

Sherman Act Section 1 Newsletter

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Editor's Note

Eric Sacks, Chicago, IL

I am pleased to present this spring's Sherman Act Section 1 Committee newsletter. I believe that the contributing authors have supplied material that will be very helpful to the Section 1 practitioner.

We have multiple articles on post-*Twombly* cases, tying, and class certification matters. **Twombly.** Since the Supreme Court's decision in *Bell Atlantic v. Twombly*, many have wondered how that decision will bear on future cases. Several have now been decided. Contributing authors Stacey Slaughter, Chad Doellinger, and Vadim Brusser each have written an article discussing the effect of *Twombly* on certain cases. Together, those three articles should provide helpful guidance on the "new" Rule 8 pleading requirements. **Tying.** Year 2007 saw several tying cases be decided. Paul Hoffman, John Schulze, Jr., and Shankar Iyer each have written an article addressing one or more tying decisions. And, Ryan Hurley discusses *Belton v. Comcast Cable Holdings*, in which the California Court of Appeal addressed tying law under California law. Those articles are a terrific means of staying current on that area of the law. **Class Actions.** 2007 also saw several class action certification decisions. Each of Helen Cho Eckert, Allyson Maltas, W. Joseph Bruckner and Elizabeth Odette, and Marguerite Sullivan have written a piece addressing certain of those developments.

In addition to the several subjects discussed above, the contributing authors have summarized several interesting decisions from the federal and state courts. **The U.S. Courts of Appeal.** John Eklund has written on the Fifth Circuit's decision in *Tunica Web Advertising v. Tunica Casino Operators Association*, in which the Court of Appeals upheld a per se theory in a boycott case. Together, Caterina Nelson and Ian Conner have addressed the Eighth Circuit's decision in *Craftsmen Limousine v. Ford Motor Company*, in which the Court of Appeals rejected a plaintiff's conspiracy claim. Kristen McAhren has written on the Fourth Circuit's recent decision addressing the arbitration of antitrust claims, *In re Cotton Yarn Antitrust Litigation*, an article that summarizes the law in that developing area. (continued on page 2)

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The Sherman Act Section 1 Committee maintains a listserv to keep members informed of breaking developments in Sherman Act Section 1 law. You may join by going to the ABA's website, or go directly to www.abanet.org/scripts/listcommands.sp?parm=subscribe/at-S1 and follow the instructions there.

Chair's Report

Lynda Marshall, Washington, DC

Welcome to the Spring 2008 edition of the Sherman Act Section 1 Committee newsletter. I hope that you find it as useful and enjoyable as I did. A big thanks to the editorial staff and talented authors who worked so hard on pulling this issue together – you did a great job!

Sherman Act Section 1 continues to be in the forefront of jurisprudence this year as courts, regulators and practitioners grapple with the application of the Supreme Court's decisions in *Bell Atlantic vs. Twombly* and *Leegin Creative Leather Products v. PSKS, Inc.* This issue contains excellent articles examining the effects of both decisions, and the Committee is devoting its Spring Meeting program to the practical aspects of the latter decision. The program, entitled, "Counseling Clients after Leegin – Proceed with Caution" – will be extremely interesting and I encourage you to attend. In addition, the regulatory agencies continue to focus on cartel enforcement (aspects of which are discussed in several articles) and class action price-fixing claims remain prevalent. Finally, the rule of reason continues to evolve in a number of settings, including but not limited to tying claims. Altogether a busy year for those who follow Section One jurisprudence.

American Bar Association Section of Antitrust Law

Continuing Legal Education Calendar

Date	Meeting Name/Event	Location	Requested CLE *	Format
03/10/2008 - 03/10/2008	Antitrust Enforcement in the Telecom Sector: Will the FCC, FTC, or DOJ Have Jurisdiction Over Future	Washington, DC	N/A	Teleconference
03/26/2008 - 03/28/2008	Antitrust Law 2008 Spring Meeting	Washington, DC	TBD	Live/In-Person
04/07/2008 - 04/07/2008	March 2008 Consumer Protection Update	N/A	N/A	Teleconference
04/14/2008 - 04/17/2008	International Bar Association ICN Annual Conference		TBD	Live/In-Person
04/27/2008 - 04/30/2008	Inter-Pacific Bar Association 18th Annual Conference		TBD	Live/In-Person
06/04/2008 - 06/05/2008	Antitrust Remedies for Dominant Firm Misconduct Symposium	Charlottesville, VA	TBD	Live/In-Person
08/12/2008 - 08/14/2008	AT Post-Annual Leadership Meeting (by invitation)	New Brunswick; Canada	TBD	Live/In-Person
09/25/2008 - 09/28/2008	Antitrust Masters Course IV	Hot Springs, VA	TBD	Live/In-Person
11/13/2008 - 11/14/2008	2008 Antitrust Fall Forum	Washington, DC	TBD	Live/In-Person
01/10/2009 - 01/12/2009	2009 Antitrust Midwinter Leadership Meeting (by invitation)	Lanai City, HI	TBD	Live/In-Person

* The American Bar Association is an accredited provider of continuing legal education in all states. You can use ABA programs to fulfill MCLE requirements in accordance with your state's rules. Credit hours shown based upon a typical 60-minute state. The MCLE rules vary by state and are subject to review and final approval. Please check your state's rules regarding limitations, approved formats and approved subjects. For more information please visit the [Center for CLE](#). For more information on the programs listed, please contact the Section of Antitrust Law at 312.988.5609 or the home page at www.abanet.org/antitrust.

Editor's Note (continued from page 1)

The U.S. District Courts. Brian Robison and Margaret Boren have together written on the Southern District of New York's decision in *U.S. Information Systems v. International Board of Electric Workers Local Union No. 3*, in which the court granted summary judgment on a price fixing claim. Jeny Maier has summarized another decision by that court, this one dismissing a number of antitrust claims and a patent misuse assertion, *Linzer Products Corporation v. Sekar*. And, Mark Correo has written on a decision by the District of Alaska denying a plaintiff's motion for summary judgment on its per se conspiracy claim. **The State Courts.** Brian Brosnahan has written on the Minnesota Supreme Court's decision in *Lorix v. Crompton Corporation*, in which the Court addressed the State of Minnesota's law on antitrust standing in light of the U.S. Supreme Court's decision in *Associated General Contractors*.

Analysis. We also have three analytical articles. Jeffrey Leon argues his view of *The Evidentiary Role of Antitrust Compliance Policies in Section One Litigation*. Next, Dean Harvey explains his reading of the *Broadcom* and *Rambus* decisions, finding that those decisions provide *New Guidance for Standard Setting Organizations*. And, Karen Sewell explains the *Use of Evidence from European Antitrust Investigations in U.S. Litigation*.

Canada. We also have three articles providing helpful explanations of developments in Canada. Chris Margison has again provided a survey of *Canadian Developments*. And Chris Hersh and Mark Nicholson explain how the United States Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKA* does not give the same protections in Canada that it does in the United States. Last, James Musgrove explains changes in Canada's antitrust immunity programs in his article *Antitrust Immunity in Canada: The Sequel*.

I hope you find this newsletter helpful to your practice and that you will agree with me that our contributors have done an outstanding job. My thanks again to them for their hard work.

Chair's Report (continued from page 1)

The Committee remains active in a variety of ways. A number of you were involved in completing the Committee's contribution to the Annual Review, which is now available for purchase. Thanks very much for all of your efforts. The Committee has two additional book projects underway. The first book, tentatively entitled "Proof of Conspiracy Under Federal Antitrust Laws," is an in-depth examination of the proving conspiracy under Section One of the Sherman Act. The second book, tentatively entitled, "Interlocking Directorates Under Section 8 of the Clayton Act," co-sponsored by the Corporate Counseling Committee, is intended to be a reference handbook on Section 8 of the Clayton Act. We are confident that both books will prove to be useful resources for both antitrust specialists and those that only occasionally deal with the antitrust laws.

In other Section One Committee news, the Committee's website continues to be a source of important information. Let me, any of the vice-chairs or our web editor know if we can post any additional information on the site that would increase its utility. We also are looking for ideas for upcoming brown bags and/or teleseminars. Feel free to email me your thoughts. Indeed, I encourage you to contact any of the Committee leadership if you have an idea or want to get involved. We look forward to hearing from you!

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RECENT DEVELOPMENTS

I. TWOMBLY

What Is Plausible After *Twombly*?

*By Stacey Slaughter,
Robins, Kaplan, Miller & Ciresi L.L.P*

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held that a trade restraint claim under § 1 of the Sherman Act cannot survive a motion to dismiss without “enough factual matter” to provide plausible grounds that an agreement was made. ___ U.S. ___, 127 S.Ct. 1955, 1959 (2007).

The plaintiffs in *Twombly* were a putative class of local telephone and high speed internet services consumers. The plaintiffs alleged that incumbent local exchange carriers (ILECs) engaged in parallel conduct to prevent competitive local exchange carriers (CLECs) from entering the local telephone and high speed internet services market. They also alleged that the ILECs avoided competition with each other in their respective markets. *Id.* at 1958.

The trial court dismissed the complaint, holding that allegations of parallel business conduct alone do not state a Section 1 claim. Citing the *Conley v. Gibson* “no set of facts” rule, the Second Circuit reversed. *Id.* at 1958. On appeal, the Supreme Court reversed and remanded, setting forth the standard for asserting an antitrust conspiracy claim based on allegation of parallel conduct.

The Court held that a party that asserts a Section 1 claim with an allegation that competitors engaged in parallel conduct, without more, does not sufficiently plead an antitrust violation. *Id.* at 1958-59. In reaching this decision, the Court concluded that the *Conley* rule that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” was an “incomplete, negative gloss on an accepted pleading standard.” *Id.* at 1959-60. The Court reasoned that *Conley* merely set forth “the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival” on a motion to dismiss. *Id.* at 1960.

The Court explicitly found that *Conley*’s “no set of facts” language “has earned its retirement” and “is best forgotten.” *Id.* at 1960, 1969. Instead, the Court requires a party to assert “enough factual matter (taken as true) to suggest that an agreement was made.” *Id.* at 1959. These facts must be “suggestive enough to render a § 1 conspiracy plausible.” *Id.* at 1965. The Court reasoned that the need for allegations to plausibly suggest an agreement, not merely be consistent with one, reflects Rule 8(a)(2)’s threshold requirement at the pleading stage that the “‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’” *Id.* at 1959. According to the Court, the threshold requirement is necessary to safeguard against unchecked discovery expense. *Id.* Thus, “a parallel conduct allegation gets the § 1 complaint close to stating a claim, but without further factual enhancement it stops short of the line between possibility and plausibility.” *Id.*

What Is Plausible After *Twombly*?

By Stacey Slaughter
(continued from Page 3)

The Court explicitly cautioned that *Twombly* was “not requiring heightened fact pleading of specifics.” *Id.* at 1960. The Court also referred to its ruling in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 (2002), an employment discrimination case in which it had rejected a heightened pleading standard. The Court explained that the *Twombly* “plausibility” standard “does not impose a probability standard at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Id.* at 1959.

Several courts that have addressed motions to dismiss after the *Twombly* decision have found that plaintiffs’ allegations of an agreement or conspiracy were sufficient to state a claim. For example, in *In re OSB Antitrust Litig.*, 2007 WL 2253419 (E.D. Pa. Aug. 3, 2007), the plaintiffs claimed that the defendants fixed prices in the oriented-strand board market. The plaintiffs alleged that the market was highly concentrated and that the defendants conspired through secret meetings and a price list that was published bi-weekly. *Id.* at *4. Following *Twombly*’s analysis, the court acknowledged that the parallel conduct by itself could have been the defendants’ natural reactions to conditions in the oriented-strand board market. The court concluded, however, that the plaintiffs’ additional allegations that the defendants discussed price fixing at industry events and enforced the agreement through a published price list were sufficient to state a claim under *Twombly*. *Id.* at *6.

Similarly, in *In re Rubber Chemicals Antitrust Litig.*, 504 F.

Supp.2d 777, 2007 WL 2348715, *11 (N.D. Cal. Aug. 15, 2007), the court held that allegations of parallel pricing, which included allegations that certain people were present at trade shows and engaged in meetings about how to fix prices, were sufficient to allege a conspiracy. *Id.* at *11. The plaintiffs alleged that certain individuals were involved in meetings to discuss price fixing and that they then took steps to fix prices and enforce the agreement to do so. *Id.*

Likewise, in *Behrend v. Comcast Corp.*, Nos. 03-6604, 07-218, and 07-219, 2007 WL 2221415 (E.D. Pa. Aug. 1, 2007), the Court declined to grant a motion to dismiss. There, plaintiffs sued Comcast, AT&T Broadband, and others for antitrust violations in the Philadelphia, Chicago, and Boston geographic markets. The court refused to interpret *Twombly* to call for a heightened pleading standard. Rather, the court found that, unlike the complaint in *Twombly*, the complaints at issue alleged facts “sufficient to show an ‘agreement’ was made to impose horizontal market divisions.” Accordingly, the court concluded that plaintiffs sufficiently alleged violations of sections 1 and 2 of the Sherman Act.

Hyland v. Homeservices of America, Inc., No. 3:05-CV-612-R, 2007 WL 2407233 (W.D. Ky. Aug. 1, 2007) reached a similar result. That case involved a claim that Defendants participated in a price-fixing conspiracy to not negotiate brokerage fees with real estate buyers and sellers in Louisville, Kentucky. Contrasting the complaint in *Twombly*, the court found that the plaintiffs’ complaint alleged more than parallel business conduct and “a ‘bare’ assertion of a ‘belief’ of a conspiracy.” The court also refused to interpret *Twombly* to require a more stringent pleading standard.

Even more recently, in *Fair Isaac Corp. et al. v. Equifax Inc. et al.*, the court found the Section 1 claims distinguishable from those alleged in *Twombly*. Civ. No. 06-4112 (D. Minn. Mar. 4, 2008). Quoting *Twombly*, that allegations of parallel conduct in certain market contexts “could very well signify illegal agreement,” the court found that the allegation of a close temporal proximity between the defendants’ agreement to jointly create, own, and control a joint venture and the alleged parallel price manipulation was sufficient to state a plausible claim for a Section 1 violation.

Still other cases have denied motions to dismiss. See, e.g., *Hypodermic Products Antitrust Litig.*, MDL No. 1730, 2007 WL 1959225 (D.N.J. June 29, 2007) (denying motion to dismiss claim by healthcare providers and distributors who sued a medical device manufacturer, alleging that it controlled a dominant share of the relevant market for certain hypodermic products).

In other post-*Twombly* cases, courts have permitted plaintiffs to amend their complaints, even if the original complaints did not meet the *Twombly* pleading standard. See, e.g., *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417, MDL 1826, 2007 WL 2875686 (Sept. 27, 2007); *In re Netflix Antitrust Litig.*, 506 F. Supp.2d 308 (N.D. Cal. 2007). For example, in *In re Graphics Processing Units*, plaintiffs purchased graphics processing units (GPUs), devices that process and display computer graphics, from the defendants. No. C 06-07417, MDL 1826, 2007 WL 2875686, at *1-*2. Plaintiffs alleged that the defendants conspired to fix prices at similar price points and coordinate the release of new products that were similar. *Id.* at *2. The court found that the plaintiffs’ allegations of parallel conduct “could possible be

indicative of a conspiracy but fall short of unusual, lockstep pricing behavior.” *Id.* at *10. The court noted that the plaintiffs had not pleaded that defendants ever met and agreed to fix prices, but rather, only that defendants had the opportunity to do so. *Id.* at *12. Finding that the plaintiffs failed to allege any specifics surrounding the agreement, including which persons from the companies attended or what their titles were, the court granted the motion to dismiss. *9, *12. However, the court permitted the plaintiffs to file motions for limited discovery and for leave to amend, provided that the motions described how they would remedy the problems with the pleadings that the court identified. *Id.* at *21.

Other post-*Twombly* courts have been less forgiving and have dismissed complaints that fail to meet the *Twombly* standard. In *In re Travel Agent Commission Antitrust Litig.*, MDL No. 1561, 2007 WL 3171675 (N.D. Ohio Oct. 29, 2007), plaintiffs alleged that defendants acted in parallel to reduce and eliminate travel commissions. In light of *Twombly*, the court first permitted plaintiffs to file an amended complaint. But in evaluating the amended complaint, the court found that plaintiffs failed to put forth facts that defendants engaged in parallel conduct and dismissed the complaint. More recently, the Northern District of California dismissed Section 1 conspiracy claims. See *In re Late Fee and Over-Limit Fee Litig.*, No. C 07-0634, 2007 WL 4106353 (N.D. Cal. Nov. 16, 2007). There, the plaintiffs were credit card holders who sued the defendants, credit card issuing banks, alleging that the defendants conspired to fix and maintain a price floor for credit card late and over-limit fees. *Id.* at *1. Defendants moved to dismiss. *Id.* The court granted the motion, holding that the plaintiffs failed to state a § 1 claim. *Id.* at *6. The court reasoned that the plaintiffs did not identify any actual agreements among the defendants or any details as to “when, where, or by whom this alleged agreement

was reached.” *Id.* at *6-*7. Rather, the complaint only contained conclusory allegations that defendants agreed to increase fees. *Id.* at *7. The court noted that defendants’ alleged “lockstep pricing” of late fees, without more, did not suggest a *preceding* agreement to fix prices. *Id.* at *6. The complaint alleged that a competitive business response to common perceptions about the market may have prompted unilateral actions by the banks. The court noted that this allegation provided an equally plausible and lawful reason for the parallel conduct. *Id.* at *7. The court dismissed the complaint without prejudice. *Id.* at *11. See also *In re Elevator Antitrust Litig.*, 502 F.3d 47, 2007 WL 2471805 (2d. Cir. 2007) (affirming dismissal of Section 1 claim when bare allegation of parallel pricing could suggest competition at least as plausibly as anticompetitive conspiracy).

Courts have also applied *Twombly* to dismiss antitrust cases when the plaintiff failed to state a sufficient antitrust injury. See *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117 (2d. Cir. 2007); *Norris v. Hearst Trust*, 500 F.3d 454 (5th Cir. 2007); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007); see also *Trans World Technologies, Inc. v. Raytheon Co.*, No. 06-5012, 2007 WL 3243941 (Nov. 1, 2007) (granting in part and denying in part the motion to dismiss, and granting motion to dismiss with respect to plaintiff’s claim of antitrust injury).

