Defendants' actions were legal, the fact that Plaintiffs merely allege that Black Hawk may have exceeded its municipal authority does not render the private Defendants' conduct impermissible under the antitrust laws."

The court reasoned that the "closest question of anticompetitive conduct" related to the city officials who acted as agents of Black Hawk in the city's alleged attempt to block the construction of the Southern Access Road. There was, however, no showing that the officials intended to block competition.

With respect to Winn, the private landowner, the Court found that plaintiffs "again fail to plead sufficient facts to support an antitrust claim." Plaintiffs did not present evidence that the named city officials were the ones who pressured Winn, or that they had knowledge or control over Winn's Black Hawk casino. Even if they had known about the casino, "there is no indication in the [evidence] why such an agreement between the parties is impermissible." As a result, the court ruled that plaintiffs "have failed to show the requisite anticompetitive conduct necessary to bring a claim under the Sherman Act."

The court then found that, even if the complaint had contained allegations of illegal anti-competitive conduct, plaintiffs failed to allege antitrust injury. The complaint claimed injury to the Central City casinos as competitors but did not allege "any injury to the competitive process or claim any injury to consumers." As a result, plaintiffs did not have standing to bring their claim. Thus, under the principles of the *Noerr-Pennington* doctrine and lack of standing, the court granted defendant Black Hawk casinos' motion to dismiss.

*For more information, please contact Suzanne Drennon at (213) 617-4254 or sdrennon@sheppardmullin.com.*

## District Court Rejects *Per Se* Price-Fixing Analysis for Borders/Amazon Websites

On March 23, 2004, the Northern District of California refused to apply the *per se* rule to a joint venture through which Amazon.com sets the prices for books sold over the Borders.com website. *Gerlinger v. Amazon.com, Inc., Borders Group, Inc.; Borders, Inc.; Borders Online, LLC; and Borders Online, Inc*., 2004 U.S. Dist. LEXIS 4604 (N.D. Cal. March 23, 2004).

After losing millions in an attempt to run its own online marketplace, Borders agreed with Amazon that Amazon would create and maintain the Borders.com website in all respects, including setting prices on delivery orders and fulfilling all such orders from Amazon's own inventory. In other words, Amazon sells its own books through the Borders.com site. (Shoppers can also reserve a book for pick-up at a Borders brick-and-mortar store; Borders retains control over prices for in-store pickups.) In return for Borders' agreement not to engage in any other online retailing during the term of the contract and its role in driving traffic to the website, Amazon pays Borders a commission on books sold and sets prices on the Borders.com website no higher than the prices on the Amazon.com website.

Plaintiff argued that this last term constituted horizontal price-fixing since it "gives Borders the right to control the minimum price at which books will be sold, even when those books do not belong to Borders" and relied on *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) for support. In *Maricopa County,* a group of physicians set a maximum fee schedule that the Supreme Court held to constitute *per se* price-fixing, even though there was no restriction on the minimum price the physicians could charge.

However, here Judge Patel distinguished *Maricopa* on the grounds that nothing in the Borders/Amazon agreement prevented Amazon from selling a book at a lower price on Borders.com than Amazon.com, although (the court acknowledged) there would be no apparent business reason for doing so. Since the Borders/Amazon agreement set no minimum, maximum, or range of prices that Amazon.com could charge for the books it sells on the two websites, it rejected the plaintiff's *Maricopa* analogy.

Tellingly, the court also noted that the *per se* rule "is not [to be] employed until after considerable experience with the type of challenged restraint," citing *BMI v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979). Since neither the parties nor the court could uncover a case with a similar type of arrangement, the court hesitated to break new ground by creating a new category for application of the *per se* rule.

Several other facts weighed in favor of Borders and Amazon. First, until its agreement with Amazon, Borders had been losing $20 million a year on its site and contemplated shutting it down. Moreover, Amazon.com and Borders.com list numerous third-party sellers who offer the same books with no attempt by Amazon or Borders to regulate the prices offered by those third-party sellers. In light of that fact, the court called plaintiff's claim that Amazon and Borders were trying to maintain an artificially high price structure "fairly ludicrous on its face".

The court also agreed with Amazon and Borders that the price provision was merely ancillary to the overall agreement, citing *Polk Bros. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985). Therefore, the court held that the rule of reason should apply and denied plaintiff's motion for judgment on the pleadings.

On the other hand, the court was troubled by the restriction on Borders engaging in any online retailing during the term of the agreement. Under the agreement, Borders would not even be permitted to provide overstock books to another online marketer, even if the source were not mentioned online. While the court rejected plaintiff's second argument that the defendants were allocating the market as a matter of law, it also denied summary judgment to defendants on this issue.

Finally, the plaintiff claimed a Clayton Act Section 7 violation based on Amazon "acquiring" an asset from Borders - the right to use the Borders.com website. Plaintiff's argument presented a novel issue under the Clayton Act: whether obtaining the legal right to redirect users of the Borders.com website to Amazon.com's website constituted the acquisition of an asset, even though Borders retained ownership of the www.borders.com domain. While the court agreed that the domain was an asset, it declined to rule on whether the right to drive traffic from that domain was an asset, holding instead that the plaintiff could not show the necessary anticompetitive effect.

As online marketing becomes more sophisticated, however, it seems likely that another court will need to resolve this issue in the future.

*For more information, please contact Jane Langdell at (213) 617-4261 or jlangdell@sheppardmullin.com.*

## DOJ White Collar Crime Update

While the Senate passes a major Antitrust Reform Bill, the Antitrust Division obtains another guilty plea from a white collar criminal.

**Senate Passes Antitrust Reform Bill**

On April 2, the Senate passed "The Standards Development Organization Advancement Act of 2003." The bill has four major provisions that make several important changes to the antitrust laws. This bill is one of the most significant reforms in the antitrust laws in recent years.

First, the bill increases the maximum prison sentences for antitrust violations to ten years from the current maximum sentence of three years, and raises the maximum fine for individuals from $350,000 to $1 million. In addition, maximum fines for corporations that violate the Sherman Act are raised to $100 million from the current $10 million maximum.