The *Twombly* standard does not appear to be limited to antitrust cases. See, e.g., *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007). In *Iqbal*, a Muslim Pakistani pretrial detainee sued government officials, claiming that they engaged in unconstitutional conduct against him while he was confined in a U.S. detention center after 9/11. *Id.* at 147. Defendants moved to dismiss, and the court denied the motion in part. The defendants appealed. The Second Circuit applied *Twombly* outside

antitrust law, and concluded that the Supreme Court was “not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where amplification is needed to render the claim *plausible*.” *Id.* at 157-58. Based on that reading of *Twombly*, the Second Circuit affirmed denial of the defendant’s motion to dismiss, except for the violation of procedural due process claim.

In the end, the *Twombly* plausibility standard may be no more illuminating than the *Conley v. Gibson* “no set of facts” rule that came before it. As a practical matter, antitrust lawyers and other litigators who plead a cause of action must still allege facts sufficient to state a claim for relief and have a good faith basis for doing so. What has become clear after *Twombly*, however, is that courts do not necessarily apply a heightened pleading standard. Instead, they consider whether a claim is plausible based on *what* facts the plaintiffs allege in the complaint, not the facts that might have been pleaded.

Recent Decisions in the DRAM Litigation: Ignoring *Twombly*

By Chad J. Doellinger,¹
Eimer Stahl Klevorn & Solberg LLP

The *In re Dynamic Random Access Memory* (“DRAM”) litigation is well-known to most antitrust lawyers. Various plaintiffs, including most states, have filed suits alleging a horizontal price-fixing conspiracy in the United States’ DRAM market. The plaintiffs made claims under both federal and state antitrust provision. Recently, a pair of district court decisions authored by District Court Judge Phyllis J.

¹ Chad J. Doellinger is an attorney with the firm of Eimer Stahl Klevorn & Solberg LLP. The views expressed here should not be imputed to his law firm or its clients.

Hamilton substantially narrowed plaintiffs' claims by dismissing portions of plaintiffs' claims. See *In re DRAM Antitrust Litigation*, No. M 02-1486 PJH, 2007 U.S. Dist. LEXIS 67948 (N.D. Cal. Aug. 31, 2007); *State of California v. Infineon Technologies AG*, No. C 06-4333 PJH, 2007 U.S. Dist. LEXIS 67475 (N.D. Cal. Aug. 31, 2007). The decisions are full of complex legal arguments on numerous issues. In particular, the courts treatment of the Supreme Court's recent holding in *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955 (2007), is worthy of a deeper examination.

In *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), the Supreme Court specified the pleading standard to be used in antitrust conspiracy cases. Judge Hamilton recognized this change and examined *Twombly* in detail. Judge Hamilton summarized this standard in both opinions:

In order to survive a dismissal motion, however, a plaintiff must allege facts that are enough to raise his/her right to relief 'above the speculative level.' [] While the complaint 'does not need detailed factual allegations,' it is nonetheless 'a plaintiffs [sic] obligation to provide the 'grounds' of his 'entitlement to relief' [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. In short, a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face,' not just conceivable.

2007 U.S. Dist. 67948 at *5 – 6; 2007 (quoting *Twombly*); U.S. Dist 67475 at *18 – 19 (quoting *Twombly*).

In spite of this clear acknowledgment, the Court failed to evaluate plaintiffs' allegations of violation of state antitrust law

under this rubric. The Erie Doctrine long ago mandated that a federal court apply federal procedural law when evaluating a state cause of action. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Because the Federal Rules of Civil Procedure relating to pleadings are procedural in nature, the Erie Doctrine requires their application.² The pleading standard in Rule 8 of the Federal Rules of Civil Procedure—as interpreted by the Supreme Court in *Twombly*—falls within this mandate. Yet, rather than applying *Twombly*, the district court curiously deferred to the pleading requirements of each state at issue.

The first decision involved assessing whether or not the State of New York, as plaintiff, had sufficiently alleged an antitrust cause of action to survive defendants' motion to dismiss. The State of New York alleged injury to New York residents, businesses, schools, and government entities.

As a threshold matter, defendants sought dismissal of New York's Sherman Act claims to the extent New York sought to recover on behalf of indirect purchasers. The Court granted defendant's motion to dismiss as to that issue, dismissing New York's claim to the extent they were brought on behalf of indirect purchasers, as required by *Illinois*

² See, e.g., *Harris Technical Sales, Inc. v. Eagle Test Systems, Inc.*, No. CIV 06-2471-PHX-RCB, 2007 WL 1888865, at *3 (D. Ariz. June 29, 2007) (holding that "[f]or the purposes of *Erie*, pleading standards are considered procedural" and "[w]here state law directly conflicts with applicable rules of the Federal Rules of Civil Procedure, federal courts must apply the Federal Rules—not state law") (citations omitted). See also *Luttrell v. O'Connor Chevrolet, Inc.*, No. 01 C 979, 2001 WL 1105125, at *5 (N.D. Ill. Sept. 19, 2001) ("Because federal notice pleading standards are procedural rules, they apply to Plaintiff's pendent state law claims under the Erie doctrine.")

Brick Co. v. Illinois, 431 U.S. 720 (1977).³

The defendants next argued that the remaining "direct purchaser" antitrust claims must be dismissed because the State of New York may not sue on behalf of unnamed government entities. In response to this argument, plaintiff contended that (1) the claims had been validly assigned to it; and (2) New York statutory authority conferred standing.

Although New York argued that antitrust claims were assigned to it by the various government agencies, the court disagreed. First, it held that New York could find no legal authority "establishing that assignment of a federal antitrust claim from government entities to the State of New York confers standing on plaintiff to bring a representative suit for damages under the Clayton Act." See 2007 U.S. Dist. LEXIS 67948 at *13. Regardless, the Court explained that the argument was flawed on its face because the assignments—to the extent they occurred—were between the OEMs and the State of New York and not the government entities on whose behalf New York purported to bring suit. See 2007 U.S. Dist. LEXIS 67948 at *14. Notably, the court relied on a pleadings failure, namely that "plaintiff nowhere alleges that the government entities were themselves ever assigned any direct purchaser claims by the OEMs, let alone that the government entities in turn assigned those claims to plaintiff State of New York." *Id.* at *15.

Next, plaintiff pointed to New York's Donnelly Act N.Y. Gen. Bus. Law §§ 340 – 347 *et seq.* to provide statutory authority for its claims.⁴ Notably, the plain

³ Curiously, the court mentioned only in a footnote New York's response, namely that direct purchaser status was conveyed to the "indirect" purchasers via an assignment or pursuant to the "control exception" to *Illinois Brick*.

⁴ Plaintiff also relied on N.Y. Executive Law §§ 63(1) and 63-c(1). That position was rejected by the court as being facially inconsistent with the

language of the Donnelly Act does give the state the right to sue “on behalf of any political subdivision or public authority of the state . . . to recover damages provided for by federal law for violations of the federal antitrust laws.” *Id.* at *15 – 16 (citing N.Y. Gen. Bus. Law § 342-b). In other words, New York was correct insofar as the Donnelly Act confers such authority “upon the request of such political subdivision or public authority.” *Id.*

The court nevertheless dismissed New York’s claim for yet another pleading deficiency, finding that New York failed “to allege either that the government entities in question requested that plaintiff bring suit on their behalf, or to name or identify the government entities in question.” *Id.* at *17. The Court granted New York leave to amend, but required allegations of specific facts to survive: “[G]iven the general ambiguity in plaintiff’s complaint as to the specific entities on whose behalf plaintiff brings suit, and the direct or indirect nature of those entities’ DRAM purchasers, plaintiff must allege in any future amendment, the nature of the purchases made by specific government entities.” *Id.* at *19.

The Court made no mention of *Twombly* or its requirements. Instead, the analysis apparently took place under New York’s fact pleading standard, which requires statements of fact “sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action.” N.Y. Civ. Prac. L. & R. § 3013 (McKinney 1974). In short, other than paying lip-service to *Twombly* in discussing the legal standard, the Court did not mention this controlling standard or attempt to apply it.⁵

plain language of the code. See 2007 U.S. Dist. 67948 at *17 – 18.

⁵ Whether or not *Twombly* would alter the outcome or not is inapposite. Curiously, the Court made no mention of the Erie Doctrine and did not

The second decision fared no better with respect to its application of *Twombly*. Although defendants moved to dismiss various counts of the complaint under a wide array of legal theories, the court’s treatment regarding plaintiffs’ purported pleading failures of its state law claims is again noteworthy.

Defendants moved to dismiss the claims brought by several states for failure to sufficiently allege the existence of intra-state activity in connection with each plaintiff’s state antitrust claim. In other words, defendants argued that plaintiffs’ pleadings were insufficient. The analysis of these purported deficiencies should have been uniform regardless of the state statute the court was examining, with the *Twombly* decision providing the analytical framework. Instead, the Court evaluated the sufficiency of the pleadings under each state’s antitrust laws. Under this piecemeal approach, the court granted defendants motion to dismiss with respect to Maryland,⁶ Mississippi,⁷ and Tennessee,⁸ and denied it with respect to Wisconsin.⁹

The difficulty with the decision is not the outcomes; it is that the court did not apply *Twombly* and thus ignored the Erie Doctrine instead deferring to state law pleading requirements. Indeed, the law is clear and well-settled that a federal court must apply the federal pleading standard when evaluating state law claims.¹⁰ The

attempt to articulate why it was applying state, rather than federal, pleading requirements.

⁶ See 2007 U.S. Dist. Lexis 67475 at *91 – 96.

⁷ See *id.* at *96 – 101.

⁸ See *id.* at *101 – 106.

⁹ See *id.* at *105 – 108.

¹⁰ “[I]t no longer can be doubted that the rules regarding the standard of specificity to be applied to federal pleadings, the pleadings allowed in the federal courts, the form of the pleadings, the special requirements for pleading certain matters, the allocation of the burden of pleading among the parties, and the signing of pleadings by an attorney of record or an

court disregarded this foundational principle.

For instance, in determining that plaintiffs had failed to allege a cause of action under Tennessee’s antitrust laws, the court relied upon a Tennessee state court decision, *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512 (Tenn. 2005). Yet the pleading standard in Tennessee is not identical to that in the Federal Rules. Although Tennessee is a notice pleading jurisdiction, its rules require that a violation of a statute be put forth with some specificity:

Every pleading stating a claim or defense relying upon the violation of a statute shall, in a separate count or paragraph, either specifically refer to the statute or state all of the facts necessary to constitute such breach so that the other party can be duly apprised of the statutory violation charged. The substance of any ordinance or regulation relied upon for claim or defense shall be stated in a separate count or paragraph and the ordinance or regulation shall be clearly identified. The manner in which violation of any statute, ordinance or regulation is claimed shall be set forth.

Tenn. R. Civ. P. 8.05.¹¹ The Tennessee Supreme Court was certainly mindful of this standard when it decided *Freeman*. By dismissing Plaintiffs’ claims for failure to allege facts sufficient under *Freeman* (rather than *Twombly*), the district court

unrepresented party, all are governed by the federal rules and not by the practice of the courts in the state in which the federal court happens to be sitting.” See *generally* 5 Fed. Prac. & Proc. § 1204 (citing numerous supporting decisions).

¹¹ The Federal Rules of Civil Procedure contain no analogous provision.

disregarded the controlling federal pleading standard.

Moreover, the court denied the motion to dismiss with respect to Wisconsin, relying on *Meyers v. Bayer AG*, 735 N.W.2d 448 (Wis. 2007). In *Meyers*, the Wisconsin Supreme Court rejected any heightened pleading requirement for antitrust claims. Indeed, the court made clear that only notice pleading was required, and that “[t]here is no exception to this rule for actions under the Wisconsin Antitrust Act.” 735 N.W.2d at 460-61. All that was required under Wisconsin law were the bald allegations that defendants unlawfully conspired in a manner that substantially affected the people of Wisconsin. Because such allegations like that were made, the Wisconsin claim was sufficient to survive dismissal. But, contrary to the holding in *Meyers*, the federal courts require something more. Indeed, in *Twombly*, the Supreme Court “retire[d]” the prevailing, broad reading of notice pleading under *Conley v. Gibson*, 78 S. Ct. 99 (1957), and made clear that, plaintiffs must do more than make a “wholly conclusory statement of the claim.” *Twombly*, 127 S. Ct. at 1968-69. The district court thus applied the wrong pleading standard. The court provided no reason why it abandoned the dictates of *Twombly* when evaluating the sufficiency of the pleadings and instead deferred to state law claims.¹²

In the end, the two DRAM decisions are driven, in large part, by confusion over the applicability of *Twombly*. Of issue is the failure to apply the uniform pleading standard mandated by the Supreme Court in *Twombly*. In so

¹² Where a federal pleading standard is more stringent than the state standard (e.g., Rule 9(b)), a federal court is compelled to apply the heightened standard and dismiss the state claim. See, e.g., *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (rejecting plaintiff’s argument that “we should refuse to apply Rule 9(b) to his state-law causes of action in this diversity case”).

doing, the district court added layers of unnecessary complexity to an already massive and complex dispute. Moreover, the resulting inconsistency—with similar claims under different state laws being held to different pleading standards—undermines the efficiency considerations that drove *Twombly* and encourages the type of forum shopping antithetical to the Erie Doctrine.

Independent Action - Inferring an Antitrust Conspiracy

*By Vadim M. Brusser,
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The central analysis of antitrust conspiracy claims based on inferred agreements usually depends on whether parallel actions by the alleged conspirators were based on independent-decision making. The examination of inferred conspiracy claims has been affected by the Supreme Court’s recent *Twombly*¹³ decision, which has heightened conspiracy pleading standards by requiring sufficient facts to make the existence of an inferred agreement “plausible.” Before *Twombly*, most inferred conspiracy cases were typically decided at the summary judgment stage, but *Twombly* will increase the number of inferred agreement cases decided at the motion to dismiss stage. This article discusses several post-*Twombly* inferred conspiracy cases and several recent decisions that scrutinize inferred conspiracy claims outside of the *Twombly* context.

In *In re Elevator Antitrust Litigation*,¹⁴ the Second Circuit considered whether post-*Twombly*, a putative class of plaintiffs had provided sufficient facts to infer a conspiracy and to survive a motion to dismiss. Plaintiffs alleged that that a group of elevator manufacturers had conspired to fix the prices of elevators and elevator-related services. Plaintiffs’ claim was based on

¹³ 127 S. Ct 1955 (2007).

¹⁴ 502 F. 3d 47 (2d. Cir. 2007).

certain parallel conduct by the defendants and on a price-fixing investigation of the defendants by European antitrust authorities.¹⁵ Plaintiffs’ complaint also alleged anticompetitive agreements between defendants at “some unidentified place and time.”¹⁶

The Second Circuit affirmed the district court’s dismissal of plaintiffs’ conspiracy claim. The court analyzed plaintiffs’ claim under *Twombly*, which established that a sufficient conspiracy claim must provide “plausible grounds to infer an agreement.”¹⁷ The court first addressed plaintiffs’ general claim that defendants had entered into multiple anticompetitive agreements. The court immediately rejected these claims and stated that “the list is in entirely general terms without any specification of any particular activities by a particular defendant.”¹⁸ After *Twombly*, such “conclusory allegations of agreement” were insufficient to state a valid claim.¹⁹

The court analyzed the plaintiffs’ allegations that defendants’ parallel conduct was adequate to state an inferred conspiracy claim. Specifically, plaintiffs argued that “similarities in contractual language, pricing, and equipment design” were enough to survive the motion to dismiss.²⁰ Again citing *Twombly*, the court disagreed and explained that although an allegation of parallel conduct may come “close to stating a claim,” the plaintiffs needed further factual support to reach the requisite level of “plausibility.”²¹

Finally, the court rejected plaintiffs’ argument that the investigation of defendants by European antitrust authorities was sufficient to state a conspiracy

¹⁵ *Id.* at *3-*4.

¹⁶ *Id.*

¹⁷ *Id.* at *2 (citing *Twombly*, 127 S.Ct. at 1965).

¹⁸ *Id.* (citing the district court’s decision).

¹⁹ *Id.* (quoting *Twombly* at 1966).

²⁰ *Id.* at *3.

²¹ *Id.*

claim.²² Although plaintiffs' complaint had claimed a "global market" for elevators, it failed to allege any facts connecting the European and U.S. elevator markets.²³ The court concluded that because the plaintiffs had not introduced evidence "linking transactions in Europe to transactions and effects [in the United States], plaintiffs' conclusory allegations do not 'nudge their claims across the line from conceivable to plausible.'"²⁴

In *Schafer v. State Farm Fire and Casualty Co.*,²⁵ the District Court for the Eastern District of Louisiana addressed the pleading requirements for an inferred-conspiracy claim. In *Schafer*, a putative class of plaintiff insureds alleged that a group of insurance companies conspired to limit the payout of insurance benefits to plaintiffs by agreeing to use the same benefit calculation software, Xactimate.²⁶ Plaintiffs alleged that Xactimate used below market prices to calculate benefits and that by agreeing to use the software, defendants depressed the size of insurance benefits paid.²⁷ Plaintiffs' claim relied almost exclusively on defendants' parallel use of the Xactimate software.²⁸

The court dismissed the conspiracy claims under the *Twombly* standard because the plaintiffs failed to allege any additional facts to infer the existence of an agreement. The fact that all defendants used Xactimate was unpersuasive as each defendant had independent incentive to use the Xactimate software because it calculated lower payouts than alternative software.²⁹ Without other facts, there was nothing to "plausibly suggest the conduct was anything other than unilateral."³⁰

²² *Id.*

²³ *Id.*

²⁴ *Id.* (quoting *Twombly* at 1974).

²⁵ 507 F. Supp. 2d 587 (E.D.La. 2007).

²⁶ *Id.* at 592.

²⁷ *Id.* at 592-93.

²⁸ *Id.* at 596-97.

²⁹ *Id.*

³⁰ *Id.* at 598.

In *Cosmetic Gallery v. Schoeneman*,³¹ the Third Circuit analyzed whether a distributor of salon-only hair-care products ("salon-only products") had orchestrated a group boycott among other salon-only product distributors to prevent them from selling those products to the plaintiff, a beauty products retailer.³² The retailer argued that there was numerous circumstantial evidence implying an agreement between the defendant and the other salon-only product distributors, including 1) that the defendant operated retail stores that competed with the plaintiff's stores, 2) that plaintiff historically undercut the defendant's retail prices, and 3) that the defendant had contacted other distributors regarding the boycott through an industry consultant.³³

The court found that the plaintiff's circumstantial evidence was insufficient to support an inferred agreement to conspire because the evidence could not, under *Matsushita*,³⁴ exclude "the possibility that the distributors acted independently."³⁵ Specifically, the court noted that the distributors had independent business reasons to refuse to sell salon-only products to the plaintiff.³⁶

The court then turned to an alternative analysis of whether the plaintiff could use its circumstantial evidence to establish a claim based on "conscious parallelism."³⁷ Quoting *Twombly* for the proposition that "neither parallel

³¹ 495 F.3d 46 (3d Cir. 2007).

³² *Id.* at 50.

³³ *Id.*

³⁴ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

³⁵ *Id.* at 53 (citing *Matsushita*, 475 U.S. at 587).

³⁶ *Id.* (noting that plaintiff had a history of selling salon-hair products outside of hair salons, a practice that was typically prohibited in hair-salon product distribution agreements in order to "increase the cache and prestige of these salon-only products lines, and enable their sale as exclusive premium products.").

³⁷ *Id.* at 53-54.

conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy," the court concluded that plaintiff had failed to establish a claim based on conscious parallelism because it did not show that defendants had acted against their economic interests.³⁸

In *Miles Distributors, Inc. v. Specialty Construction Brands, Inc.*,³⁹ the Seventh Circuit examined whether distributors of building products had entered into a horizontal conspiracy to force a manufacturer of tile installation products to terminate a supply agreement with a price-cutting distributor.⁴⁰ The plaintiff distributor had expanded its presence throughout the State of Indiana by lowering prices for the manufacturer's products. The manufacturer requested that plaintiff raise its prices after the defendant distributors vigorously complained to the manufacturer that plaintiff's low prices were driving down the defendants' margins.⁴¹ The defendants also threatened to carry and promote other tile installation products if the manufacturer failed to act.⁴² The manufacturer eventually terminated plaintiff's supply agreement after the plaintiff refused to raise its prices.⁴³

The plaintiff argued that the distributors had reached an inferred agreement amongst themselves to force the manufacturer to cease supplying the plaintiff. In addition to the defendants' complaints and threats, the plaintiff relied on an email between two defendant distributors stating that they should "work together" to address the plaintiff's price-cutting. The plaintiff also introduced evidence of a post-termination "sales blitz" by the defendants to replace the manufacturer's lost product sales due to plaintiff's termination.⁴⁴

³⁹ *Id.* at 54.

³⁹ 476 F.3d. 442 (7th Cir. 2007).

⁴⁰ *Id.* at 445.

⁴¹ *Id.*

⁴² *Id.* At 449-50.

⁴³ *Id.* at 447.

⁴⁴ *Id.* at 450.

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendants on the horizontal conspiracy claim.⁴⁵ It found that the defendant distributors' behavior was insufficient to infer an agreement because they could not rule out that defendants acted independently.⁴⁶ Indeed, the court noted that the defendants' behavior, such as the complaints to the manufacturer, were "natural and unavoidable reactions by distributors to the activities of their rivals."⁴⁷ The defendants' complaints and threats to the manufacturer, the email to "work together," and the post-termination sales blitz were not enough to support concerted action. Under *Matsushita*, the plaintiffs were required to present stronger circumstantial evidence before the court could condemn business behavior that was consistent with competition.⁴⁸

In *In re Linerboard Antitrust Litigation*,⁴⁹ the Eastern District Court of Pennsylvania considered whether linerboard manufacturers had conspired to reduce the output of linerboard. The plaintiffs, a class of purchasers of linerboard products, alleged that defendants had agreed to restrict the production and inventory of linerboard by idling machines that were capable of full production ("market downtime").⁵⁰ The plaintiffs presented several types of circumstantial evidence to support their claim, including parallel conduct by defendants, actions contrary to defendants' economic interests, traditional evidence of conspiracy, and defendants' pretextual explanation for their behavior.⁵¹

In addition to the other types of facts that support an inferred conspiracy, plaintiffs offered evidence that defendants' decision to simultaneously implement

market downtime was contrary to each defendant's independent self interest.⁵² Market downtime was extremely costly and was rarely implemented prior to the market downtime at issue in the case.⁵³ Plaintiffs also showed that certain defendants' rationale for the market downtime, to reduce individual excess inventory, was pretextual and that the true reason was to reduce industry-wide supply.⁵⁴

In denying the defendants' summary judgment motion on the issue of conspiracy, the court found that plaintiffs' evidence tended to exclude the possibility that the defendants had implemented market downtime independently.⁵⁵ The court analyzed plaintiffs' evidence under *Matsushita's* requirement that evidence pointing to inferred conspiracy must "tend to exclude the possibility that the alleged conspirators acted independently."⁵⁶ In this case, the court concluded that plaintiffs' evidence "easily meets the *Matsushita* standard" because the defendants' behavior could not be explained by independent business conduct.⁵⁷

In summary, while *Twombly* will undoubtedly change the landscape of inferred conspiracy cases by requiring plaintiffs to bring more to the table at the motion to dismiss stage, proving or disproving independent-business behavior will remain the key issue.

II. TYING

Northern District of California Allows Tying Suit Against Apple

By Charles Paul Hoffman,
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In *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090 (N.D. Cal. 2006), the Northern District of California refused to grant Apple Computer, Inc.'s motion to dismiss antitrust claims brought by Melanie Tucker, a consumer who had purchased an iPod portable music player and digital music through Apple's iTunes Music Store ("iTMS").

In her complaint, Tucker alleged that Apple had tied together sales of iPods and sales of music through the iTMS, so that tracks purchased at the iTMS could only be played on iPods and iPods could not play music downloaded from competitors (though consumers could transfer music on CDs to iPods). Notably, Apple did not license the Windows Media Digital Rights Management system used by most other online music stores. *Id.* at 1094. Indeed, Tucker alleged that the processor chips used in the iPod line supported Windows Media DRM, but that Apple had disabled the functionality. *Id.* at 1095.

Although Apple argued that its actions had no coercive effect on Tucker, as she was not required to purchase music with her iPod or an iPod with her music, the court held that Apple had coerced her into downloading music only from Apple. The court did not require Tucker to demonstrate that she herself had been coerced by Apple's actions. "[T]here is no requirement that individual purchaser plaintiffs must allege coercion at the individual level, rather than at the market level, to state a Section 1 tying claim. In the Ninth Circuit, '[t]he essence of an antitrust tying violation is not the seller's unilateral refusal to deal with a buyer who refuses to buy the tied product, but the use by the seller of its "leverage" to

⁴⁵ *Id.*

⁴⁶ *Id.* at 450.

⁴⁷ *Id.* at 449.

⁴⁸ *Id.* at 450.

⁴⁹ 504 F. Supp. 2d 38 (E.D.Pa. 2007).

⁵⁰ *Id.* at 54.

⁵¹ *Id.* at 52-53.

⁵² *Id.* at 54.

⁵³ *Id.* at 54-56.

⁵⁴ *Id.* at 57.

⁵⁵ *Id.* at 59-60.

⁵⁶ *Id.* at 55.

⁵⁷ *Id.* at 54-55.

force a purchaser to do something that he would not do in a competitive market.” *Id.* at 1097.

The court also dismissed Apple’s claims that the products were not tied because some users bought only iPods, while others bought only music from iTunes. Citing *Eastman Kodak Co. v. Image Tech Servs.*, 504 U.S. 451 (1992), the court held that the fact that some customers buy one product but not the other did not bar Tucker’s antitrust claim. *Tucker*, 493 F. Supp. 2d at 1098.

The court also found that Tucker had sufficiently alleged that Apple had market power, as it controlled 83% of the Online Music Market and 90% of the hard-drive based player market. *Id.* at 1098. In addition, the court held that Tucker had sufficiently alleged that Apple’s conduct had affected a significant volume of commerce. As such, the court refused to dismiss Tucker’s claim for per se tying.

In addition, the court also refused to dismiss Tucker’s claim of Section 2 monopolization. Although Apple raised independent business reasons for its refusal to license Windows Media DRM or to license its own DRM system to other manufacturers, “the existence of valid business reasons in antitrust cases is generally a question of fact not appropriate for resolution at the motion to dismiss stage.” *Id.* at 1101.

In the time since the court issued its opinion, iTunes and other online music stores (such as Amazon’s MP3 store) have begun selling DRM-free music that can be played on any portable music player.

2007 Tying Cases

By John J. Schulze, Jr.,
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In 2007, the federal courts addressed claims of illegal tying arrangements under Sherman Act section 1 in several cases. This article discusses four of those cases, three from district courts within the 9th Circuit and one from

a district court out of the 6th Circuit. The tying claims failed to survive in three of the four instances. In one case where a tying claim did survive, the law was applied in a novel manner.

In *Cyntergra, Inc. v. Indexx Laboratories, Inc.*, 520 F.Supp.2d 1199 (C.D. Cal 2007), the defendant developed and sold a variety of products used by veterinarians to diagnose and treat illnesses. Plaintiff claimed to have developed innovative “molecular based” animal diagnostic products, and in addition to other antitrust causes of action (e.g. violation of § 3 Clayton Act and California Unfair Competition law), claimed defendant illegally tied the sale of a feline leukemia virus diagnostic test to a separate feline immunodeficiency virus test.

The court dismissed the tying claim because the Plaintiff lacked standing. Using the standing standard from *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462-463 (1992), and *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339, (1990), the court required the plaintiff to show that it was either a purchaser forced to buy the tied product or a competitor restrained from entering the market for the tied product. In this case, plaintiff did not fit into either category. Plaintiff contended that it had standing because it had been precluded from competing in the relevant market. But the plaintiff failed to show it offered a competing product to either of the allegedly tied products. The court found that without a competing product, the plaintiff “cannot show it was ‘adversely affected’ by Defendant’s allegedly illegal tying arrangement.” *Cyntergra*, 520 F. Supp.2d at 1211.

The court also ran the plaintiff’s tying claim through the tying test from *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1413 (9th Cir.1991), which required the plaintiff to show:

- 1) defendant tied two distinct products or services;
- 2) defendant possessed economic power in the tying

product market to coerce its customers into purchasing the tied products; and

- 3) the tying arrangement affected a “not insubstantial volume of commerce” in the tied product market.

The court wrote that even if plaintiff did have standing to assert a tying claim, under the *Bhan* tying test, the plaintiff failed to show the feline leukemia virus diagnostic test and the feline immunodeficiency virus test were two distinct products because there was not “sufficient consumer demand so that it [would be] efficient for a firm to provide the two tests separately.” *Cyntergra*, 520 F.Supp.2d at 1211. Defendant demonstrated that consumer demand for a stand-alone feline immunodeficiency virus test was so low that it would be uneconomic for any company to offer it as an in-clinic test separately from the feline leukemia virus diagnostic. Bolstering the defendant’s economic argument was an American Association of Feline Practitioners and Academy of Feline Medicine Advisory Panel Report that recommended all cats be treated for both feline leukemia and feline immunodeficiency virus.

In *Catch Curve, Inc. v. Venali, Inc.*, 519 F.Supp.2d 1028 (C.D. Cal 2007), the plaintiff brought suit alleging patent infringement over a fax-to-email service. The defendant responded with a number of affirmative defenses (e.g., failure to state a claim, laches, waiver and estoppel) and counterclaimed asserting violations of the Clayton Act, the Lanham Act, California Unfair Competition Law, and a tying claim for offering licenses to relevant patents in a pool in violation of section 1 of the Sherman Act. The court applied a slightly more rigorous statement of tying law based on *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) rather than the *Bhan* tying test used by the *Cyntergra* court above. In addition to determining standing by obliging the defendant to have an economic interest in the tied product, and requiring the

defendant to show 1) two distinct products or services, 2) market power in the relevant market for the tying product, and 3) that the tied product involves a “not insubstantial” amount of interstate commerce, the court required that the defendant also show a sale agreement to sell the tying product conditioned upon the purchase of the tied product. Regardless of this additional hurdle and the Court noting “the Ninth Circuit’s disfavor in pre-trial dismissals of antitrust actions,” the defendant’s tying cause of action was dismissed, with leave to amend, for failing two of the requirements in both the *Bhan* and *Jefferson Parish* tying test. The defendant did not allege two distinct products and two distinct markets. Defendant’s complaint only mentioned a ‘Relevant Innovation Market’ only once and did not provide any support for this market definition. The court stated that “[a]lthough one might conclude that [defendant] contends that the AudioFax patents are the tying product and that some ‘unwanted ... patents’ are the tied product, this essential allegation is not obvious from the claims.” *Catch Curve*, 519 F.Supp.2d at 1039. Furthermore, the defendant did not allege that the tied product involved a “not insubstantial” amount of interstate commerce.

In *Perry v. Rado*, 504 F.Supp.2d 1043 (E.D.Wash. 2007), the plaintiff filed a complaint claiming that the revocation of a doctor’s medical center credentials was actionable under a litany of causes of actions, including section 1 of the Sherman Act. The court analyzed the complaint in the light of the purpose of the antitrust laws: “Antitrust laws are intended to preserve competition for the benefit of consumers,” “reduction of competition does not invoke the Sherman Act until it harms consumer welfare.” *Id.* at 1047 (citing *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1055 (9th Cir. 1999), *Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433 (9th Cir. 1995)). In *Perry*, the plaintiff’s allegations only

concerned the affect of the tying claim on the plaintiff, not on competition. The court wrote “[n]o facts are pled showing a cognizable antitrust injury,” and the complaint “offers no more than conclusory allegations of antitrust injury.” *Id.* at 1049. Accordingly, the Court dismisses the antitrust claim with prejudice. The plaintiff’s subsequent request for reconsideration of the dismissal was denied. See *Perry v. Rado*, Case No. CV-07-5001-LRS, 2007 WL 2041974, (E.D. Wash 2007).

In *American Standard, Inc., v. Meehan*, 517 F.Supp.2d 976 (N.D. Ohio 2007), the plaintiff franchisor manufactured Trane brand heating, ventilating, and air conditioning systems, and claimed the defendant franchisee fraudulently failed to account for over a million dollars owed to the franchisor. The franchisee counterclaimed, claiming a violation of section 1 of the Sherman Act. The franchisee filed a motion for a temporary restraining order and preliminary injunction preventing the franchisor from terminating the relationship. That request was denied, however, the court preserved the franchisee’s tying argument. The manual of policies and procedures that governed the franchisee’s obligations established the minimum limits on the sale price of all franchisor-branded products and maximum limits on the sale price of all non-franchisor-branded products. The franchisee’s claim was deemed “somewhat novel.” The franchisee asserted that the franchisor’s power over its branded products (the tying products) forced the franchisee to purchase certain non-branded products (the tied products) on the franchisor’s terms when the franchisee would rather have purchased the non-branded products on its own terms. Therefore, the court wrote that this may be a viable antitrust claim because the franchisor’s requisite economic power over its own brand and a direct economic interest in the franchisee’s sales of non-brand products could result in

increased prices for the franchisee’s customers.

Recent Tying Law Cases

By Shankar Iyer,
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The relevant tying law parts of two recent cases—*Cascade Health Solutions fka McKenzie-Willamette Hospital v. PeaceHealth*, 2007 U.S. Appl. LEXIS 21075 (9th Cir. 2007) and *Med Alert Ambulance, Inc. v. Atlantic Health System*, 2007 U.S. Dist. LEXIS 570-83 (D. N.J. 2007)—are discussed below.

Cascade Health Solutions fka McKenzie-Willamette Hospital v. PeaceHealth

The relevant parties in *Cascade Health Solutions fka McKenzie-Willamette Hospital v. PeaceHealth* were McKenzie-Willamette Hospital (“McKenzie”) and PeaceHealth. McKenzie and PeaceHealth are the only two providers of hospital care in Lane County, Oregon. PeaceHealth operates three hospitals in Lane County. McKenzie’s sole endeavor is McKenzie-Willamette Hospital, a 114-bed facility. McKenzie filed a complaint against PeaceHealth asserting seven claims for relief. Five of the claims arose under federal antitrust laws: monopolization, attempted monopolization, conspiracy to monopolize, tying, and exclusive dealing. The other two claims arose under Oregon state law: price discrimination and intentional interference with prospective economic advantage.

Before trial, the district court granted PeaceHealth summary judgment on McKenzie’s claim that PeaceHealth illegally tied primary and secondary services (the tied or forced products) to its provision of tertiary services (the tying product) in violation of section 1 of the Sherman Act. McKenzie appealed the district court’s grant of summary judgment to PeaceHealth on McKenzie’s tying claim. For the purposes of the appeal, the relevant market—

which the parties did not dispute—was the market for primary and secondary acute care hospital services in Lane County. (Primary and secondary hospital services are common medical services such as setting a broken bone. Some hospitals also provide tertiary care, which includes more complex services like invasive cardiovascular surgery.)

In reviewing the district court's grant for summary judgment, the Court of Appeals for the Ninth Circuit cited the *per se* rule developed by the Supreme Court for illegal tying arrangements according to which a plaintiff must prove three elements. First, that the defendant tied together the sale of two distinct products or services. Second, that the defendant possesses enough economic power in the tying product market to be able to coerce its customers into buying the tied product. Third, that the tying arrangement affects a "not insubstantial volume of commerce" in the tied product market. McKenzie alleged two distinct products—tertiary services (the tying product) and primary and secondary services (the tied product)—and PeaceHealth did not dispute that the tying arrangement affected a substantial volume of sales in the tied market. Therefore, the Court of Appeals focused on the second element as to whether PeaceHealth coerced purchases of primary and secondary services.