Second, the bill amends the Tunney Act, a law which requires that agreements between the Antitrust Division and private parties to be subject to judicial review. The intent of this reform is to require the courts to engage in a meaningful review instead of merely rubber stamping their approval of the Antitrust Division's consent. The amendment will require courts to consider certain factors, such as the competitive effect of a proposed consent judgment and the impact of entry of such judgment upon competition in the relevant markets. In addition, courts would be prohibited from entering any consent judgment filed by the Antitrust Division, unless it makes a finding to support the Division's conclusion that the consent judgment is in the public interest.

Third, the bill encourages more corporations to cooperate with the Department of Justice information about antitrust conspiracies by limiting the civil liability of corporations that take part in the Department of Justice's corporate leniency program. Under the existing corporate leniency program, the Department of Justice agrees not to criminally prosecute corporations that provide critical information about antitrust conspiracies. In exchange for this limitation to civil liability, the corporations must pay restitution to private plaintiffs and assist the private plaintiffs with other antitrust lawsuits.

Finally, the bill decreases liability for Standard Development Organizations ("SDOs"). SDOs are private, voluntary non-profit organizations that set standards for industry products. For example, one SDO may set the standard for the required depth of a swimming pool before a diving board may be installed. Under the bill, qualifying SDOs that pre-notify the Antitrust Division of their standard setting activities will not be subject to treble damages in private suits brought against them.

**Dutch Shipping Company Agrees To Plead Guilty In International Parcel Shipping Investigation**

On April 19, Dutch-based Jo Tankers B.V. ("Jo Tankers") has agreed to plead guilty and pay a $19.5 million criminal fine for participating in an international cartel to allocate customers, rig bids, and fix prices on parcel tanker affreightment contracts for shipments of specialty liquids to and from the United States and elsewhere.

Parcel tanker shipping is the transportation of bulk chemicals, edible oils, acids and other specialty liquids by compartmentalized deep sea vessels. The temperature and other specifications of the compartments in the vessels can be regulated according to specific requirements about the type of liquid being transported. A contract of affreightment provides for the transportation of bulk liquids from one port to another and typically covers multiple shipments during a certain period.

The charges state that between the second half of 1998 and November 2002, Jo Tankers and its co-conspirators: 1) engaged in discussions concerning customers and prices of parcel tanker shipping products to and from the United States and elsewhere; 2) agreed not to compete for one another's customers either by not submitting prices or bids to certain customers, or by submitting intentionally high prices or bids to certain customers; and 3) discussed and exchanged prices submitted to certain customers so as not to undercut one another's prices. As a result, the Antitrust Division alleged that consumers in the market for international parcel tanker shipping services paid non-competitive and higher prices for parcel tanker shipping.
This case is a continuation of the Justice Department's ongoing criminal investigation into anticompetitive practices in the parcel tanker shipping industry. On January 7, 2004, Hendrikus van Westenbrugge, a former co-managing director of Jo Tankers B.V., was sentenced to serve three months incarceration and pay a fine of $75,000 for his role in the

conspiracy. On October 22, 2003, Odfjell Seachem AS, its Chairman, Bjorn Sjaastad, and a Vice President, Erik Nilsen, pleaded guilty to charges of participating in the shipping cartel. Seachem was sentenced to pay a $42.5 million fine; Sjaastad was sentenced to serve four months incarceration and pay a $250,000 fine; and Nilsen was sentenced to serve three months incarceration and pay a $25,000 fine.

Jo Tanker's plea is the result of an investigation being conducted by the Antitrust Division's Philadelphia Field Office and Federal Bureau of Investigation in Philadelphia.

*For more information, please contact Robert Magielnicki Jr. at (202) 218-0029 or rmagielnickijr@sheppardmullin.com.*

## *RECENT ACTIVITIES*

## DOJ ANTITRUST HIGHLIGHTS

- Shortly after WellChoice abandoned its efforts to acquire Oxford Health Plans, on April 26, UnitedHealth Group announced that it would acquire Oxford for $4.7 billion in stock and cash, giving UnitedHealth, one of the nation's largest health insurers, a greater presence in the New York metropolitan area. Oxford insures 1.5 million people in Connecticut, New Jersey and New York. The merger is the latest combination among health insurance companies. The DOJ is expected to review the merger.

- On April 21, Microsoft promised that it will offer competitors licenses for some of its technology until at least two years beyond the expiration of the antitrust settlement it negotiated with the Antitrust Division. Microsoft's concession responds to DOJ lawyers' and U.S. District Judge Colleen Kollar-Kotelly's concerns that a key provision of the settlement is falling short. The judge and the government had hoped the settlement would energize rivals of the world's largest software maker. While the judge, who approved the settlement in November 2002, praised Microsoft's overall efforts under the settlement agreement, she acknowledged that it is difficult to measure the agreement's impact on the market. The antitrust settlement compels Microsoft to offer its technology to competitors to build products that seamlessly communicate with computers running Windows software. When the settlement was negotiated, the judge and government lawyers described that requirement as among its most significant provisions toward restoring competition in the technology industry. So far, only 14 companies including Sun Microsystems and Time Warner have paid Microsoft for licenses to use such technology in their own software products. Microsoft disclosed that it will offer similar licensees until at least November 2009, two years past the expiration of the antitrust settlement. It also pledged to allow competitors to license some technology from the next version of its operating system software, known as Longhorn.

- On April 20, Assistant Attorney General R. Hewitt Pate addressed attendees at the Seoul Competition Forum and the Third Annual International Competition Network ("ICN") Conference in Seoul, Korea via live video feed. During the address, Mr. Pate thanked Dr. Kang Chul-Kyo, Chairman of the Korean Fair Trade Commission ("KFTC"), for

## *RECENT ACTIVITIES*

### DOJ Antitrust Highlights *(Continued)*

his kindness and "his efforts to build a sound relationship between the DOJ and the KFTC. Mr. Pate also offered his perspective on the important role of the KFTC in the world of antitrust and spoke about the current and future roles of the ICN. He praised Korea for becoming a leader in the promotion of sound competition law and policy. Mr. Pate commended the KFTC's successful enforcement actions against participants in the international vitamin and international graphite electrodes cartels, and he indicated that it is an important participant in the fight against international cartels. He also acknowledged the KFTC as one of the first competition enforcement agencies in Asia to adopt a corporate amnesty program, a tool that has proven helpful across the globe in detecting and rooting out both domestic and international cartels.