The court rejected McKenzie's argument, which relied heavily on the Fifth Circuit's opinion in *Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), that the standard of coercion is lower or non-existent for plaintiffs who are not parties to the tying arrangement. By citing *Jefferson Parish Hosp. Dist. No.2 v. Hyde*, 466 U.S. 2, 15-18, 104 S. Ct. 1551, 80 L. Ed. 2d 2 & n. 25 (1984), the court agreed that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to

coerce the buyer into the purchase of a tied product that the buyer either did not wish to purchase at all, or might have preferred to purchase from a different seller on different terms. Since coercion is the touchstone issue in assessing a claim of illegal tying, the court rejected McKenzie's argument that it did not need to demonstrate coercion as part of its tying claim because it was not a party to the tying arrangement.

The court also addressed McKenzie's argument that, even if coercion must be shown in tying cases brought by third parties, there was a disputed factual issue regarding coercion. The court held that the instances in which PeaceHealth's pricing practices might have led to customers paying higher prices to purchase the tied products separately did not necessarily create a fact issue on coercion. But, the court did identify evidence that might be construed as economic coercion by a trier of fact: only four insurers out of a total of twenty-eight insurers in Lane County made a separate purchase might be indicative of some degree of coercion, thereby placing that issue in the realm of facts that must be tendered to a jury. Also, evidence that McKenzie's prices on primary and secondary services were lower than PeaceHealth's prices on those services, while not dispositive evidence of an illegal tie, could lead to the inference that a rational consumer would not purchase PeaceHealth's allegedly overpriced products in the absence of the tie. The court therefore concluded that the evidence showed genuine factual disputes about whether PeaceHealth forced insurers to take its primary and secondary services if the insurers wanted tertiary services, either as an implied condition of dealing or as a matter of economic imperative through its bundled discounting.

Finally, the court found that the substantial market power enjoyed by PeaceHealth by virtue of its being the sole provider of tertiary services in Lane County created the possibility that PeaceHealth

would have been able to force unwanted purchases of primary and secondary services. Whether, PeaceHealth did, in fact, use its market power to coerce purchases of primary and secondary services was a question that only further factual development could address. Therefore, the court vacated the district court's order of summary judgment to PeaceHealth on McKenzie's tying claim.

Med Alert Ambulance, Inc. v. Atlantic Health System, 2007 U.S. Dist. LEXIS 570-83 (D. N.J. 2007)

The relevant parties were plaintiff Med Alert Ambulance, Inc. ("Med Alert"), an erstwhile private ambulance services company that operated primarily in Sussex, Morris, and Warren Counties in New Jersey from 1984 to 2004, when it went out of business. Defendant was Atlantic Health System (AHS)—a non-profit health care system based in New Jersey and operates three hospitals in New Jersey. One of the hospitals, Morristown Memorial Hospital (MMH) is a tertiary care facility that provides advanced specialized treatment and services. Atlantic Ambulance Corporation (AAC) is an ambulance services company incorporated by AHS in August 2001. Med Alert primarily provided specialty care transport services. (Specialty care transport consists of transports of critically injured or critically ill patients by a ground ambulance vehicle and usually takes place between a sending hospital and a tertiary care facility. It differs from basic life support transport services, which are basic transports by ground ambulance vehicles with the provision of medically necessary supplies and services. The level of care needed by the patient dictates whether specialty care transport or basic life support services are requested. Basic life support services are not a substitute for specialty care transport services.) AHS entered the ambulance services business in 2001 with the creation of AAC.

Med Alert filed a fourteen count complaint on April 5, 2004 in the United States District Court for the District of New Jersey. Of the fourteen counts, Counts I and VI alleged violations of Section 1 of the Sherman Act and the corresponding New Jersey antitrust statute, N.J. STAT. ANN. 56:9-3. The court's ruling was in response to AHS's motion for summary judgment.

Med Alert alleged that when AAC entered the market, Med Alert and other specialty care transport providers experienced sharp declines in the number of runs they provided. This sharp decrease in competition and business was, according to Med Alert, the result *inter alia* of a tying arrangement whereby MMH conditioned the availability of tertiary care. Specifically, Med Alert alleged that AHS created an illegal tying arrangement whereby patients and hospitals in Northwest New Jersey who sought tertiary care services from MMH were required, in order to obtain those services, to use AAC as the specialty care transport ambulance service. AHS argued that Med Alert could not prove a tying arrangement because they failed to establish a relevant product or geographic market; AHS also argued that Med Alert could demonstrate neither coercion nor a formal tying arrangement.

The court reviewed the evidence provided by three nurses and found it sufficient to demonstrate, for the purposes of summary judgment, a formal, if not written, policy of conditioning the availability of tertiary hospital services on the use of MMH's ambulance company AAC. In the court's opinion, this testimony created a genuine issue as to the existence of a formal tying arrangement. The court then considered the *per se* rule for evaluating Med Alert's alleged failure to adequately define the tying market and found that Med Alert did not demonstrate any genuine issues of material fact which would support a claim of a tying violation of Section 1 of the

Sherman Act under the *per se* theory. This was because the market studies that Med Alert's economic expert relied on did not provide sufficient information to determine whether AHS's market share for tertiary care services was dominant in the relevant geographic market.

The court then addressed whether Med Alert could assert a tying claim under the rule of reason theory. The court surveyed the evidence relating to the product and geographic markets and found that the Med Alert CEO's declaration—given her experience as CEO of Med Alert for 20 years and her intimate knowledge of the ambulance industry—was valid evidence and could be used in determining whether Med Alert had demonstrated that a genuine issue as to material fact exists regarding the relevant product and geographic markets. Therefore, her testimony on the nature and functioning of specialty care transport could reasonably be relied upon by Med Alert's economic expert in his analysis of the relevant product market. The court noted further that Med Alert's economic expert's analysis of medical protocols governing the transport of SCT patients and mandated response times to which specialty care transport ambulance companies must adhere, and the decision-making process which goes into the actual decision to select a specialty care transport provider were dispositive evidence that there was an issue of fact as to the threshold definition of what constitutes the relevant geographic market.

Having determined that Med Alert's proposed definitions of the relevant product and geographic markets survive summary judgment, the court analyzed the adverse effect on competition based on these markets. Citing *United States v. Brown University*, 5 F.3d 658, 668, 3d Cir. 1993 (“The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in

price, or deterioration in quality of goods or services.”), the court reasoned that because proof of actual anticompetitive effects is often difficult to produce, “courts typically allow proof of the defendant's ‘market power’ instead.” In analyzing the effects on AHS's market power, the court cited several strands of evidence presented by Med Alert's economic expert.

First, the court cited evidence of a decrease in competition in the market for specialty care transport ambulance services, so that after AHS initiated the alleged tying program two specialty care transport providers that serviced the three SBT service routes exited these markets. The second strand of evidence was the fact that AAC's market share has increased, after the alleged tying, to monopolistic levels (in 2004, AAC held a market share of 100% of the Newton to MMH route, 83.96% of the St. Clare's to MMH route, and 80% of the Hackettstown to MMH route). Third, Med Alert submitted an analysis of AAC's billing procedures that, in the court's view, demonstrated how AAC, which held a large share of the market, had increased prices—after Med Alert exited the markets, AAC increased the price of non-emergency specialty care transport services from \$ 1200 to \$ 1500 per transport. Finally, Med Alert also produced evidence of shifting non-reimbursable insurance costs to patients on the Newton-to-MMH route. The court held that these various strands of evidence were sufficient to create a genuine issue of material fact as to whether the tying arrangement resulted in an “actual adverse effect” on competition. Consequently, it dismissed AHS's motion for summary judgment.

Belton v. Comcast Cable Holdings, LLC

By Ryan M. Hurley,
Baker & Daniels LLP

In *Belton v. Comcast Cable Holdings, LLC*, 60 Cal. Rptr. 3d 631 (Cal. Ct. App. 2007), the California Court of Appeals held that a cable service provider's practice of requiring purchasers of music services to also obtain cable television programming was not an unlawful tying arrangement in violation of section 1 of the Sherman Act. Plaintiffs were cable service subscribers who alleged that Comcast Cable Holdings, LLC ("Comcast") offered FM radio or other music services to residents of Sonoma County, California only as part of a basic cable tier package that included television cable service. *Id.* Plaintiffs challenged Comcast's practice on several grounds, including that it amounted to unfair competition.

Discovery in *Belton* revealed that neither plaintiff desired Comcast's cable programming. *Id.* However, each plaintiff accepted Comcast's basic cable package in order to receive Comcast's music services. *Id.* Plaintiffs objected to Comcast's refusal to provide "a la carte" music services, and alleged that Comcast's conduct forced them to purchase cable television services they did not want because they had "no other practicable means of obtaining access to the FM or music services." *Id.* at 636-37.⁵⁸

After deposing plaintiffs, Comcast moved for summary judgment on plaintiffs' claim for unfair competition. *Id.* at 639. Under California statute, acts which are unlawful, unfair, or fraudulent constitute unfair competition. *Id.* Thus, violations of other laws, including the antitrust laws, are independently actionable as unfair competition.

⁵⁸ Despite this allegation, the record demonstrated that plaintiffs could obtain music services elsewhere, including over the internet, on their home radios, and through a satellite service which offered digital quality music. *Id.* at 638.

Id. Plaintiffs argued that Comcast's practice of requiring subscribers to purchase cable programming in order to obtain music services was an unlawful tying arrangement in violation of section 1 of the Sherman Act. *Id.* at 640. Therefore, in order to prevail on their unfair competition claim, plaintiffs had to show that Comcast's practice violated the Sherman Act (or some other statute).

The California Court of Appeals began its analysis by observing that both the Sherman Act and California's Cartwright Act prohibit tying arrangements that operate as unreasonable restraints of trade. *Id.* The court noted that a "tying arrangement under antitrust laws exists when a party agrees to sell one product (the tying product) on the condition that the buyer also purchases a different product (the tied product), thereby curbing competition in the sale of the tied product." *Id.* (citing *Northern Pac. R.R. Co. v. United States*, 356 U.S. 1 (1958)). To prevail on a tying claim a plaintiff must show (1) an arrangement, agreement or condition where the sale of the tying product was linked to the sale of the tied product, (2) the defendant had sufficient economic power in the tying market to coerce the purchase of the tied product, and (3) a substantial amount of sale was effected in the tied product. *Id.* This last element, sometimes referred to as "tied market foreclosure," proved fatal to plaintiffs' claim against Comcast.

The court held that plaintiffs' tying theory failed as a matter of law based on the undisputed fact that neither plaintiff desired Comcast's cable television service. *Id.* at 641. Plaintiffs could not demonstrate foreclosure in the market for cable programming, the "tied product," since plaintiffs would not have purchased cable programming absent Comcast's practice. *Id.* The court cited *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984), for the proposition that when a buyer is "forced" to

purchase a product he would not have otherwise acquired, "there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." *Belton*, 60 Cal. Rptr. 3d at 641.

This same principle had been applied by the California Court of Appeals to a practice very similar to Comcast's. *Id.* In *Morrison v. Viacom, Inc.*, 78 Cal. Rptr. 2d 133 (Cal. Ct. App. 1998), plaintiffs alleged that Viacom's practice of requiring them to purchase broadcast channels as a prerequisite to obtaining satellite cable channels was an unlawful tying arrangement. As in *Belton*, the plaintiffs conceded that but for Viacom's practice, they would not have paid for broadcast channels because they were available for free over the airwaves. *Viacom*, 78 Cal. Rptr. 2d at 138. The court held this "devastating" concession established that plaintiffs could not show an adverse impact on competition in the tied product market. *Id.*

The *Belton* court rejected plaintiffs' attempt to distinguish *Viacom*. *Belton*, 60 Cal. Rptr. 3d at 641. The court affirmed the trial court's judgment that Comcast's practice was not an unlawful tying arrangement under section 1 of the Sherman Act because plaintiffs could not demonstrate anticompetitive impact in the tied product market. *Id.* at 642.

III. CLASS CERTIFICATION

District Court Certifies Class in Foundry Resins Price-Fixing Conspiracy Case

By Helen Cho Eckert,
Heller Ehrman

On May 2, 2007, the Southern District of Ohio certified a class comprised of customers located in the United States who purchased foundry resins directly from defendants (or their predecessors, controlled subsidiaries or affiliates) within the time period of January 1,

2001 to December 31, 2003.⁵⁹ *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393 (S.D. Ohio 2007). Plaintiffs in this multidistrict litigation allege that defendant manufacturers conspired to fix prices of foundry resins, allocated markets, and agreed not to compete against one another. In ruling on plaintiffs' motion for class certification, the court analyzed whether plaintiffs had established the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3). Rule 23(a) requires that: (1) the class be so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the class representatives are typical of the claims or defenses of the class ("typicality"); and (4) the class representatives are able to fairly and adequately represent the members of the class ("adequacy"). Rule 23(b)(3) requires that: (1) questions of law or fact common to the class predominate over questions affecting the individual members ("predominance"); and (2) on balance, a class action is superior to other methods available for adjudicating the controversy ("superiority").

In efforts to defeat class certification, defendants first moved to strike the plaintiffs' class expert because his opinions on impact and damages failed to qualify as admissible expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Upon noting the "doubtful[ness]" of plaintiff's proposition that *Daubert* applies in the class certification context, the court nevertheless concluded that the expert's testimony was sufficiently reliable and relevant to be deemed admissible under *Daubert*. Accordingly, defendants' motion to strike was denied.

⁵⁹ The term "foundry resins" includes resin systems (often including a resin, co-reactant and catalyst) and refractory coatings used in foundries to produce casts and molds to cast metal.

The court then turned to defendants' challenges concerning the typicality and adequacy requirements under Rule 23(a)(3) and (a)(4), respectively.⁶⁰ With regard to typicality, defendants argued that the class representatives' methods of procuring and purchasing foundry resins were atypical of one another and of the class. Plaintiffs countered that class representatives needed to prove elements common to the entire class, such as the existence, scope and efficacy of the alleged conspiracy. In finding plaintiffs' arguments more persuasive, the court made clear that when the class representatives' claims are based on the same legal theory or arise from the same course of conduct by defendants, the specific circumstances leading to each individual purchaser's injuries do not defeat a finding of typicality.

Defendants next attacked adequacy, arguing that the class action was driven solely by the interests of the attorneys and that the class representatives lacked knowledge of the facts and nature of the class action interests they purportedly represented. In again rejecting defendants' arguments, the court noted that to require class representatives to be sophisticated and knowledgeable of such a complicated antitrust case would render the class action tool useless.

After finding that plaintiffs had satisfied Rule 23(a), the court turned to its analysis of the predominance and superiority requirements under Rule 23(b)(3). Disputing the predominance of common questions of law and fact, defendants argued that impact and damages -- which plaintiffs must establish in order to prevail on their claims -- could only be determined on an individual basis because of a multitude of variations among the class, including the existence of

⁶⁰ As defendants made a sufficient showing -- and plaintiffs did not seriously dispute -- numerosity and commonality, the court found that defendants had satisfied Rule 23(a)(1) and (a)(2), respectively.

individualized negotiations, purchasing contracts, size of purchases, and the wide diversity of resins. Plaintiffs countered by proffering analysis of its class expert which showed that characteristics of the foundry resins industry would allow impact to be established by common proof on a class-wide basis.

In finding for plaintiffs with respect to impact, the court cited to other opinions for the general rule that common issues regarding the existence and scope of an antitrust price-fixing conspiracy predominate over questions only affecting individual members.⁶¹ The court also found for plaintiffs on damages, determining that plaintiffs have proffered several reasonable damage methodologies to be applied on a class-wide basis. The court further reasoned that even if damages later ended up being too individualized to resolve as a class action, that fact, by itself, would be insufficient to warrant denial of class certification. Rather, alternatives such as reorganizing the class into sub-classes or decertifying it altogether for the damages stage could be implemented at the appropriate time.

Finally, the court found that because common issues of law and fact predominated over individual ones, a class action was superior to many separate trials, especially in such an expensive and complicated antitrust case where a class action may be the only realistic method of adjudication.

Columbus Drywall, et al v. Masco, et al.

*By Allyson M. Maltas,
Latham & Watkins LLP*

In a July 20, 2007 Order, Judge Julie E. Carnes of the Northern District of Georgia resolved multiple pending motions

⁶¹ See e.g., *In re Catfish Antitrust Litig.*, 826 F.Supp. 1019, 1035 (N.D. Miss. 1993); *In re Infant Formula Antitrust Litig.*, MDL No. 878, 1992 WL 503465, at *6 (N.D. Fla. Jan. 13, 1992).

relating to plaintiffs' requested certification of a proposed litigation class and approval of settlements reached with four defendants. *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 2007 U.S. Dist. LEXIS 52589 (N.D. Ga. July 20, 2007). In that decision, the Court agreed that plaintiffs' motion for class certification should be denied because plaintiffs radically changed the class definition underpinning the motion while that motion was pending. *Id.* at *18-19. The Court required plaintiffs to re-file a new motion reflecting their changes. *Id.* at *19. The Court further acknowledged that certifying the settlement classes before determining the propriety of certifying the redefined litigation class could prejudice non-settling defendant Masco Corporation ("Masco"), and provided an explicit reservation of Masco's rights to contest the litigation class. *Id.* at *21.

The plaintiffs in *Columbus Drywall* are six small contractors that install fiberglass insulation. These contractors allege that their competitor, Masco, the largest insulation contractor and distributor of fiberglass insulation in the country, orchestrated a conspiracy with the five largest manufacturers⁶² of fiberglass insulation to impose and maintain a price "spread" between the prices that Masco paid for fiberglass insulation and the prices paid by other purchasers. *Id.* at *7. Specifically, plaintiffs alleged in their most recent complaint that "Masco entered into a series of agreements with the individual manufacturers, in which the individual manufacturers agreed to sell residential fiberglass insulation to independent contractors at prices that were a significant

⁶² In addition to Masco, four manufacturers, Johns Manville ("Johns Manville"), CertainTeed Corporation ("CertainTeed"), Knauf Insulation GmbH ("Knauf") and Guardian Fiberglass ("Guardian") (and its distribution company), are defendants in the case. *Id.* at *6. Owens Corning, which is in bankruptcy, was not named as a defendant. *Id.* at *6-7.

percentage above those offered to Masco." *Id.* In essence, plaintiffs contend that the low prices that Masco receives by virtue of its size and buying power are instead the product of an illegal conspiracy.