- The Antitrust Division issued second requests for additional information to Cingular and AT&T Wireless around April 19. The Antitrust Division is expected to conduct a lengthy antitrust review of this transaction that combines two of the largest wireless phone companies in the United States. The staff is expected to focus on regional and/or local markets where Bell South and SBC have local phone companies and where AT&T Wireless and Cingular overlap. The parties are claiming that the relevant product market to be reviewed is wireless telephones including cellular frequencies at 850 MHz, PCS frequencies at 1900 MHz, and specialized mobile radio carriers, such as Nextel and Southern LINC. These carriers provide service that is substantially identical to other wireless mobile phone carriers because neither consumers nor carriers distinguish wireless services based on the type of technology utilized. The parties also claim that the geographic market is national because most mobile phone companies offer national calling plans with national rates. Consumer groups contend that while mobile phone companies offer national calling plans, everything is done locally with regards to phone numbers and home calling area. Therefore, consumers only really have access to local wireless providers. The DOJ is expected to thoroughly investigate areas in Texas (Dallas and San Antonio), the Midwest (Oklahoma City), and the South (Orlando and Jacksonville, Florida).

- On April 15, the DOJ and ten states (Texas, Hawaii, Maryland, Massachusetts, Minnesota, New York, North Dakota, Michigan, Connecticut, and Ohio) amended the government's complaint against Oracle's proposed acquisition of PeopleSoft. The amended complaint reiterates the government's contention that allowing Oracle to buy PeopleSoft is anticompetitive. The complaint alleges that the merger will raise the cost of human resources management and financial services management software for large companies. The DOJ and the ten states believe that Oracle and PeopleSoft currently constrain each other's pricing. Both directly compete for customers with licensing, discounting, reducing customers' implementation costs, and making other business concessions. The amended complaint also alleges that Oracle cannot demonstrate that the merger would produce substantial merger specific efficiencies. As the Division and Oracle prepare for trial, both parties have exchanged preliminary witness lists. The Antitrust Division's list includes PeopleSoft customers while Oracle's list includes a number of potential competitors. The trial is scheduled to begin on June 7, 2004.

## *RECENT ACTIVITIES*

### DOJ Antitrust Highlights (*Continued*)

- On April 13, the Eastern District of Kentucky issued an opinion on cross-motions for summary judgment on the Dairy Farmers of America, Inc.'s claim of estoppel against the DOJ for approving a similar merger about ten years ago. Last year the DOJ challenged the Dairy Farmers of America's 2002 acquisition of a controlling interest in the Southern Belle Dairy. Dairy Farmers of America claimed that the government should be stopped from challenging the current acquisition based on its approval 10 years ago of a similarly structured dairy acquisition in another market involving different parties. Dairy Farmers of America claimed that it had relied on the government's approval of that prior transaction in structuring its current acquisition. The Eastern District of Kentucky rejected that argument and granted the DOJ's motion for summary judgment on that defense.

- On April 7, Michigan, Ohio and Connecticut filed a motion in U.S. District Court in San Francisco to join the DOJ and seven other states in opposing Oracle's takeover of PeopleSoft. Michigan's Attorney General, Mike Cox, indicated that the combination of Oracle and PeopleSoft could cost Michigan taxpayers more than $130 million. On the same day, the Wall Street Journal reported that while Oracle lost a major software deal to a small competitor, Oracle may have gained valuable evidence that would help Oracle win its case against the DOJ. Evidently, the DOJ selected American Management Systems, Inc. for a $24 million financial-management software deal. The Fairfax, Virginia, company beat Oracle and PeopleSoft for the deal even though the DOJ's antitrust lawyers do not count AMS among Oracle's significant competitors. Oracle will argue that niche vendors such as AMS, customers' in-house programmers, consulting firms that knit together diverse software programs, and Microsoft should be included in an overall market for business-applications software. The DOJ, however, is focusing on financial and human-resource software used by large companies and institutions. The DOJ contends that these customers choose among Oracle, PeopleSoft and SAP AG of Germany, the market leader. The DOJ's search for new software highlights that other competitors exist. The article reports that in 2002 the DOJ began evaluating possible replacements for seven incompatible and outdated accounting systems at the FBI, the Bureau of Prisons and other agencies. Oracle, PeopleSoft and AMS emerged as the finalists. Each offered deep discounts on the initial purchase price to secure the estimated $1 million a year in payments for product support and upgrades. AMS was selected as the winning bidder.

- On April 1, the Antitrust Division announced that David A. Higbee was appointed to serve as Chief of Staff and Deputy Assistant Attorney General for the Antitrust Division. In this new position, Mr. Higbee will have primary responsibility for a number of ongoing management initiatives at the Division aimed at making the Division's enforcement efforts more efficient and effective. Mr. Higbee will help coordinate the work of the other deputies in exercising their supervisory responsibilities. On March 31, the Antitrust Division announced that Thomas O. Barnett was appointed to serve as the Deputy Assistant Attorney General in charge of civil enforcement for the Division. Mr. Barnett will oversee three of the Division's civil sections in this position.

- On March 31, Scott D. Hammond, Director of Criminal Enforcement of the Antitrust Division, discussed current trends in criminal antitrust enforcement at one of the sessions at the 52nd Annual Spring Meeting of the ABA in

## *RECENT ACTIVITIES*

### DOJ Antitrust Highlights *(Continued)*

Washington D.C. Mr. Hammond discussed two current trends that have expanded interest within the Antitrust Division over the past few years: the interest in individual accountability and the increase in the number of corporations charged and convicted of obstruction of justice. The continued interest in individual accountability involves jail sentences for both foreign and domestic nationals. He noted that jail time has increased significantly over the past five years. In 1999, the average jail sentence was 8 months; in 2000, it was 10 months; in 2001, it rose to 15 months; in 2002, it spiked to 18 months; and 2003 heralded another record increase to 21 months. The Antitrust Division is continuing its efforts to build and bring cases against foreign nationals. The Division also is bringing those foreign nationals to the United States to stand trial and seeking convictions as well as possible jail sentences. In the last year, three countries including the United Kingdom, the Netherlands, and Norway were added to a list of about eight countries from which foreign nationals have served time in U.S. prisons. Mr. Hammond also indicated that he has witnessed a dramatic increase in the number of corporations convicted of obstruction of justice (*i.e.*, five in the last couple of years). Mr. Hammond cautioned practitioners to advise their clients that the exposure for obstruction is potentially far greater than the stated $500,000 penalty in antitrust cases because a corporation that engages in obstruction of justice in an antitrust count faces the possibility that his culpability score will be raised significantly. Each time the culpability score increases, the potential liability can be increased by as much as tens of millions of dollars depending on the total commerce involved.

In the same session on March 31, Mr. Hammond discussed future developments in criminal antitrust enforcement. Mr. Hammond urged attendees to keep an eye on Japan in the international cartel enforcement area and on a legislative proposal to raise the statutory maximum jail time and fines for antitrust offenses in the United States. (*See* related articles on pp. 4 and 8.) Under the proposal, statutory maximum jail times would be increased to 10 years and create statutory maximum fines of up to $100 million. There is also a proposal to detreble overcharge recoveries against the first amnesty applicant who agrees to cooperate with the victims. The first amnesty applicant would only face single damage exposure just for the damage. It would remove joint and several liability for the amnesty applicant, and the legislation would achieve this reward without in any way reducing the recovery to victims because those co-conspirators who do not qualify for amnesty would have to pick up the tab for the joint and several liability and any treble damages, even for the damages caused by the amnesty applicant.

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

### FTC ANTITRUST HIGHLIGHTS

- On May 3, the FTC announced the filing of a complaint in the U.S. District court for the District of Columbia to obtain civil penalties against Bill Gates for violating the reporting requirements of the Hart-Scott-Rodino ("HSR") Pre-merger Notification Act. A stipulation and proposed final judgment was filed with the complaint requiring Mr. Gates to pay an $800,000 civil penalty to settle the case. The HSR violations involved two separate purchases by

## RECENT ACTIVITIES

### FTC Antitrust Highlights *(Continued)*

Mr. Gates of outstanding voting shares of stock in two companies, Republic Services, Inc. and ICOS Corporation, without making the required HSR filings. Mr. Gates relied on the investment only exemption in the purchase of Republic's shares. However, that exemption is limited to holdings that do not exceed 10% of the outstanding shares. Mr. Gates' Republic stock purchase put his holdings over the 10% threshold. In the ICOS purchase, Mr. Gates was not eligible for the investment only exemption because he was on the Board of Directors of ICOS. A second similar case was filed by the DOJ against Manulife Financial Corporation on May 3. Manulife agreed to pay $1 million to settle the charges. Manulife acquired more than $50 million of John Hancock common stock at the time it was considering an acquisition of John Hancock, claiming an investment only exemption. Since it was considering a Manulife/John Hancock combination, the exemption was disallowed. The maximum penalty for a HSR violation is $11,000 a day.

- On April 29, the FTC announced a proposed consent order with two leading industrial gas producers, L'Air Liquide ("Air Liquide") and Messer Griesheim GmbH ("Messer"), under which Air Liquide will be allowed to acquire Messer but will be required to divest several important U.S. assets to ensure that competition is maintained in the markets for liquid oxygen, liquid nitrogen, and liquid argon. Through the transaction, Air Liquide will acquire the entire capital share of Messer and subsequently transfer Messer's Messer Griesheim Industries ("MGI") to its subsidiary American Air Liquide. To remedy the alleged anticompetitve effects of the proposed transaction, the consent order will require American Air Liquide to divest six air separation units and related assets currently owned and operated by MGI in California, Texas, Louisiana, and Mississippi within six months of a final order. The companies announced the proposed $3.5 billion acquisition in January of this year. "Absent the relief required by the Commission's proposed order, this acquisition was likely to substantially lessen competition in those U.S. markets for liquid argon, oxygen, and nitrogen, where the parties previously competed," said Susan Creighton, Director of the FTC's Bureau of Competition. "The consent agreement … will preserve the existing competition in those markets and ensure that consumers of these important industrial gases do not pay more for them in the future."

- On April 28, the FTC's Bureau of Competition and Bureau of Economics drafted a Model Request for Additional Information and Documentary Material ("Second Request") for merger transactions involving retail markets. This model is based upon prior Second Requests issued for retail transactions. The model has been modified from prior retail Second Requests to eliminate some information that may not have been essential to the Bureaus' review of such transactions, and to include additional information that will aid in the future review of these transactions. In the FTC's views, the release of this model Second Request provides greater transparency to parties concerning the Commission's review of transactions in the retail industries. The Bureaus intend to use the model as a basis for drafting future retail second requests, although the Bureaus will modify the model to the extent necessary to review specific issues raised by a particular transaction. The Bureaus also expect to release additional model Second Requests for other industries over the next several months.

- On April 16, pursuant to a Federal Register notice, the FTC requested public comment on various issues related to the state of competition in the contact lens industry. In connection with the passage of the Fairness to Contact Lens Consumers Act, Congress directed the FTC to conduct a study to determine the strength of competition in the sale

## *RECENT ACTIVITIES*

### FTC Antitrust Highlights *(Continued)*

of prescription contact lens. In preparation of the study, the Commission is requesting public comments on the following relevant issues: (1) the incidence of exclusive relationships between prescribers or sellers and contact lens manufacturers, and the impact of such relationships on competition; (2) the difference between online and offline sellers, including price, access and availability; (3) the incidence, if any, of contact lens prescriptions that specify brand name on custom labeled contact lenses and the resulting effect on consumers and competition; (4) the impact of the FTC Eyeglass Rule on competition; and (5) any other issue that may impact competition in the contact lens industry. Public comments must be received on or before June 24, 2004.