On May 22, 2006, plaintiffs filed a motion to certify a class of all residential contractors who purchased fiberglass insulation from the manufacturer defendants from January 1, 2000 to December 31, 2004. *Id.* at *8-9. Plaintiffs submitted the expert report of Dr. John A. Del Roccoli to support their motion. *Id.* at *9. Dr. Del Roccoli opined that the conspiracy alleged by plaintiffs, a conspiracy to sell insulation at prices that were "a significant percentage" above those offered to Masco, would impact all class member by "artificially raising the starting point for negotiations" and "interfering with natural competitive forces" that otherwise would have driven prices for fiberglass insulation down." *Id.* Dr. Del Roccoli contended that he could demonstrate class-wide impact with a regression analysis and an examination of the structural and competitive characteristics of the fiberglass insulation industry. *Id.* According to the Court, Defendants' opposition to plaintiffs' motion was "a very powerful and persuasive attack against use of Dr. Del Roccoli's analysis to support a common impact" and demonstrated that "sufficient questions remain regarding the ability of the plaintiffs to ultimately certify a class." *Id.* at *36, 39.

Four months after moving for class certification under the conspiracy theory alleged in the complaint and the common impact analyses provided by Dr. Del Roccoli, and with that motion still pending, plaintiffs attempted to change their allegations in "mid-stream." *Id.* at *10, 18. On liability issues, plaintiffs' expert Dr. Jeffrey Leitzinger explained that plaintiffs now asserted that Masco and the manufacturers agreed to maintain an artificially elevated spread between the prices that they charged to Masco and the higher prices that they charged to other,

smaller, insulation contractors. Dr. Leitzinger also explained that "[p]laintiffs now propose to limit the class definition to those contractors for whom statistical 'before and after' analysis of the available electronic transaction data yields evidence of impact in the period of January 1, 1999 to December 31, 2003." *Id.* at *10. Dr. Leitzinger performed a "before and after" analysis comparing two years that were allegedly less impacted by the purported conspiracy (1998 and 2004) with the four years allegedly most impacted by the purported conspiracy (1999-2003) and identified 377 contractors that he believed experienced an artificially increased spread. *Id.* at *11, 15.

Masco objected to plaintiffs' attempt to alter their conspiracy theory and class definition while the original class certification motion was still pending, and filed an emergency motion to file a supplemental brief in opposition to plaintiffs' motion for class certification. *Id.* at *11. Masco argued that the Leitzinger report impermissibly sought to re-argue class issues and that plaintiffs' revisions were concessions that Dr. Del Roccoli's analysis failed to demonstrate impact with common proof. Plaintiffs responded and for the first time gave notice to the Court that they intended to seek approval of the revised litigation class defined in Dr. Leitzinger's report. *Id.* at *11-12. *See also id.* at *18 ("Plaintiffs did not formally request leave of the Court to amend or alter their class definition. In fact, it was not until defendants indicated in an opposition pleading that plaintiffs were attempting to change their litigation class definition mid-stream, that plaintiffs sent notice to the Court formally alerting it to the fact that the class definition had now changed"). Masco filed a motion for leave to file a reply to plaintiffs' response. *Id.* at *12.

In the meantime, "with plaintiffs' original motion for class certification pending on a litigation class definition that the plaintiffs had since abandoned," plaintiffs

filed motions for preliminary approval of settlements they had reached with the four manufacturer defendants. *Id.* at *12. The settlements totaled \$37.25 million. *Id.* at *13-14. The settlement class proposed by plaintiffs was not limited to the 377 contractors identified in the Leitzinger report or based upon Dr. Leitzinger's "before and after" analysis. *Id.* at *15. Instead, plaintiffs sought to certify a settlement class of all residential contractors who purchased fiberglass insulation during the period of January 1, 1999 through December 31, 2004 and argued that Dr. Del Roccili's analysis demonstrated that plaintiffs could show antitrust impact with common proof. *Id.* at *14, 36.

Masco filed a motion to stay consideration of the settlements until the Court decided whether to certify the litigation class. *Id.* at *19. Masco argued that because the Supreme Court's decision in *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), required the Court to determine whether the settlement class meets every requirement of Fed. R. Civ. P. 23, the Court's decision to certify a settlement class could impact the decision to certify the litigation class and prejudice Masco. *Id.* at *21.

The Court accepted Masco's arguments relating to the litigation class and proposed settlements. First, the Court denied plaintiffs' motion for certification of the litigation class because plaintiffs changed their class definition while the original motion was pending and did not provide any opportunity for Masco to properly respond to the changes. *Id.* at *19. The Court explained that "[b]y failing to properly seek leave of the Court to file an amended class definition, defendants have been unable to submit a reply or expert declaration regarding plaintiffs' entirely new class definition. The Court concludes that any ruling on plaintiffs' amended class definition, given this chronology of events, presents grave prejudice to defendants, including a potential

due process violation." *Id.* at *18-19. As a result, the Court required plaintiffs to file a new motion for class certification based upon their new class definition and conspiracy theory. *Id.* at *19.⁶³ Plaintiffs did so on June 29, 2007. *Id.*

Second, though the Court granted plaintiffs' motions to preliminarily approve the settlements, the Court specifically preserved the record in response to Masco's concerns about possible prejudice to a decision on the litigation class. *Id.* at *21. The Court was careful to note that "[i]n approving the settlement class, the Court is not endorsing any evidence that the parties will submit in connection with plaintiffs' redefined litigation class. Rather, the Court's decision regarding the settlement class rests solely on the uncontested evidence presented by plaintiffs and the settling defendants. In short, certification of the settlement class will not have preclusive effect on defendant Masco in contesting the litigation class." *Id.*

The Court further explained that Masco's arguments against Dr. Del Roccili's opinion on the issue of demonstrating antitrust impact with common proof constituted "a very powerful and persuasive attack against the use of Dr. Del Roccili's analysis to support a common impact" and found that "sufficient questions remain regarding the ability of the plaintiffs to ultimately certify a class." *Id.* at *36, 39. However, the Court concluded that the existence of such problems actually counseled in favor of certification of a settlement class because the settlement context "alleviates some of the issues that would have appeared had this class been certified as a litigation class." *Id.* at *38. The Court cited with approval Judge Thrash's decision in *In re Motorsports Merchandise Antitrust Litig.*, 112 F.

⁶³ The Court also denied as moot Masco's motions for leave to file a supplemental brief and reply in opposition to plaintiffs' original motion for class certification. *Id.* at *4.

Supp. 2d 1329, 1334 (N.D. Ga. 2000), where the Court certified a settlement class in part because "a serious question remained regarding plaintiffs' chance of obtaining class certification" and certification of a settlement class would make recovery more likely for the plaintiffs. *Id.* at *38. The Court determined that individual issues regarding antitrust impact thus did not preclude certification of a settlement class. *Id.* at *40.

Thus, Masco's responses to plaintiffs' motions to certify litigation and settlement classes resulted in two victories for Masco. First, the Court's consideration of Masco's briefs alerting the Court to plaintiffs' changes in theory and class definition convinced the Court to deny plaintiffs' pending motion. Further, Masco's arguments against Dr. Del Roccili's analysis and in favor of a motion to stay demonstrated to the Court the problems with Dr. Del Roccili's analysis and convinced the Court to expressly reserve Masco's rights to contest the redefined litigation class.

In re OSB Antitrust Litigation – Class Certification Decisions

*By W. Joseph Bruckner and
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I. SUMMARY OF HOLDINGS

On August 3, 2007, in *In Re OSB Antitrust Litigation*, a horizontal market restriction case brought under the Sherman and Clayton Acts and state antitrust and consumer protection statutes, Judge Diamond of the Eastern District of Pennsylvania certified a class of direct purchasers of Oriented Strand Board ("OSB"), with a caveat for group buying organizations. The Court also certified two classes of indirect purchasers, one for damages under the state laws of eight states and one for injunctive relief under the federal Clayton Act. However, home buyers were excluded from the proposed indirect purchaser class because those plaintiffs

failed to meet the equitable relief and predominance requirements under Fed. R. Civ. P. 23(b)(2) and (b)(3).

II. SUMMARY OF ALLEGATIONS

OSB is a structural wood-based paneling product widely used in residential and other construction. Ninety-five percent of the OSB market in North America is controlled by nine OSB manufacturers, including Ainsworth Lumber Co., Georgia-Pacific Corp., Grant Forest Products, Inc., J.M. Huber Corp., Louisiana-Pacific Corp., Norbord Industries, Inc., Potlatch Corp., Tolko Industries, Inc., and Weyerhaeuser Co. In the 1990s OSB took market share from plywood in residential home construction. OSB's market share increase leveled off in 2000 and 2001, the market became oversupplied, and prices stagnated at low levels.

Plaintiffs allege that beginning in June 2002 defendants conspired to raise OSB prices and margins by collectively reducing OSB supply. Plaintiffs claim defendants' conspiracy included: (1) mill shutdowns; (2) delays or cancellations of the construction of new OSB mills; (3) purchasing OSB from competitors instead of manufacturing it themselves; and (4) maintaining low operating rates. Plaintiffs also allege that defendants policed their conspiracy by using *Random Lengths*, a twice-weekly industry publication listing OSB prices, to monitor each other's OSB prices. Plaintiffs claim that, as a result of Defendants' conspiracy, they bought OSB at artificially inflated prices.

III. THE DIRECT PURCHASER CLASS

A. Predominance of Classwide Proof of Impact and Damages Under Rule 23(b)(3).

As is often the case involving class certification of horizontal conspiracy cases under section

one of the Sherman Act, the battleground in *OSB* was whether the Direct Purchaser Plaintiffs had shown under Fed. R. Civ. P. 23(b)(3) that classwide issues would predominate in plaintiffs' proof of economic injury or impact, and the measure of damages.

In finding that plaintiffs had shown that classwide issues would predominate in showing injury or impact, the court found that Direct Purchaser Plaintiffs had established the three necessary elements to establish a presumption of injury, also known as the "*Bogosian* shortcut."⁶⁴ Specifically, plaintiffs offered evidence consistent with their theory that defendants conspired to raise prices, plaintiffs showed that prices rose dramatically during the alleged conspiracy period and that prices likely would have been lower in a free market, and finally plaintiffs showed that they purchased OSB at the higher prices. While noting that reliance on the *Bogosian* shortcut alone is insufficient, the court found that plaintiffs also had offered proof of actual economic injury through expert economic evidence, thus following the "belt and suspenders" approach favored by the Third Circuit.⁶⁵

Although the expert economists for Direct Purchaser Plaintiffs and defendants disagreed on several economic and structural aspects of the OSB industry, the court found significant the fact that defendants' expert did not dispute plaintiffs' expert's methodology, but rather his conclusions. The court concluded that such disputes go to the merits of plaintiffs' allegations and thus may be resolved at trial, not on class certification, and added that there was at least as much record support for plaintiffs' expert's conclusions as for those of defendants' expert. The court concluded that it could only reject plaintiffs' expert's analysis if it had no probative value – if he had not

⁶⁴ *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 448 (3d Cir. 1977).

⁶⁵ *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153 (3d Cir. 2002).

identified a valid method by which plaintiffs would attempt to prove his conclusions at trial, or if he had not shown that he could apply such a method to the facts of this case –which the court found was not the case.

B. Group Buying Organizations

Defendants estimate that approximately 20% to 30% of the proposed class comprised entities that purchased OSB from defendants through group buying organizations. The court concluded that only members of group buying organizations who have "a significant ownership interest in or functional control" over their organizations have standing as direct purchasers to sue for damages under the Sherman Act, applying the Third Circuit's requirement of "functional unity" between the intermediate distributor and one of the parties.⁶⁶ When no member of the group has a sufficient ownership interest or control, the direct purchaser is the group buying organization itself.⁶⁷ The court added that since the proposed class need only be ascertainable by some objective criteria, not actually ascertained, challenges to individual claims based on class membership could be resolved at the claims phase of the litigation.

In addition to arguing *Illinois Brick's* "ownership/control" exception,⁶⁸ plaintiffs had argued in the alternative that such entities are indirect purchasers entitled to recover damages under *Illinois Brick's* "fixed-quantity cost-plus" exception,⁶⁹ but the court noted that courts have almost never

⁶⁶ *Howard Hess Dental Labs, Inc. v. Dentsply Inter., Inc.*, 424 F.3d 363, 372 (3d Cir. 2005) (citing *Jewis Hospital Ass'n v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971 (6th Cir. 1980)); *Mid-West Paper Prod. Co. v. Continental Group, Inc.*, 596 F.2d 573, 589 (3d Cir. 1979).

⁶⁷ See *Howard Hess*, 424 F. 3d at 372.

⁶⁸ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 n. 16 (1977).

⁶⁹ *Illinois Brick*, 431 U.S. at 733.

applied this exception, and cast doubt on its viability.

IV. THE INDIRECT PURCHASER CLASSES

The court certified two classes of entities that purchased OSB for end use— a multi-state class under Rule 23(b)(3) with eight state subclasses (with leave for plaintiffs to offer class representatives for nine additional states and the District of Columbia), and a nationwide class under Rule 23(b)(2) under the injunction provisions of Section 16 of the Clayton Act.⁷⁰

Unlike in its certification of the Direct Purchaser Plaintiff class, the court declined under *Bogosian* to presume classwide impact of defendants' conspiracy on the proposed indirect purchaser class. The court also concluded that plaintiffs could not demonstrate impact on a classwide basis on the home-buyer segment of the proposed class (i.e., class members who claim that an increase in OSB prices increased the prices they paid for their homes), and accordingly excluded that segment from the certified class.

VI. CURRENT STATUS OF THE CASE

The United States Court of Appeals for the Third Circuit denied defendants' petition under Rule 23(f) for leave to appeal the district court's certification of the OSB classes. Defendants J.M. Huber, Georgia-Pacific, and Ainsworth have settled with Direct and Indirect Purchasers, and trial

⁷⁰ In addition to the Rule 23(b)(2) injunctive class under the Clayton Act, Indirect Purchaser Plaintiffs had sought certification of a damages class under antitrust and consumer protection statutes in the District of Columbia and the 20 states that have enacted Illinois Brick "repealer" statutes. See, e.g., *D.R. Ward Const. Co. v. Rohm and Haas Co.*, 470 F. Supp.2d 485, 503 (E.D.Pa. 2006); *In re Hydrogen Peroxide Antitrust Litig.*, 2006 WL 999955, at *1 n.2 (E.D. Pa. Apr. 11, 2006).

is scheduled to begin March 25, 2008 against the remaining defendants.

In re Polyester Staple Fiber Antitrust Litigation

*By Marguerite M. Sullivan,
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On July 19, 2007, Judge Voorhees of the Western District of North Carolina certified a class in the polyester staple fiber ("PSF") litigation, a horizontal price fixing class action that a group of PSF purchasers filed in 2003 against the four major PSF manufacturers in the United States, Arteva Specialties, S.ar.l., d/b/a KoSa, now named INVISTA S.ar.l. and Arteva Services, S.ar.l. (collectively, "Arteva"), Wellman, Inc., E.I. DuPont de Nemours and Company and the related DAK entities, and Nan Ya Plastics Corp. and Nan Ya Plastics Corporation, America, a/k/a Nan Ya Plastics Corporation USA. *In re Polyester Staple Antitrust Litigation*, MDL No. 3:03CV1516, 2007 WL 2111380 (W.D.N.C. July 19, 2007). The lawsuit followed guilty pleas that Arteva and one of its employees, Troy F. Stanley, Jr., entered in December 2002, in which they admitted to conspiring to fix certain PSF prices and allocate certain PSF customers.

On November 16, 2004, the plaintiffs moved to certify a class of individuals or entities who purchased PSF in the United States directly from any of the defendants or their alleged co-conspirators from April 1, 1999 to July 31, 2001. Class plaintiffs contend that the conspiracy was an industry-wide conspiracy that affected all purchasers of all types of PSF.

All but one of the defendants settled with the plaintiffs while the class certification motion was pending. The remaining defendant, Arteva, opposed class certification. Arteva argued that class treatment was improper for several reasons. First, the conspiracy could not have affected *all* purchasers of *all* types of PSF because it was a narrow

conspiracy aimed only at large textile companies that bought a specific type of PSF known as "fine denier" fiber. The competitors attempted to raise prices to those specific purchasers through separate customer-specific price negotiations. As a result, Arteva asserted that individual issues as to whether particular class members were subject to the conspiracy and whether conspiratorial conduct influenced any particular customer's pricing would predominate over common issues.

Second, Arteva argued that a price-fixing conspiracy in the PSF industry could not possibly have the generalized, market-wide effects that are critical to class certification because there are different markets for different types of PSF products. There are nearly 200 types of PSF that fall into four general use categories (textile or fine denier, carpet, fiberfill, and other nonwovens). PSF products that are designed for use in one of these categories are not interchangeable with fibers that are designed for use in other categories. Thus, Arteva argued, impact and damages could not be determined on a class-wide basis using a simple formula, but would require individual evidence related to each individual customer.

Third, Arteva argued that the class representatives failed both the typicality and adequacy requirements of Rule 23 because none were targets of the conspiracy, and the majority of them did not purchase fine denier PSF. Finally, Arteva argued that a class action was not superior to individual actions under Rule 23, as evidenced by the fact that most of the customers that purchased textile PSF from the defendants retained their own counsel and filed individual lawsuits. This includes nearly every customer that Arteva admits was a target of the conspiracy and accounts for 70-75% of the putative class in terms of sales volume.