- On April 15 and 16, the FTC, the National Academy of Sciences ("NAS"), and the Berkeley Center for Law and Technology co-sponsored a conference that addressed patent reform and how it might be implemented. The event brought together government officials, business representatives, scholars, lawyers, and leading members of the patent community to discuss the most significant recommendations of two recent reports on patent reform - one from the FTC and one from the NAS issued the week of April 12. In October 2003, the FTC issued a report on how to promote innovation by finding the proper balance between competition and patent law and policy. The FTC report contained ten recommendations to reform the patent system, including legislative and regulatory changes to improve patent quality. FTC Commissioner Mozelle W. Thompson and Deputy General Counsel for Policy Studies Susan S. DeSanti participated in the Berkeley conference, along with government representatives from the U.S. Patent and Trademark Office and the European Patent Office. Industry participants included representatives from Cisco, Chiron, eBay, Eli Lilly, Genentech, Google, Inflexion Point Strategy, Intel, and Microsoft. Representatives from the American Intellectual Property Law Association, the American Bar Association Section of Intellectual Property Law, and the Intellectual Property Owners Association also participated. The complete agenda, including topics covered and speakers, is available on the FTC's website. The NAS statement of task for its report on patent reform can be found at www.law.berkeley.edu/institutes/bdt/patentform/NAS_task_statement.pdf.

- On April 8, at the request of the Rhode Island Attorney General and the Deputy Senate Majority Leader of the Rhode Island State Senate, the FTC commented on seven state bills pending in the Rhode Island Legislature. The FTC was asked to comment on the competitive effects of the pharmaceutical bills, all of which contained so-called "freedom of choice" provisions for patients who require pharmaceutical services, and "any willing provider" provisions directed at health insurers and employee benefit plans that contract with pharmacies. Although the bills were designed to increase competition by letting consumers choose their pharmacy provider, the FTC concluded that the bills, if enacted into law, would likely have the "unintended consequences" of limiting competition, undermining consumer choice and increasing the cost of pharmaceutical services. The FTC staff further explained that the bills would discourage pharmacy providers from offering low prices. The Commission staff noted that pharmacies have clear incentives to offer health plans attractive terms (*i.e.*, low prices and good service) because they might get an exclusive contract to serve the health plan members. However, the staff argued that by banning exclusive contracts, the bills would destroy those incentives. The FTC staff cited empirical evidence that confirms that by intensifying competition among providers, selective contracting lowers pharmaceutical prices.

## *RECENT ACTIVITIES*

### FTC Antitrust Highlights *(Continued)*

- On April 7, FTC General Counsel William E. Kovacic testified on behalf of the Commission before the Subcommittee on Antitrust, Competition Policy, and Consumer Rights of the Senate Judiciary Committee on "Market Forces, Anticompetitive Activity and Gasoline Prices". Mr. Kovacic detailed the FTC's initiatives to maintain competitive markets in the energy sector and indicated that the Commission will take enforcement action, if warranted, to protect U.S. consumers from price increases resulting from any illegal conduct. Mr. Kovacic described the FTC's gasoline price monitoring and investigation initiative requiring the Commission to monitor wholesale and retail prices of gasoline and examine why unusual gasoline price movements occur. The testimony also reviewed the FTC merger efforts in the oil and gasoline industries, including an analysis of the merger of Chevron and Texaco and the Commission's challenge to the proposed $6 billion merger of Valero Energy Corporation and Diamond Shamrock Corporation. Mr. Kovacic presented a summary of the FTC's recent non-merger investigations into gasoline pricing, including the Commission's complaint against Union Oil Company of California for allegedly deceiving the California Air Resources Board. Mr. Kovacic also described the FTC's recent investigation into West Coast gas price spikes, which resulted in no action by the Commission.

- On April 7, less than a week after the FTC filed its complaint in the U.S. District Court for the District of Columbia seeking a preliminary injunction to block Arch Coal's ("Arch") proposed $364 million acquisition of Triton Coal Company LLC ("Triton"), the Commission issued an administrative complaint challenging the proposed deal. Similar to the allegations in the federal court preliminary injunction papers, the administrative complaint alleges that the proposed acquisition of Triton by Arch would:
  - Combine two of the four leading producers of Wyoming Southern Power River Basin ("SPRB") coal, substantially increase concentration in the SPRB coal market, result in a highly concentrated SPRB coal market, eliminate the existing substantial competition between Arch and Triton, and substantially reduce competition in the SPRB coal market;
  - Combine the two firms that hold the principal sources of excess capacity in SPRB coal and bring under Arch's control the principal source of excess capacity for production of 8800 Btu SPRB coal;
  - Combine two among only four producers in Tier 1 of the SPRB coal, substantially increase concentration in 8800 Btu SPRB coal, result in high concentration among 8800 coal producers, eliminate the existing substantial competition between Arch and Triton and substantially reduce competition in 8800 Btu SPRB coal; and
  - Increase the likelihood of coordination in the market for SPRB coal - a market that is already susceptible to coordination.

  The complaint filed on April 1 asked the federal court to prevent the companies from closing their transaction until the FTC is able to complete its formal examination of the proposed acquisition in the proceeding that was initiated by the April 7th administrative complaint. The vote to issue the administrative complaint was 5-0, with Commissioner Leary issuing a separate statement indicating his belief that the "administrative arena is the best place to address the challenging issues presented by this case." Commissioner Leary voted against seeking a preliminary injunction. *See* April issue of the *Sheppard Mullin Antitrust Review* at pp. 2 and 14 for additional coverage of the Arch/Triton matter.

## *RECENT ACTIVITIES*

### FTC Antitrust Highlights *(Continued)*

- On April 2, the staffs of the FTC's Office of Policy Planning and Bureaus of Competition, Consumer Protection, and Economics provided comments on Maryland House Bill 795, which would permit corporate ownership of funeral homes. According to the staff's comments, the bill would permit easier entry into the funeral home business, thereby increasing competition and potentially offering consumers lower prices and better quality for funeral home services. The comments were sent to Maryland Delegate Joanne Benson in response to her request. According to the comments, current Maryland law generally restricts the ownership and operation of funeral homes to licensed funeral directors. Corporations are barred from owning and operating funeral homes, except for 59 corporations holding licenses that were issued before 1945. The Bill would remove that restriction, thereby permitting both corporations and limited liability companies to own and operate funeral homes. The staff's comments applauded the change. "We believe that by permitting corporations and LLCs to own funeral homes, Maryland will make entry into the funeral home industry easier, which should ultimately benefit consumers both in price and quality," the comments noted.

- On March 30, the Commission filed in federal court its complaint, stipulation, and agreed-to judgment against RHI AG ("RHI") to resolve charges that RHI violated various provisions of an FTC order issued in 2001. Under the terms of the settlement, RHI agreed to pay a civil penalty of at least $650,000 for the violations and to conduct asbestos remediation at a divested plant, substantially beyond the remediation required in the original order. On February 19, 2004, the Commission announced that it had reached a settlement with RHI, and had modified the agency's order. Pursuant to the settlement filed in court on March 30, RHI will pay a civil penalty of $650,000 within 30 days after entry of judgment by the court. In addition, RHI will perform specified asbestos remediation at a plant divested to Resco Products, Inc., located in Marelan, Quebec, Canada. Depending on the final cost of this remediation, the consent judgment may require RHI to pay an additional civil penalty of up to $350,000 after the remediation is complete. The FTC filed the complaint, stipulation, and consent judgment in the United States District Court for the District of Columbia. The Commission vote to accept the settlement, and to notify the Department of Justice of its intention to file the settlement, was 5-0.

- On March 30, the Commission filed an *amicus curiae* brief in *Teva Pharmaceuticals USA v. Pfizer, Inc.*, Case No. 04-1186. The case, which is currently pending in the U.S. Court of Appeals for the Federal Circuit, is a Hatch-Waxman Act pharmaceutical action between the two companies related to Teva's proposed generic version of Pfizer's blockbuster antidepressant Zoloft. The Commission's brief was filed in support of Teva, which is seeking the reversal of a district court order dismissing its declaratory judgment action against Pfizer. In dismissing Teva's complaint, the district court ruled it lacked subject matter jurisdiction over Teva's action. Unless the court of appeals reverses that decision, Teva will not be able to get FDA approval for its application to market its generic version of Zoloft until 180 days after the first generic applicant, Ivax Pharmaceuticals, Inc., enters the market with its version of the drug. The case is significant, the FTC contends, because the rule of law it establishes likely will determine the extent to which brand-name drug manufacturers and first generic applicants can delay the entry of lower-cost generic versions of brand-name drugs by "parking" the limited 180-day exclusivity period granted a generic first applicant under the Hatch-Waxman Act. The FTC's brief explains that declaratory actions by subsequent generic companies (such as Teva) play a vital role in the Hatch-Waxman regime by providing these

## *RECENT ACTIVITIES*

### FTC Antitrust Highlights *(Continued)*

applicants with the opportunity to eliminate bottlenecks that can delay them from obtaining FDA approval to market their product. It then presents a two-pronged argument supporting jurisdiction over Teva's case, stressing the Commission's particular expertise in competition issues concerning the operation of the Hatch-Waxman Act, and specifically citing the issuance of the Commission's Generic Drug Study, issued in July 2002. The brief also discusses the implications of the district court's decision for future suits by subsequent generic applicants. If affirmed, the FTC brief states, the district court's holding would permit the examples of "parking" identified in the Generic Drug Study to delay the entry of generic products, possibly for a matter of years.

- On September 26, 1914, President Woodrow Wilson signed the legislation that established the FTC. Ninety years later, on September 22-23, 2004, the FTC will host a public symposium in celebration of its 90th anniversary. The symposium will be held in the Conference Center at the Commission's 601 New Jersey Ave., NW, building, and will feature panel discussions covering a broad range of topics relevant to the Commission's history and the implications for the future. A detailed agenda of the panel topics and speakers will be posted on the Commission's Web site in the near future. The Commission also is planning a dinner celebration for the evening of Wednesday, September 22. The keynote speaker at the dinner will be the Honorable Richard A. Posner, a judge for the U.S. Court of Appeals for the Seventh Circuit and FTC alumnus.

*For more information on any of these activities, please contact Robert W. Doyle, Jr. at (202) 218-0030 or rdoyle@sheppardmullin.com.*

### FTC CONSUMER PROTECTION HIGHLIGHTS

- On April 29, the Bureau of Consumer Protection announced its first two enforcement efforts under the Controlling the Assault of Non-Solicited Pornography and Marketing Act, or the CAN-SPAM Act. The Act went into effect on January 1, 2004 and prohibits, among other things, the use of practices which disguise the origins of "spam" emails. In conjunction with the U.S. Attorney's Office in Detroit and the U.S. Postal Inspection Service, the FTC filed a complaint against Detroit-based Phoenix Avatar and four principals, which alleged that the defendants sold bogus "diet" patches and used "spoofing" techniques, which involved using the email addresses of innocent third parties in the "from" or "reply to" fields. The FTC also filed a complaint against Global Web Promotions, a spam enterprise operating in Australia and New Zealand. The FTC's complaint in that case alleges that Global Web Promotions and associated individual defendants sent hundreds of thousands of "spam" emails to U.S. consumers advertising diet patches, also using "spoofing" techniques.

- On April 27, the FTC announced its Hispanic Law Enforcement and Outreach Initiative, designed to address the growing problem of deceptive advertising aimed at Spanish-speaking consumers. The agency announced seven actions against various defendants that were alleged to have targeted primarily Hispanic audiences. The actions involved alleged claims relating to unsubstantiated dietary supplements claims, work-at-home business opportunities, and bogus international driver's permits among other charges.

## Recent Activities

### FTC Consumer Protection Highlights *(Continued)*

- On April 20, the FTC voted unanimously to deny the petition for rulemaking proceedings relating to procedures employed by the agency to investigate health-related claims used to market dietary supplements. The First Amendment Health Freedom Association, a coalition of manufacturers and consumers of dietary supplements, petitioned the agency to hold proceedings relating to certain aspects of the FTC investigatory process. The coalition was interested in the following subjects: 1) evaluations of scientific evidence prior to initiating the investigation, the identification of specific advertising content claimed to be misleading, 2) grounds for the staff's belief that the substantiation is inadequate, 3) the use of warning letters to advertisers as a primary enforcement mechanism as opposed to the issuance of civil investigative demands or access letters (which are generally used to initiate formal investigations).