The court issued a decision after extensive briefing and after the parties had completed both

fact and expert discovery for trial. The court held that a class action is appropriate because the plaintiffs' claims are typical of those of the class in that "each alleges injury via an illegal overcharge as a result of an industry-wide price-fixing and customer allocation conspiracy in violation of the Clayton Act." In addition, the court held that common factual and legal issues predominate over individual issues. Specifically, the nature of the antitrust violation, particularly the scope of the alleged conspiracy (*i.e.*, whether it included all purchasers of all PSF products or only certain purchasers of fine denier textile PSF), is the predominant common issue for trial. Although the court recognized that individual issues may arise as to the fact and extent of each customer's injury, it concluded that common impact may be presumed using the *Bogosian* short-cut if the jury finds a broad industry-wide conspiracy. According to the court, under *Bogosian*, "an illegal price fixing scheme presumptively impacts upon all purchasers of a price fixed product in a conspiratorially affected market." The court thus concluded that "[i]f the jury later finds facts consistent with Plaintiffs' allegations, reliance on the *Bogosian* principle or inference will be sufficient to establish common impact." In other words, the court put off the determination of whether the fact and extent of injury is subject to class-wide evidence until the jury makes its findings as to the scope of the violation: "Subject to Plaintiffs' proof regarding the conspiracy's scope, an inference of antitrust injury may, in fact, benefit the entire putative class and eliminate the need for any individual inquiry regarding injury or impact."

At the same time, Judge Voorhees recognized that the class representatives must establish that each individual putative class member has sustained actual antitrust injury as a result of the alleged conspiracy and that the damages inquiry

necessarily requires individual proof. The court held nevertheless that such individual proof does not defeat class certification and it accepted class plaintiffs' expert witness' methods for determining class-wide damages without weighing them against Arteva's expert's competing testimony. Finally, the court raised the possibility of creating subclasses to account for the different types of PSF products or bifurcating the liability and damages phases of the trial and including customer-specific evidence of impact in the damages phase, but it declined to decide those important procedural issues.

On August 1, 2007, Arteva moved under Fed. R. Civ. P. 23(f) for an interlocutory appeal to challenge the court's order. Arteva argued in its motion that Judge Voorhees misapplied the predominance standard of Rule 23(b)(3) because he focused on the violation element of the plaintiffs' claim, rather than impact and damages and, in doing so, improperly relied on the *Bogosian* short-cut. Arteva argued that the Fourth Circuit in *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), rejected this method in favor of a bright line rule that class certification is only appropriate in an antitrust action if both the fact and extent of injury can be ascertained mechanically. Arteva also argued that the court failed to conduct the rigorous analysis that Rule 23 requires because it declined to evaluate competing economic evidence as to the likelihood that the conspiracy would have market-wide effects and accepted plaintiffs' expert's testimony wholesale. Finally, Arteva argued that the district court committed clear, reversible error by failing to "define the class claims, issues, or defenses," as required by Fed. R. Civ. P. 23(c)(1)(B), and instead offered several competing alternatives as to what might be tried as a class without ever deciding the issue.

On August 28, 2007, the Fourth Circuit denied Arteva's

motion. In this author's view, the Fourth Circuit missed the opportunity to instruct the bench and bar on a number of important questions, such as the inherent conflict among class representatives where a defendant has previously pled guilty to anti-competitive behavior as to one class representative but not others, the proper application (if any) in the Fourth Circuit of the "*Bogosian* shortcut" to class-wide impact, and the proper interpretation of Fed. R. Civ. P. 23(c)(1)(B). The trial in the PSF litigation is scheduled to begin on March 31, 2008.

IV. FEDERAL COURTS OF APPEALS

Fifth Circuit Breathes Life Into *Per Se* Rule

*By John J. Eklund,
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The last three decades have not been kind to the *per se* rule of analysis under section 1 of the Sherman Act. The Supreme Court has slowly, but inexorably, narrowed the class of commercial activity to be judged under the *per se* rule. In 1977, non-price vertical restraints became subject to the rule of reason.⁷¹ Two years later, the Court held that price and output restraints created through an integrated joint venture were not *per se* unlawful.⁷² In 1984, the NCAA's naked restraints on price and output of televised college football games was subjected to the rule of reason.⁷³ That year, the Court also had declared that not all tying arrangements should be condemned as illegal *per se*.⁷⁴ The trend continued in 1997 when the Court ruled that maximum resale pricing agreements should be analyzed under the rule of

⁷¹ *Continental TV Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

⁷² *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

⁷³ *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

⁷⁴ *Jefferson Parish v. Hyde*, 466 U.S. 2 (1984).

reason⁷⁵, and persists today as reflected in the Court's 2007 decision declaring that minimum resale pricing agreements also are no longer *per se* illegal.⁷⁶

In 1985, the Court decided *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*⁷⁷ There, the Court held that not all group boycotts are illegal *per se*. The Court noted that its previous applications of the *per se* rule to group boycotts had been in situations in which firms had made joint efforts "to disadvantage competitors by 'either denying[,] or persuading or coercing suppliers or customers to deny[,] relationships the competitors need in the competitive struggle.'"⁷⁸ In addition, the Court noted that *per se* illegal group boycotts "often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete...and frequently the boycotting firms possess[] a dominant position in the relevant market."⁷⁹

The Fifth Circuit had the opportunity recently to join the Supreme Court in narrowing the use of the *per se* rule to analyze group boycotts in *Tunica Web Advertising v. Tunica Casino Operators Association, Inc.*⁸⁰ However, it declined to do so.

In *Tunica*, the plaintiff had acquired rights to an internet domain name, which it proposed to lease to all of the casinos in Tunica County, Mississippi. Under the proposal, visitors to "tunica.com" would automatically be directed to the web site of the Tunica County Tourism Commission ("TCTC"), which featured information about all of the local casinos. The casinos had formed a trade association, to which the TCTC referred the plaintiff's proposal.

The trade association rejected the proposal, but there also was

evidence that the member casinos agreed among themselves not to do business with the plaintiff at all, either collectively or individually. Plaintiff then created its own "tunica.com" website to offer online casino hotel bookings. When the plaintiff solicited casinos to advertise on its website, each of them declined. There was additional evidence that the casinos had voted at another trade association meeting to not do business with "tunica.com."

The plaintiff sued, claiming the casinos, the TCTC, and the trade association had engaged in a group boycott. The district court granted summary judgment in favor of the defendants. The court reasoned that the casino's actions could not be *per se* illegal because the plaintiff did not compete with them. Analyzing the facts under the rule of reason, the court held that the casinos' concerted rejection of the plaintiff's first offer did not unreasonably restrain trade because it occurred only in response to a request for a concerted decision. It further held that the plaintiff's claims based on the casino's subsequent refusal to advertise on "tunica.com" failed for lack of evidence that the refusals were pursuant to an agreement.

The Fifth Circuit agreed that since the plaintiff had made its original proposal to the casinos jointly, their rejection of the proposal was effectively the action of a single economic unit, and therefore not concerted action within the purview of section one.⁸¹ However, the court stated that a casino official's statements to the plaintiff about the source of the casinos' actions, if admissible, were sufficient evidence to defeat summary judgment on the question of whether the casinos' subsequent refusals to deal with plaintiff were pursuant to an agreement not to do business with plaintiff at all.⁸²

⁸¹ *Id.* at 410.

⁸² *Id.* at 410-11. The admissibility question was whether the official's statements were hearsay, admissions of a party opponent, or co-conspirator statements. The Fifth Circuit

Next, the court addressed whether the Casinos' conduct could be characterized as a *per se* violation of the Sherman Act. Relying largely on the Supreme Court's decision in *NYNEX Corp. v. Discon, Inc.*,⁸³ the court noted that for a group boycott to qualify for *per se* condemnation, it had to be based upon an agreement among competitors.⁸⁴ Then, rejecting the district court's holding, the Fifth Circuit held that the victim of an alleged group boycott need not be a competitor of the conspirators in order to recover under the Sherman Act.⁸⁵

The court acknowledged that some earlier Fifth Circuit decisions and academic writings had concluded that *per se* treatment of group boycotts was inappropriate unless the victim competed with at least one member of the alleged conspiracy.⁸⁶ However, it interpreted the Supreme Court's *Northwest Wholesale Stationers* decision and found it dispositive of the issue.

As noted above, the Supreme Court had made two statements about the nature of group boycotts that are *per se* illegal. First it said that boycotts it previously had found to be *per se* illegal had involved joint actions to disadvantage *competitors*. It then listed the characteristics of those conspiracies, including that they cut off access to necessary supplies, markets or facilities and the conspirators frequently dominated their market.

The *Tunica* court treated each of part of these descriptions as a separate characteristic of *per se* illegal boycotts.⁸⁷ Since the Supreme Court had said that a *per se* illegal boycott need not embody all of these characteristics,⁸⁸ the Fifth Circuit held that disadvantaging competitors was not necessary to *per se*

remanded the case for specific findings on this issue.

⁸³ 525 U.S. 128 (1998).

⁸⁴ 496 F. 3d at 412.

⁸⁵ *Id.* at 414.

⁸⁶ *Id.* at 412-13.

⁸⁷ *Id.* at 413-14.

⁸⁸ 472 U.S. at 295.

⁷⁵ *State Oil v. Kahn*, 522 U.S. 3 (1997).

⁷⁶ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

⁷⁷ 472 U.S. 284 (1985).

⁷⁸ *Id.* at 294, quoting L. Sullivan, *Law of Antitrust* at 261-62 (1977).

⁷⁹ *Id.*

⁸⁰ 496 F.3d 403 (Fifth Cir. 2007).

treatment.⁸⁹ The District Court had not specifically considered the extent to which the alleged conspiracy had the characteristics the Supreme Court had identified, other than disadvantaging competitors. So, the Fifth Circuit reversed and remanded the case for further proceedings.⁹⁰

A careful reading of *Northwest Wholesale Stationers* reveals that it could justify the Fifth Circuit's decision in *Tunica*. The Supreme Court expressly noted that it "generally" applied the *per se* rule to "joint efforts...to disadvantage competitors...."⁹¹ In describing other characteristics of *per se* illegal boycotts, the Court said they "often" cut off access to supplies, facilities or markets "necessary for the boycotted firm to compete...and frequently the boycotting firms possess[] a dominant position in the relevant market."⁹² So, while describing the victims of boycotts in terms that connote a competitive relationship to the defendants, the Supreme Court's use of qualifiers indicates that it was not ruling that there always had to be one for the *per se* rule to apply.

The Fifth Circuit also found support for its reading of *Northwest Wholesale Stationers* in the Supreme Court's 1990 decision *FTC v. Superior Court Trial Lawyers Association*.⁹³ There, the Supreme Court held that an agreement among lawyers to refuse to accept indigent criminal defense assignments unless authorities raised the hourly rates paid for the work violated Section 5 of the FTC Act because the conduct was a *per se* violation of section 1 of the Sherman Act.⁹⁴ Since the victim of that boycott (the court system) was not in competition with the boycotters, but the Court applied the *per se* rule anyway, the Fifth Circuit

reasoned that the *per se* rule could apply in the *Tunica* case.⁹⁵

However, according to the *Tunica* court, *Superior Court* was a boycott case in name only. The gravamen of the offense there was that the lawyers had agreed on a price below which they would not sell their services to the Superior Court. The "boycott" was nothing more than the natural result of the price agreement, an element that appeared to be missing in *Tunica*. The Fifth Circuit recognized this distinction and found it unimportant.⁹⁶

The Supreme Court has never held a group boycott without a price fixing element illegal *per se* unless the victim was a competitor of one of the defendants. Only time will tell if the decision in *Tunica* will herald a reinvigoration of the *per se* rule or, like so much other conduct, will fall victim to the high Court's demonstrated willingness to eschew its use in favor of the rule of reason.

A Market No Jury Could Find-Craftsmen Limousine

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In *Craftsmen Limousine, Inc. v. Ford Motor Company*, 491 F.3d 380 (8th Cir. 2007), the Eighth Circuit affirmed summary judgment for the defendant, because the plaintiff failed to show any relevant anticompetitive effects. Plaintiff, a limousine maker, took Ford and GM products and "stretched" them, which entailed "cutting the base vehicle in two, inserting structural pieces between the two halves of the base vehicle, and welding the parts back together," to create super stretch limousines. Following a number of accidents involving stretched Ford and GM products, both companies developed vehicle certification programs, which, among other requirements, limited the length to which their base vehicles could be

stretched. Many of the plaintiff's super-stretched limousines were longer than allowed under these programs, and the plaintiff did not participate in the certification program. Plaintiff alleged that Ford, GM, the Limousine Industry Manufacturers' Organization, and a number of coach-building companies had engaged in a conspiracy to restrain trade by lobbying magazines not to carry advertisements for the products of non-program limousine builders or allow those builders' products to be shown at their trade shows. Craftsmen initially prevailed at trial, but the Eighth Circuit reversed the verdict, finding that the trial court erred in applying a *per se* standard of illegality to the defendants' conduct, and remanded the case for trial under the rule of reason. See *Craftsmen Limousine, Inc. v. Ford Motor Company*, 363 F.3d 761 (8th Cir. 2004).

Craftsmen retained an economist who analyzed the effect of the behavior of Ford and American Coach, a limousine maker, (the two parties with whom Craftsmen had not settled) on Craftsmen's income. The economist did not "explore whether the restraints had or could have an anti-competitive impact upon the limousine industry as a whole." Ford moved to exclude the testimony of Craftsmen's economic expert, and Ford and American Coach moved for summary judgment. The district court granted Ford's motion to exclude the expert's testimony, finding that the expert had failed to analyze whether the restraints were anticompetitive under the rule of reason, and took issue with the expert's definition of the relevant market, which was defined as limousines stretched beyond Ford and GM length restrictions (120 inches and 130 inches, respectively), because the expert provided no empirical support for his market definition. The district court also granted the summary judgment motions.

The Eighth Circuit upheld the exclusion of the plaintiff's economic expert's testimony,

⁸⁹ 496 F. 3d at 414.

⁹⁰ *Id.* at 414-15.

⁹¹ 472 U.S. at 294 (emphasis added).

⁹² *Id.* (emphasis added).

⁹³ 493 U.S. 411 (1990).

⁹⁴ *Id.* at 423.

⁹⁵ 496 F. 3d at 414.

⁹⁶ *Id.* at 414, n. 16.

holding that the expert had merely analyzed the effect of the program on the plaintiff, not on competition in the industry. The Eighth Circuit also found Craftsmen's market definition "unavailing," stating: "Under that definition, a Lincoln Town Car stretched by 85 inches competes in the same product market as one stretched by 120 inches, while a Town Car stretched by 120 inches competes in a separate market from one stretched by 121 inches. Further, a Town Car stretched by 85 inches would compete in the same market as a Cadillac DeVille stretched by 130 inches, while a Town Car stretched by 125 inches would compete in a separate market than a DeVille stretched by the exact same length. Any reasonable juror would find it implausible that consumers would make such arbitrary distinctions when buying limousines...." The Court also noted that Craftsmen's product market definition "would ultimately undermine Craftsmen's claim," noting that "the restrictions insulated well-established coachbuilders like Craftsmen from competition in the specialty limousine market" by barring members of Ford and GM quality programs from serving that allegedly separate market. The court held that no reasonable jury could find that this market was properly defined.

The Eighth Circuit then examined whether Craftsmen had presented sufficient evidence for a jury to find detrimental effects on competition in the limousine market overall. The Court found that Craftsmen failed to show that prices had increased above competitive levels or that competitors had exited the market and failed to provide any other economic indication that the industry suffered any anticompetitive consequence from the advertising restraints. The Court considered whether Craftsmen had provided evidence to prove anticompetitive effects indirectly and found it had not, noting that it was "clear that Ford and American Coach, acting

independently, do not wield power in the limousine market..." and that Craftsmen had failed to offer any evidence that the coachbuilders had formed a cartel with the ability to exercise market power collectively. The Court also noted that it would not have been in Ford's interest to enter such a cartel in any event, as "[a]ny anticompetitive agreement among coachbuilders would likely reduce output in the limousine market and therefore hurt Ford's sales of base vehicles without any apparent benefits to Ford." The Supreme Court denied Craftsmen's petition for writ of certiorari. See *Craftsmen Limousine, Inc. v. Ford Motor Company*, 128 S. Ct. 654 (2007).

***In Re Cotton Yarn Antitrust
Litigation – Right to Join
Parties and Four-Year Statute
of Limitations Period Are Not
Substantive Rights Under the
Antitrust Laws***

*By Kristen J. McAhren,
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In *In re Cotton Yarn Antitrust Litigation*,⁹⁷ the Fourth Circuit held *inter alia* that parties to an arbitration agreement that prohibited joinder of jointly and severally liable defendants did not alter any substantive right under the Sherman or Clayton Acts so as to deny the remedial and deterrent functions of the antitrust laws as defined in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which held antitrust disputes are properly arbitrable "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."⁹⁸ Additionally, the Fourth Circuit held that because the Clayton Act's four-year limitations period was merely a procedural provision, an agreement between the parties to limit antitrust claims to a one-year limitations period was similarly enforceable. The parties had also agreed that this one-year limitations period could not be tolled. The Fourth Circuit

remanded the case to the United States District Court for the Middle District of North Carolina for proceedings on the limited issue of whether this non-tolling agreement was enforceable.

Cotton Yarn thus adds to the limited post-*Mitsubishi* jurisprudence regarding what amounts to substantive rights under the antitrust statutes. The case also is notable because it reveals that more than twenty years after the Supreme Court deemed antitrust disputes as a proper subject of arbitration, antitrust arbitration remains controversial and that the issue of whether parties' may as a practical matter effectively vindicate their statutory rights in the arbitral forum remains a live one. As explained by the Fourth Circuit, the burden of establishing that the purpose of the antitrust laws will not be served in the arbitral forum is a high one. This burden must be supported with specific evidence to establish that the arbitration agreement plainly denies a right embodied in the statute or that the agreement so precludes a party from making its claim or defense that it effectively defeats the purpose of the antitrust laws.

**BACKGROUND – MITSUBISHI
AND WAIVER OF STATUTORY
RIGHTS IN ARBITRATION**

Before the 1985 *Mitsubishi* decision, antitrust causes of action generally were presumed non-arbitrable. Led by the Second Circuit, courts considered the arbitral forum inadequate to serve statutory public policy goals or to effectively adjudicate the private cause of action.⁹⁹ Arbitration

⁹⁹ *Amer. Safety Equip. Corp. v. J.P. MacGuire & Co.*, 391 F.2d 821, 827-28 (2d Cir. 1968); e.g. *Lake Comm'ns, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984); *Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d 116 (7th Cir. 1978); *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974) (noting consensus among circuits as to non-arbitrability of antitrust claims); *Helffenbein v. Int'l Indus., Inc.*, 438 F.2d 1068 (8th Cir. 1971).