- On April 16, the FTC announced a final order that bans six major New York and New Jersey-based telemarketing companies and their principals from further violations of the Telemarketing Sales Rule. The agency charged the defendants with defrauding thousands of consumers nationwide by pitching bogus "pre-approved" advance-fee credit cards through postcard mailers and inbound telemarketing calls. The FTC alleged that the defendants failed to disclose to consumers minimum credit-related requirements before receiving a card. The complaint also alleged that consumers who did eventually receive credit card packages usually received packages with additional fees, higher interest rates, and low credit limits. The United States District Court for the Eastern District of New York's final order requires the defendants to pay almost $11.8 million in consumer redress and court costs.

- The FTC also announced on April 16 that the agency will seek public comment on a proposed rule regarding the proper disposal of consumer report information under the Fair and Accurate Credit Transactions Act ("FACTA") and the Fair Credit Reporting Act ("FCRA"). FACTA is a recent amendment to the FCRA that directs the FTC and other federal regulatory agencies to coordinate in adopting comparable and consistent rules regarding the disposal of sensitive consumer information. The agency is specifically interested in comments regarding the costs and benefits of the proposed standard for maintenance of the information, and any other alternative standards. The proposed rule requires the person maintaining the records to use "reasonable measures" to safeguard the information. Comments on the proposed rule must be received on or before June 15, 2004.

- On April 13, the agency announced the adoption of a final rule that requires "spam" email containing sexually explicit content to be identified in the subject line of the email. According to the rule, which goes into effect on May 13 (one month after the announcement), these emails must specifically contain the phrase "sexually explicit" in the subject line. This regulation is promulgated pursuant to the requirements of the CAN-SPAM Act.

*For more information on any of these activities, please contact June Casalmir at (202) 218-0027 or jcasalmir@sheppardmullin.com*

# RECENT ACTIVITIES

## INTERNATIONAL ANTITRUST HIGHLIGHTS

- On April 15, the European Commission ("EC") suspended its antitrust investigation into Oracle's proposed $9.4 billion hostile take over bid of PeopleSoft Inc. The EC said its investigation could not go forward because Oracle had failed to provide vital information. This is the second suspension of the Oracle-PeopleSoft case by the European Union ("EU") executive body in 2004. EC Spokesman Tilman Lueder stated the suspension would last until the information that the company had promised was delivered. Based on EU law, the EC, unlike U.S. antitrust authorities, must make a ruling within four months of a decision to launch a second stage probe into a proposed merger. However, the EC also has the power to stop the clock on an investigation. In this case, the EC suspended the review because it requested information dealing with issues on Oracle's market position in software dealing with human resources and financial management, but has not yet received the information.

- The EC announced on April 14 it had accepted the divestiture proposals submitted by AB Volvo ("Volvo") that had been mandated by the EC when it approved Volvo's acquisition of the truck division of Renault Véhicules Industriels in September 2000. The acquisition was approved subject to a number of conditions that were designed to prevent the creation of dominant positions in the truck and bus markets. One of the conditions was the divestment of Volvo's stake in AB Scania ("Scania") by a date agreed with the EC. To fulfill that condition, Volvo announced it would sell its Scania B-shares to Deutsche Bank. Volvo also stated it would sell its Scania A-shares, which carry most voting rights, to Volvo's shareholders, provided a number of conditions were fulfilled.

- The EC approved new antitrust rules on April 7 that will give companies more freedom to devise technology transfer patent and software licensing agreements. The new rules replace a 1996 regulation that left companies reluctant to allow licensing for fear of violating antitrust rules. The EU hopes to surpass the United States by 2010 as the leading knowledge-based economy in the world. The new EU licensing regulation, effective May 1, allows companies to license with a competitor, provided the two do not control 20 percent of a market. The threshold for noncompetitors is 30 percent.

- On April 2, Philip Lowe, the director-general for competition at the EC announced that its decision last month to impose a record fine on Microsoft Corp. for allegedly abusing its market dominance in computer operating systems was entirely consistent with rules set by the World Trade Organization ("WTO") aimed at protecting intellectual property rights. U.S. Trade Representative Robert B. Zoellick raised the issue with European Trade Commissioner Pascal Lamy, suggesting that an adverse decision against Microsoft could contravene the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). In the end, however, before it announce d its decision, the EC determined that fining Microsoft 497 million euros (about $606 million) would not be a violation of TRIPS.

- Senators Mike DeWine (R-Ohio) and Herb Kohl (D-Wisconsin), chairman and ranking member, respectively, of the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights introduced a bill in the Senate on April 1 that would permit the DOJ and the FTC to bring action against the Organization of Petroleum Exporting Countries ("OPEC") for colluding with other countries to fix the price of oil. The bill comes in the wake of a March 31 decision by OPEC to cut world output of petroleum supplies by 1 million barrels per day beginning April 1.

# Recent Activities

## International Antitrust Highlights *(Continued)*

OPEC is an international organization of 11 countries that are all net exporters of oil, including Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates, and Venezuela. These member countries collectively supply about 40 percent of the world's oil output, and possess more than three-quarters of the world's total proven crude oil reserves.

*For more information on any of these activities, please contact Camelia Mazard at (202) 218-0028 or cmazard@sheppardmullin.com.*

## FCC ANTITRUST HIGHLIGHTS

- On May 3, two top U.S. consumer groups urged FCC regulators to block Cingular Wireless Corporation's ("Cingular") proposed purchase of AT&T Wireless Services, Inc. ("AT&T Wireless"), citing concerns that it would lead to higher prices and poor service. Consumers Union and the Consumer Federation of America petitioned the FCC to prevent the combination on the grounds that it would cut competition and consolidate too much valuable spectrum in a single company. "This merger proposes an unacceptable level of concentration at the national level, clearly in violation of the merger guidelines," states the petition, which will determine the merger outcome. "But the anti-competitive effects this merger will have on local markets is of even greater concern." AT&T Wireless and Cingular had filed a series of applications pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended. In these applications, they seek Commission approval of the transfer of control of licenses and authorizations held by AT&T Wireless and its subsidiaries to Cingular. This transfer of control will take place as a result of a proposed merger whereby AT&T Wireless will become an indirect, wholly-owned subsidiary of Cingular. Additionally, various entities in which AT&T Wireless holds non-controlling interests have filed applications for *pro forma* transfers of control.

- Consumer groups want new cable-ownership limits before the FCC gives any consideration to the purchase of Adelphia Communications Corp. ("Adelphia") by either Comcast Corp. ("Comcast") or Time Warner Inc. ("Time Warner"). A federal court struck down FCC cable ownership in March 2001, but the agency has failed to adopt new limits, despite public pressure to do so from the Consumers Union and the Consumer Federation of America. With Adelphia potentially in play, the groups want FCC rules in place to guide the legality of any deal involving Comcast, the largest cable company, with about 22 million wholly owned subscribers, or Time Warner, which had 10.9 million subscribers as of August 2003. "We ask that you direct the staff not to process any request for permission to acquire new cable systems from Comcast and Time Warner," lawyers for the groups said in a letter to FCC chairman Michael Powell on April 30. Moreover, the letter complained that the FCC's failure to adopt rules by now was "unconscionable". The FCC's rules voided by the court limited one cable company to 30% of all pay TV subscribers. Another rule tossed out required cable operators to reserve 40% of their first 75 channels for unaffiliated programmers. In an April 16 filing, Comcast informed the FCC that under agency rules that take into account both full and partial ownership interests, the company served 26.2 million subscribers, or 28.9% of all pay TV subscribers.

## Recent Activities

### FCC Antitrust Highlights *(Continued)*

- On April 28, Comcast announced that it would withdraw its $59.9 billion bid for The Walt Disney Corp. ("Disney"). Comcast's decision comes less than three months after launching its bid on February 11, in which the company proposed to exchange 0.78 Comcast shares for every Disney share. As Disney stock rose on speculation that other potential suitors would enter the picture, the deal quickly became unattractive to its shareholders. Disney's Board officially rejected the bid as too low less than one week later. According to Comcast CEO Brian Roberts, the decline in the company's stock and the subsequent rise in Disney shares would have meant giving up substantially more Comcast shares than was prudent. "Having discipline means knowing when it's time to walk away," Roberts said. "That time is now." He added that it is unlikely that Comcast would be willing to go back to the negotiating table. "We're moving on," Roberts said. "Today was the time to withdraw, in our best judgment." Analysts had speculated for months that Comcast would drop the Disney bid. Disney may have accelerated the process by issuing a statement on April 27 reiterating its confidence in CEO Michael Eisner. Turmoil surrounding Eisner's leadership of the company spurred Comcast's bid in the first place. Opting out of a Disney bid could open the door for Comcast to pursue Adelphia, which said last week that it would explore options for a sale. On a conference call with analysts, Roberts said pursuing Adelphia is a possibility. "I suspect we'll look at those," he said on the conference call. "A number of their systems fit our footprint."

- On April 13, the U.S. Court of Appeals for the District of Columbia Circuit stayed its decision to overturn key portions of the FCC's local telephone rule for an additional 45 days, as requested by both parties (*USTA v. FCC*, D.C. Cir., No. 00-1012, *stay granted* 4/13/04). As a result, the court's decision will extend until June 15. The purpose of the stay is to give competitive local exchange carriers time to negotiate commercial agreements for access to the regional Bell operating companies' networks. While the stay does not affect the Commission's ability to seek *certiorari* with the Supreme Court, the solicitor general has not yet said whether he will pursue that course. A majority of the Commission supports an appeal, but FCC Chairman Michael Powell does not. On March 2, the appeals court overturned the portions of the Commission's so-called "triennial review" order requiring the Bell companies to provide unbundled access to their network elements at wholesale prices. The court stayed its own order for 60 days to give the FCC time to write new rules. The United States Telecom Association ("USTA") filed a separate petition April 9 with the court to consent to the 45-day stay. However, USTA said it only supported the stay for the purposes of negotiations, and would oppose any request to stay the court's mandate for the duration of a Supreme Court review. If carriers do not reach commercial agreements by June 17, USTA would urge the court to put its mandate into effect so that the FCC would be forced to write new rules. Although most of the Bell companies have extended open offers to the competitors in their regions, just one deal has been made public to date. SBC Communications announced it had reached agreement with Sage Telecom, one of the largest competitors in its region. Trade associations representing competitive local exchange carriers have called for transparency in the negotiations.

*For more information on any of these activities, please contact Olev Jaakson at (202) 218-0021 or ojaakson@sheppardmullin.com*

## Antitrust Attorneys

***Del Mar***
(858) 729-9000
Pamela J. Naughton
Elizabeth Balfour

***Los Angeles***
(213) 620-1780
James J. Burgess
Suzanne B. Drennon
Frank Falzetta
David R. Garcia
Andrea Hasegawa
Don T. Hibner, Jr.
Jane R. Langdell
Kathyleen A. O'Brien
Mark Riera
Michelle Sherman
Carlton A. Varner

***Orange County***
(714) 513-5100
Finley L. Taylor

***San Diego***
(619) 338-6500
James J. Mittermiller
Robert D. Rose
Timothy B. Taylor
Frank Polek

***San Francisco***
(415) 434-9100
Edward C. Duckers
Gary L. Halling
James L. McGinnis
Thomas D. Nevins
Michael Scarborough
David D. Sohn
Mona Solouki

***Washington D.C.***
(202) 218-0000
Andre P. Barlow
M. June Casalmir
Robert M. Disch
Robert W. Doyle, Jr.
John R. Fornaciari
M. Roy Goldberg
Robert L. Magielnicki
Camelia C. Mazard

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*For further information, please contact:*

Sheppard, Mullin, Richter & Hampton LLP

Antitrust and Trade Regulation Practice Group

Robert W. Doyle, Jr. at 202.218.0030 or rdoyle@sheppardmullin.com

*www.sheppardmullin.com*