⁹⁷ 505 F.3d 274 (4th Cir. 2007).

⁹⁸ 473 U.S. 614, 637 (1985).

denied both the public and the parties the rights and protections afforded by Congress in the antitrust laws.

The exact rationale for this prohibition varied among circuits, but the analysis was the same—whether the antitrust statutes were “of a character inappropriate for enforcement by arbitration.”¹⁰⁰ Noting that the antitrust cause of action was created by Congress to serve the national interest in a freely competitive economy, the courts distinguished antitrust claims from commercial disputes that were “private matters” for which arbitration was typical.¹⁰¹ Even the private cause of action found in the Clayton Act was conferred not to compensate plaintiffs for private damage but to supplement public enforcement efforts by bestowing plaintiffs with the role of “private attorney general” to the end of protecting competition.¹⁰² The arbitral forum, however, was seen as a forum for the private resolution of private disputes, usually within the confines of total confidentiality and with limited judicial review.¹⁰³ It was reasoned that without published decisions and precedent the national agenda could not be served. Moreover, it was assumed that arbitrators would incline towards business resolutions to antitrust disputes and have little to no interest in resolving disputes with the larger national interest in mind.¹⁰⁴ The arbitral forum was

¹⁰⁰ *Wilco v. Swan*, 201 F.2d 439, 444 (2d Cir. 1953) *overruled on other grounds* by 346 U.S. 427 (1953) which had held in the context of a labor dispute that the issue of whether a statutory claim was arbitrable in the first instance was a question of whether the statute itself was of a “character inappropriate for enforcement by arbitration.”

¹⁰¹ *American Safety*, 391 F.2d at 826.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ In addition to the fact that the FAA itself limits judicial review of the arbitral decision, there is no requirement that an arbitrator issue a written opinion or other findings of fact of law which a court could review. See 9 U.S.C. §§ 10-11. For a discussion of these

therefore inconsistent with Congress’ desire to create a uniform body of economic law.¹⁰⁵

Moreover, even if the antitrust dispute could be characterized as merely a “private” dispute, the normative and statutory rights and procedures of arbitration were inconsistent with the pursuit of an antitrust cause of action and thus effectively denied the parties’ their rights under the statutes.¹⁰⁶ The hallmark of arbitration was (and still is) said to be the speedy and efficient resolution of disputes by virtue of limited proceedings adjudicated under principles of common sense and equity.¹⁰⁷ Not surprisingly, therefore, neither the FAA nor normative arbitration practice have provided parties a right to discovery in the first instance.¹⁰⁸ Moreover, arbitrators lack authority to order discovery from third-parties who have not consented to the arbitrator’s jurisdiction.¹⁰⁹ Antitrust claims, it was argued, inherently require broad, complex and detailed discovery and inquiry, including market-level and economic

limitations and strategies for how parties may attempt to revise the norms of the arbitral forum so as to accommodate complex antitrust litigation see Robert Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. Rev. 1072, 1079 (1969).
¹⁰⁵ *American Safety*, 391 F.2d at 826.
¹⁰⁶ *Id.* at 827; see also *Cobb*, 488 F.2d at 47.

¹⁰⁷ See *Wilco v. Swan*, 346 U.S. 427, 438 (1953); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A] party who has not agreed to arbitrate will normally have a right to a court’s decision about the merits of its dispute But where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right’s practical value.”).

¹⁰⁸ Neither statutory nor common laws provide parties a right to discovery in arbitration. See THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 116-177 (Hon. Curtis E. von Kann (ed.) (2006). The FAA does provide for limited court-ordered discovery in aid of arbitration under certain “extraordinary” circumstances. FAA, 9 U.S.C. § 7.

¹⁰⁹ *Id.* at 127-131.

discovery and inquiry.¹¹⁰ From there, the courts then assumed, if not always articulated, the conclusion that an antitrust claim could not truly be pursued or defended without broad proceedings and discovery.¹¹¹ By this logic, the inability of the party to engage in a robust antitrust analysis in arbitration was against public policy as a *de facto*, if not express, denial of the parties’ rights under the Sherman and Clayton Acts.¹¹²

Mitsubishi – Arbitration Proper So Long as Statutory Rights Protected

In *Mitsubishi*, the Supreme Court rejected the notion that the antitrust private cause of action was a “public” cause of action distinguishable from other commercial disputes, reasoning that, while the antitrust statutes served important national and public interests, the Clayton Act’s treble-damage cause of action was remedial, seeking primarily to compensate parties for antitrust injuries.¹¹³ The public policies articulated in the antitrust statutes therefore had to give way to the FAA’s policy in favor of the enforcement of private agreements to arbitrate.¹¹⁴ The only governing inquiry as to whether an antitrust

¹¹⁰ *Id.*; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, (1st Cir. 1983) *rev’d* 473 U.S. 614 (1985) (describing concern articulated in *American Safety* regarding limitations of discovery as an “understatement”). As stated by the Supreme Court in the context of a labor dispute, “the factfinding process in arbitration usually is not the equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, cross-examination, and testimony under oath, are often severely limited or unavailable.” *Wilco*, 346 U.S. at 437.

¹¹¹ *American Safety* 391 F.2d at 827; *Cobb*, 488 F.2d 41.

¹¹² See *Cobb*, 488 F.2d at 427; *Pitofsky*, 44 N.Y.U. L. Rev. at 1079.

¹¹³ *Id.* at 635.

¹¹⁴ *Id.*

claim was arbitrable, therefore, was the question of whether the parties had agreed to arbitrate the particular antitrust claim.¹¹⁵

The Supreme Court declined to presume that the purpose of the antitrust laws would not be served by the arbitral forum: “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”¹¹⁶ In other words, antitrust claims could be properly arbitrated “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum” such that “the statute will continue to serve both its remedial and deterrent function.”¹¹⁷ Should, therefore, it be the case that the parties’ arbitration agreement amounted to a “prospective waiver of a party’s rights to pursue statutory remedies for antitrust violations, [the Court] would have little hesitation in condemning the agreement as against public policy.”¹¹⁸ However, the mere fact that the arbitral forum differed from that of litigation would no longer be enough to carry the burden of this argument.

The *Mitsubishi* Court gave no guidance as to which elements of the laws were “statutory” and thus non-waivable. Since then, the Court has not opined further on the practical implications of complex antitrust litigation, and particularly

discovery, once in arbitration.¹¹⁹ In fact, to-date, the Supreme Court has yet to determine or opine as to which, if any, statutory rights under the Sherman or Clayton Acts are non-waivable, or under what circumstances the arbitral procedures may provide inadequately to effectively allow the parties to pursue or defend the cause of action. With one exception, the lower courts, including the Fourth Circuit, have not found any statutory rights to actually exist under the antitrust laws. That exception has been the First Circuit’s determination in *Kristian v. Comcast Corp.* that the Clayton Act’s right to treble-damages cannot be waived.¹²⁰

Cotton Yarn: Joinder and Statute of Limitations Are Not Substantive Rights Under The Antitrust Laws

In *Cotton Yarn*, the defendants sought to arbitrate the plaintiffs’ section one claims under various form clauses used in textile industry sales contracts. The clauses each provided for the arbitration of “any controversy arising out of or relating to” the applicable contract.¹²¹ They also included provisions that prescribed the remedies, including attorneys’ fees, that could be awarded by the arbitrator, that expressly prohibited the joinder of claims or parties, and that limited the statute of limitations to a one-year period

with no possibility of tolling.¹²² The plaintiffs argued that, assuming the arbitration clause could be enforced against all parties,¹²³ those provisions denied the remedial and deterrent purposes of the antitrust laws and thus were unenforceable under *Mitsubishi*.¹²⁴ First, plaintiffs argued that the provision preventing the arbitrator from awarding “consequential, indirect, special, punitive damages or damages for lost profit” and the provision limiting the statute of limitations denied plaintiffs the treble-damage remedy and four year limitations period expressly written into the statute.¹²⁵ Second, they argued that the no-joinder

¹²² All the contracts at issue included the provision that:

“(d) Buyer shall not be entitled to join, implead or intervene other parties or assert other disputes with Seller by offset, defense, or counterclaim or by consolidation of proceedings or otherwise with any proceeding hereunder . . . (f) Any claim by Buyer of any kind, nature or description is barred and waived unless Buyer institutes arbitration proceedings within one (1) year after the claimed breach occurs. The failure to institute arbitration proceedings within this one year period shall constitute an absolute bar to the institution of any arbitration or other proceedings by Buyer and a waiver of all claims on Buyer’s part. . . .”

Id. Some of the contracts additionally prevented the arbitrator from awarding any “consequential, indirect, special, punitive damages or damages for lost profit.” *Id.* at 601.

¹²³ Before the court as an initial matter was the issue of whether the arbitration clause was enforceable as to certain parties to oral agreements. The court determined that due to the prevalence of the use of arbitration in the industry the arbitration clause was an implied part of the parties’ oral agreements and thus such imputation of the clause did not run afoul of North Carolina’s prohibition on reading material terms into contracts. *Id.* at 600-601. This holding was affirmed by the Fourth Circuit.

¹²⁴ *Id.*

¹²⁵ *Id.* at 601.

¹¹⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615-26 (1985). The Supreme Court, noting that the purpose of the Federal Arbitration Act (FAA) was to place private agreements to arbitrate on the same footing as other contractual agreements, relied upon the language of the FAA which provides that a written agreement to arbitrate is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.* at 625 (discussing FAA, 9 U.S.C. § 2).

¹¹⁶ *Id.* at 627.

¹¹⁷ *Id.* at 637.

¹¹⁸ *Id.* at 637 n. 19.

¹¹⁹ The Court has held that practical issues of the arbitration, such as discovery, are for the arbitrator to be determined in the first instance. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)

¹²⁰ *Kristian v. Comcast Corp.*, 446 F.2d 25, 45 (1st Cir. 2006) (provisions in arbitration clause that excluded treble-damages unenforceable denial of statutory rights); see also *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 317 (5th Cir. 2002) (suggesting but not deciding that parties may waive punitive but not treble-damages);

¹²¹ *In re Cotton Yarn Antitrust Litig.*, 406 F. Supp. 2d 585, 589-90 (M.D.N.C. 2005).

provision—which would require that plaintiffs pursue antitrust claims individually and against each defendant individually in over 100 separate arbitration proceedings—unreasonably raised the costs of the cause of action and prevented plaintiffs from presenting or the individual arbitrators from adjudicating a unified conspiracy claim. The agreement thus prevented plaintiffs from vindicating their rights and effectively immunized the defendants from antitrust liability.¹²⁶

The Middle District of North Carolina agreed that both the no-joinder and the limitations provisions prevented plaintiffs from exercising statutory rights, were inconsistent with the remedial and deterrent functions of the antitrust statutes, and therefore could not be enforced.¹²⁷ As to the no-joinder provision, the district court was persuaded that the provision in operation ran afoul of the Supreme Court's admonition in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,¹²⁸ that the Sherman Act claim is a claim for a single conspiracy and thus under the Act, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing it as separate parts, but only by looking at it as a whole" ¹²⁹ While it stopped short of holding that the four-year

¹²⁶ Plaintiffs' opposition at 21 and 18 n.21.

¹²⁷ 406 F. Supp. 2d at 603.

¹²⁸ 370 U.S. 690 (1962).

¹²⁹ *Id.* at 602.; (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). The District Court also relied on *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 115 (D.D.C. 2004), which held that "conspiracy allegations in antitrust cases cannot be compartmentalized and considered in isolation as if they were separate lawsuits, thereby overlooking the conspiracy claim itself." (internal quotes omitted).

limitations period as written into the antitrust laws could never be waived, the district court had little difficulty in finding a one-year period presumptively inadequate to serve the purposes of the antitrust laws.¹³⁰ Not only would such a period be inadequate to discover antitrust conduct, the limitations period also served to limit claims to one-year of damages and thus "significantly changed Defendants' obligations" under the antitrust laws.¹³¹ The district court did not reach the issue of whether treble-damages under the Clayton Act were a non-waivable statutory right, finding that the clause did not unambiguously deny the arbitrator the right to award such treble-damages.¹³²

The Fourth Circuit reversed, holding the no-joinder provision valid and reversing and remanding on the statute of limitations. First, the Fourth Circuit rejected the idea that the no-joinder provision could be facially invalid. Because co-conspirators are not necessary parties under the Federal Rules or case law, their preclusion from an arbitration proceeding alone could not make the arbitration agreement invalid.¹³³ Cases like *Continental Ore* on which the district court relied, do require that the fact-finder evaluate liability based on the "whole picture" of the conspiracy rather than on the actions of any one particular defendant. According to the Fourth Circuit, however, nothing in those cases establishes that such an inquiry is impossible in the absence of any of the alleged co-conspirators from the proceeding.¹³⁴

Moreover, plaintiffs had failed to establish that multiple proceedings would in practical effect prevent an arbitrator or arbitrators from following *Continental Ore* and deciding liability as to each defendant in each proceeding as part of a unified conspiracy claim. The no-

¹³⁰ *Id.* at 602.

¹³¹ *Id.* at 603.

¹³² *Id.* at 627.

¹³³ 505 F.3d 274, at *7.

¹³⁴ *Id.*

joinder clause did not expressly preclude plaintiffs from preventing evidence about non-party defendants in any particular proceeding or from introducing evidence developed in one arbitral proceeding into another proceeding.¹³⁵ Nor did plaintiffs show that the rules that would be applied to the arbitration precluded the admission of such evidence.¹³⁶ The Fourth Circuit acknowledged that multiple proceedings would raise costs and create proof problems. The court stated that, if it were the case that the costs of segregated proceedings were prohibitive or plaintiffs were in fact unable to pursue discovery so as to establish their claims because of the multiple arbitrations, the court would find that the no-joinder provision unenforceable. Plaintiffs, however, had failed to provide specific evidence of costs or burden sufficient to persuade the court of those alleged costs or burdens.¹³⁷

Turning to the one-year limitation on actions, the court reasoned that because the Clayton Act does not expressly prohibit parties from shortening the four-year limitations period specified in the statute, the only question for resolution was whether the one year period agreed to by the parties was reasonable.¹³⁸ In explaining that the Clayton Act's limitations period is procedural rather than substantive, the court relied upon the fact that the four-year limitations period was added in 1955 "more than forty years after the [Act's] original substantive liabilities were established."¹³⁹

¹³⁵ *Id.* at *9.

¹³⁶ The contracts allowed for the parties to pick either the rules of the American Arbitration Association or the Yarn Rules. Brief of Appellees, *In re Cotton Yarn Antitrust Litig.*, Record Nos. 05-2392(L), 04-2392, at 29 (April 24, 2005). Plaintiffs had argued that these Rules provided for "more limited" discovery than that in federal litigation. *Id.*

¹³⁷ *Id.* at 9.

¹³⁸ *Id.*

¹³⁹ *Id.* at *11 & n. 9 (quoting *Amer. Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 558 n. 29 (1974)). In *American*

Prior to that, state statutes of limitations were applied to the federal period. Under the circumstances, the court reasoned, it was hard to see how standardizing the statute of limitations across the federal actions amounted to Congressional conference of a substantive right.¹⁴⁰ And because it had held the limitations period a procedural rather than substantive right, the Fourth Circuit maintained that any resulting limit on the remedy available to plaintiffs could not violate the plaintiffs' statutory rights.¹⁴¹

The Fourth Circuit recognized case law holding that the Clayton Act allows for imputed tolling for purposes of fraudulent concealment.¹⁴² Because the district court did not address the agreement to waive tolling and the parties' were silent on it on appeal, the Fourth Circuit remanded to the district court to determine whether the complaint was timely filed due to the application of the fraudulent concealment doctrine.¹⁴³ The district court was advised that if it determines the filing untimely without fraudulent concealment, it must then determine whether the limitations period as written was unenforceable and should consider severance of the provision short of denial of the arbitration agreement in its entirety.¹⁴⁴

Pipe, the Supreme Court had recited the legislative history of the Clayton Act's limitations provision and observed that "During debate a member of the House Judiciary Committee reporting the bill was asked, '[A]m I correct in assuming that this limitation provided by this amendment is strictly a procedural limitation and has nothing to do with substance?' to which he replied: 'It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations.'"

¹⁴⁰ *Id.* at *12.

¹⁴¹ *Id.*

¹⁴² *Id.* at *13.

¹⁴³ *Id.* at *14.

¹⁴⁴ *Id.* As explained in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003),

A lengthy dissent would find the limitations period unenforceable as analogous to an agreement to limit statutory damages.¹⁴⁵

V. FEDERAL DISTRICT COURT CASES

Summary Judgment on Labor Practices Section 1 Claim

*By Brian Robison
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In *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, 2007 U.S. Dist. LEXIS 56229 (S.D.N.Y. Aug. 3, 2007), the Southern District of New York adopted the magistrate judge's decision to grant summary judgment for the defendants on a Sherman Act Section 1 claim. Focusing on the concerted action element, the court held that the plaintiffs had not put forward sufficient evidence of a conspiracy to exclude plaintiffs from the relevant market, and it dismissed all of plaintiffs' claims on summary judgment.

Plaintiffs were a group of contractors who employed members of the Communication Workers of America, AFL-CIO ("CWA") to install low-voltage telecommunications and data ("tel-data") wiring for business customers in New York City. They sued Local Union Number 3 of the International Brotherhood of Electrical Workers, AFL-CIO ("Local 3"), as well as several of

normally the only determination to be made by the court when presented with a motion to enforce an arbitration agreement is the gateway issue of whether the parties' agreed to arbitrate the instant claim or claims. Once the court determines there is a valid arbitration agreement, it is for the arbitrator to decide in the first instance the scope of the parties' agreement or to determine what kind of arbitration was contemplated by the parties. In *Cotton Yarn*, however, the parties had previously agreed to submit the statute of limitations issue to the court in the first instance. 406 F. Supp. at 602-03.¹⁴⁵ *Id.* at *23.

the electrical contractors who employed Local 3 workers, alleging a violation of Section 1 of the Sherman Act, along with state law claims for tortious interference and for acts in contravention of the Donnelly Act, New York's Sherman Act counterpart. In substance, plaintiffs alleged that Local 3 and its contractors had conspired in an attempt to force CWA contractors out of the telecommunications installation market.

Local 3 workers and CWA workers had different skill sets. While Local 3 laborers were trained to install both high- and low-voltage electrical systems, CWA laborers could install only low-voltage systems. Installing high-voltage systems required more knowledge and involved more risk, so Local 3 electricians typically received higher wages than CWA electricians. Because Local 3 electricians were paid the same wage, no matter the system on which they were working, CWA contractors could underbid Local 3 contractors for low-voltage work.

Aware of CWA's ability to underbid them, defendants allegedly threatened potential customers that, if the customer hired a non-Local 3 contractor for low-voltage work, the Local 3 workers employed to do high-voltage work on the same project would ensure that there would be scheduling delays and cost overruns. Indeed, plaintiffs presented evidence indicating that Local 3 members had, on a number of occasions, disrupted projects where CWA electricians were used. The result of Local 3's illegal activity, plaintiffs contended, was that customers had been required to rescind contracts with CWA contractors and award them to Local 3 contractors instead, causing plaintiffs damage.

Conceding that improper conduct had more than likely occurred, the court nevertheless held that there was no evidence of conspiracy and, thus, no Section 1 claim. All of the evidence that plaintiffs offered, the court stated, could just as easily support the notion that Local 3 and its

contractors had acted *independently* to rectify the problems attributable to Local 3's difficulty in competing with CWA on low-voltage work. Moreover, some evidence indicated that Local 3 contractors had attempted to mitigate the damage caused by their workers' improper conduct, rather than using such conduct as a bargaining tool to force customers to award them contracts. Finally, the court stated that the evidence offered to demonstrate agreement could likewise support the idea that Local 3 and its contractors had, on several occasions, come together to discuss legitimate ways to increase their competitiveness.

The court concluded that, although the defendants might be liable for extortion or unfair labor practices under the NLRA, they were not liable under the Sherman Act. There was no evidence that the defendants had acted in concert, and unilateral action to exclude CWA from the market did not violate Section 1. In addition, because an antitrust case should not be permitted to go to trial where the evidence is as consistent with permissible conduct as with illegal conspiracy, summary judgment was proper. The court dismissed the Sherman Act claim and declined to exercise jurisdiction over the remaining state law claims.

Linzer Products Corp. v. Sekar

*By Jeny M. Maier,
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In *Linzer Products Corp. v. Sekar*, 499 F. Supp. 2d 540 (S.D.N.Y. 2007), the Southern District of New York dismissed a number of antitrust claims brought by a licensee against its licensor. The licensee sought to invalidate a restrictive covenant in a licensing agreement between them that conditioned the license on the licensee's commitment to an exclusive dealing arrangement.

The licensor, Chandra Sekar, entered into a license agreement with Linzer Products Corporation

("Linzer") in 1998. Under that agreement, Sekar would permit Linzer to use his patented paint roller manufacturing process in exchange for royalties. The agreement contained a provision, Section 14.4, under which Linzer warranted that during the term of the agreement it would not manufacture or sell any polypropylene paint roller unless it was a "Licensed Product" under the agreement.

The parties began to dispute their obligations under the license agreement in 2006, when Linzer filed a declaratory judgment action, choosing not to wait for Sekar to sue for breach and/or patent infringement. Linzer alleged a number of antitrust claims, including claims that Section 14.4 of the license agreement was unenforceable because: (1) Sekar committed patent misuse in imposing the restriction; (2) if enforced, the restriction would be an unreasonable restraint on competition in violation of section 1 of the Sherman Act; (3) if enforced, Section 14.4 would violate section 3 of the Clayton Act; and (4) Sekar's actions constituted monopolization and attempted monopolization under section 2 of the Sherman Act.

Patent Misuse Claim: Looking to the Federal Circuit's decision in *U.S. Philips Corp. v. Int'l Trade Comm'n*, 424 F.3d 1179, 1186 (Fed. Cir. 2005), the court explained that "[a] patentee's market power is necessary, but not sufficient, for a finding of patent misuse based on conditional licensing." The *Linzer* court found that the allegations in Linzer's complaint did not "allow even an inference of a relevant market in which Sekar has monopoly power." 499 F. Supp. 2d at 553. The court credited, for purposes of both patent misuse and antitrust claims, the Supreme Court's holding in *Illinois Tool Works v. Independent Ink*, 547 U.S. 28 (2006), that there is no presumption of monopoly power from the mere possession of a patent.

Sherman Act Claims: Linzer's section 1 claim was based on its

allegation that Section 14.4 "chills innovation by preventing Linzer from using competing manufacturing technologies, thus reducing the demand for superior one-ply [paint roller] manufacturing processes, which processes could reduce prices for consumers." 499 F. Supp. 2d at 553. As with Linzer's patent misuse claim, the court found that Linzer's complaint failed to allege a clearly defined relevant market. Likewise, Linzer's failure to allege a relevant market in which Sekar possessed or could possess monopoly power destined his section 2 claims for dismissal.

Clayton Act Section 3 Claim: Linzer also sought a declaratory judgment that Section 14.4 was unenforceable because its enforcement would violate the exclusive dealing prohibition in section 3 of the Clayton Act. The court, however, agreed with Sekar that section 3 is limited to leases or sales of commodities and found that it was "beyond cavil" that the dominant purpose of the 1998 agreement was to license intellectual property, not to sell goods, and that therefore section 3 was inapplicable. 449 F. Supp 2d at 556.

District of Alaska Decision

*By Mark A. Correro,
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Alaska Rent-A-Car ("Alaska"), operating as an Avis franchisee, rented cars to the general public and to corporate customers. Avis's franchise agreement gave all franchisees freedom to set their own prices unless they chose to participate in Avis's corporate program. Participation in the program was voluntarily. While the program guaranteed Avis's institutional customers nationally uniform pricing, it allowed participating franchisees to set their own prices for the general public. Alaska opted to participate in the lucrative corporate program. Even though Alaska was operating as an Avis franchisee in the state, Avis decided to acquire Budget Rent-A-Car ("Budget") and continue operating it as a wholly-

owned subsidiary under the Budget brand.

Alaska sued Avis for violations of section 1 of the Sherman Act. See *Alaska Rent-A-Car, Inc. v. Cendant Corp. et al.*, No. 03-cv-00029, 2007 WL 2206784 (D. Alaska July 27, 2007). Alaska alleged for summary judgment and argued that: 1) the corporate participation program agreements between Avis and its franchisees were horizontal restraints on competition—per se violations; and 2) were illegal vertical price restraints. The district court agreed with Alaska that Avis's acquisition and operation of Budget "reduced competition in the rental car market between the Avis and Budget brands." But, standing alone, that does not violate the antitrust laws. The court therefore considered three issues bearing on Avis's purported liability.

First, the court considered whether Avis, a parent, and Budget, its subsidiary, could conspire in violation of the Sherman Act. The court held that they could not. "The first hurdle that . . . [Alaska] has failed to overcome is that, as a matter of law, a concerted activity between a parent and a subsidiary corporation can not constitute a combination or conspiracy under the Sherman Act." *Id.* at 23. (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770–74 (1984)).

Next, the court considered whether Avis and Budget as franchisees could conspire with each other in violation of the Sherman Act. The court held that franchisees cannot conspire with each other when operated as a common enterprise. Nearly all of the Budget and Avis policies and procedures were set by the parent. The court reasoned that: "The threshold requirement of concerted activity is missing among multiple corporations operated as a single entity when corporate policies are set by one individual or by a parent corporation." (citing *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447 (9th Cir. 1993); *General*

Business Systems v. North American Philips Corp., 699 F.2d 965, 980 (9th Cir. 1983); *Thomsen v. Western Elec. Co., Inc.*, 680 F.2d 1263, 1266-67 (9th Cir. 1982)). In *Fischer Nevada*, the fast-food franchisee operations were externally indistinguishable—all served the same products, the same way, under the same logo. Similarly, the franchisees at issue in the Avis/Budget case were internally indistinguishable. "[T]he avis and Budget operations are internally indistinguishable" "Although the two 'brands' are operated through separate wholly-owned subsidiaries," this "does not change the substance—it is limiting competition with itself." Such economic unity prevents the franchisees from conspiring under the Sherman Act.

Last, the court considered whether giving franchisees a choice to opt-in or opt-out of a corporate pricing program constitute retail price maintenance in violation of the Sherman Act. The court found that it did not. First, the court found that the *per se* rule does not apply when, as here, the operations involve a "significant degree of economic integration" (citing *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006)). And, moreover, it does not apply to any vertical price restraints" (citing *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. ___ (2007)). The court found that under the rule of reason, Alaska failed to produce evidence that prices were set "either below (i) that necessary to sell the product or (ii) cost"

In addition to the Rule 23(b)(2) injunctive class under the Clayton Act, Indirect Purchaser Plaintiffs had sought certification of a damages class under antitrust and consumer protection statutes in the District of Columbia and the 20 states that have enacted Illinois Brick "repealer" statutes. See, e.g., *D.R. Ward Const. Co. v. Rohm and Haas Co.*, 470 F. Supp.2d 485, 503 (E.D.Pa. 2006); *In re Hydrogen Peroxide Antitrust Litig.*, 2006 WL 999955, at *1 n.2 (E.D. Pa. Apr. 11, 2006).

VI. STATE COURTS

Minnesota Supreme Court Bucks Trend of Applying Associated General Contractors To Indirect Purchaser Cases

*By Brian P. Brosnahan,
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The Minnesota Supreme Court has reversed the dismissal of an indirect purchaser class action alleging that consumers paid more for tires due to defendants' conspiracy to fix the prices of rubber processing chemicals. *Lorix, etc., et al. v. Crompton Corp., et al.*, 736 N.W. 2d 619 (Minn. 2007). The district court had dismissed the case on the pleadings for lack of standing, applying of the five-factor test of *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("AGC"), and the State Court of Appeals affirmed. But, the Supreme Court held that the AGC factors "do not provide the benchmark for standing under Minnesota antitrust law," disagreeing with recent cases in which courts have applied the AGC factors to defeat indirect purchaser claims. See, e.g., *Kanne v. Visa U.S.A., Inc.*, 272 Neb. 489, 723 N.W. 2d 293 (2006); *Fucile v. Visa U.S.A., Inc.*, NO. 51560-03 CNC, 2004 WL 3030037 (Vt. Super. Ct. Dec. 27, 2004).

The defendants were manufacturers of rubber processing chemicals that were sold to tire manufacturers at prices the plaintiffs alleged were inflated by a conspiracy. The appeals court held that Minnesota antitrust law required that an antitrust plaintiff "be a participant or competitor in the market restrained by the alleged antitrust violation." Plaintiff's case was dismissed because although she purchased the end use product, tires, she was not a participant in the market for the rubber-processing chemical manufactured by the defendants. The Minnesota Supreme Court

rejected the argument that the AGC factors determine standing under Minnesota antitrust law. The Court held that AGC factors (2) (whether the injury alleged is direct or indirect) and (3) (whether there are more directly injured plaintiffs with motivation to sue) cannot apply in Minnesota because indirect purchasers are explicitly vested with a cause of action under Minn. Stat. Section 325D.57. Addressing AGC factor (5) (complexity of apportionment and risk of duplicative recoveries), the Court held that Minnesota courts must address complex apportionment issues and attempt to prevent duplicative recoveries but that neither problem presents a valid reason for denying standing. Likewise, the Court rejected the use of AGC factor (1) (whether the plaintiff is a consumer or competitor in the allegedly restrained market) as a reason for denying standing under Minnesota law. A plaintiff's relation to the alleged violation must satisfy ordinary principles of antitrust injury (and thus must be an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful), but antitrust injury is not limited to participants in the market in which trade was restrained. Minnesota courts must, however, apply the fourth AGC factor (whether the damages claims are speculative) and must address whether the alleged injuries are "so remotely related to antitrust violations that courts simply cannot provide relief." 736 N.W. 2d at 631. The Court concluded, "Standing under Minnesota antitrust law must be defined by some prudential limits informed by foreseeability, proximate cause, remoteness, and relation of the injury to the purposes of the antitrust law. . . ." *Id.* Applying these principles, the Court held that plaintiff had standing because she was an end user of a consumer good whose price was inflated by anticompetitive conduct earlier in the chain of manufacture, and the alleged injury – an overcharge – is

exactly the sort of injury that would be expected to flow from a price-fixing violation.

In discussing the recent trend of cases that have applied the AGC factors to defeat indirect purchaser standing by consumers who allege that the merchants they bought from were subjected to an illegal arrangement tying the acceptance of credit and debit cards (including the decision of a Minnesota District Court in *Gutzwiller v. Visa U.S.A., Inc.*, No. C4-04-68, 2004 WL 2114991 (Minn. Dist. Ct. Sept. 15, 2004)), the Court stated that Minnesota standing law would likely reach the same result in those cases as did application of the AGC factors, since the injury alleged in those cases "is most likely too remote and speculative to afford standing." 736 N.W. 2d at 632. The Court noted the "unique damages issues" in tying cases, where an increase in the price of the tied product may be offset in whole or in part by a decrease in the price of the tying product. The Court also pointed out that the overcharge alleged in the credit card/debit card tying litigation was an overcharge incurred by merchants that accepted credit and debit cards and was then "passed on to consumers in the form of higher prices on essentially every good sold in the state of Minnesota, even those purchased with cash. . . . Thus, the market affected by the anticompetitive conduct was in essence the market for all goods bought and sold in Minnesota." In contrast, Lorix's claim was "relatively focused, and was "limited to purchasers of tires manufactured with price-fixed chemicals." *Id.* And the Court could not say on a motion to dismiss whether Lorix's damages "are so speculative as to render proof impossible." *Id.* at 633.

VII. ANALYSIS

The Evidentiary Role of Antitrust Compliance Policies in Section One Civil Litigation

By Jeffrey A. Leon,
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Antitrust compliance policies have become a standard part of the corporate compliance milieu, joining policies on harassment, IT abuse, document retention, and many others. Antitrust compliance policies serve numerous salutary corporate objectives, including educating the workforce to avoid exposing the company to antitrust litigation and potentially protecting the company from criminal exposure if low-level employees violate the law.

Thus, a robust antitrust compliance program can act as a shield against antitrust litigation and exposure. See e.g., *U.S. v. Stolt-Nielsen S.A.*, 524 F.Supp.2d 586, 608 (E.D. Pa. 2007) (Compliance with leniency agreement found because "[b]y promptly instituting the antitrust compliance policy . . . Stolt-Nielsen 'took prompt and effective action to terminate its part in the anticompetitive activity being reported.'"). However, lawyers involved in civil price-fixing litigation know all too well that plaintiffs' lawyers regularly try to use non-compliance with antitrust policies as an evidentiary sword, seeking admissions from witnesses on whether particular actions were permitted or prohibited by the employee's compliance policy. The following actual exchange is typical of plaintiff deposition questioning:

- Q. Do you understand the [] antitrust compliance program to tell [] employees that they are not to share with competitors, either directly or through a third party, information concerning future price moves planned by [your company]?
- A. Our policy would certainly say that we would not provide to our competitors,

directly or intentionally through a third party, future pricing moves.

Q. Because that would be a violation of the antitrust laws, as you understand them?

A. I believe so.

Experienced antitrust counselors know that a well written compliance policy is not intended as a statement of antitrust law. Indeed, it is recognized that “sometimes, the drafter of the materials will opt to set the written standards higher than what the law requires” so as to avoid behavior which, while not illegal, could expose the company to expensive and distracting litigation or investigations. Hannay, W., *Corporate Compliance Series: Designing An Effective Antitrust Compliance Program*, Chapter 3:8 (2005). It is thus questionable whether an admission of violating a company’s antitrust compliance policy has any evidentiary significance. Given the recurrent use of antitrust compliance policies in civil antitrust litigation, it is perhaps surprising that there is little settled law on the admissibility of such evidence. This prudential dearth is most likely due to the infrequency of civil price-fixing actions reaching trial.

This article shares my recent experience with, and views about, these evidentiary issues in *In re High Pressure Laminates Antitrust Litigation* (S.D.N.Y.) No. 00-MD-1368. The HPL Litigation was tried to a verdict before Judge Charles Brieant in the White Plains Division of the Southern District of New York during April and May, 2006. The HPL plaintiffs were seeking a post-trebling damages award of \$1.3 billion from the sole non-settling defendant, Wilsonart International. Plaintiffs’ primary evidence was certain conversations among HPL competitors, and the plaintiffs sought and were allowed to introduce some testimony relating to whether the conversations were a violation of applicable company policies, subject to a limiting instruction. The jury ultimately

returned a complete defense verdict in favor of Wilsonart, ending more than six years of litigation.

This article discusses the arguments advanced for and against admission of antitrust compliance policies and reproduces the curative instruction delivered by Judge Brieant. It is hoped that this article can serve as a practical resource for those briefing this issue in the future.

It is the author’s view that such evidence ought not be admissible because of a lack of relevance and the very real prospect of jury confusion. This is a view most likely shared by Judge Brieant, who stated at summary judgment that “any violation of defendants’ antitrust compliance policies by one of its employees is not evidence of a violation of the antitrust laws.” (Slip Op., Sept, 7, 2004 at 20.) The prudential significance of Judge Brieant’s admissibility ruling in the HPL case is limited by the unique factual context of the HPL case, where a key document discussing a competitor conversation made reference to, and was prepared pursuant to, an antitrust compliance policy. As Judge Brieant explained during his oral ruling, he believed the compliance evidence had “to be received to give coherence to the [] memorandum at issue.” (April 10 Tr. at 5.) Absent such a need to “give coherence,” it is questionable whether the deposition testimony at issue would have been admissible.¹⁴⁶

I. **IS EVIDENCE OF THE CONTENT OF OR COMPLIANCE WITH DEFENDANTS’ ANTITRUST COMPLIANCE POLICIES RELEVANT PURSUANT TO**

¹⁴⁶ Judge Brieant did not allow all testimony related to antitrust compliance into evidence. The record is replete with instances where particular questions and answers concerning antitrust compliance were not admitted because they did not provide “context.”

FEDERAL RULE OF EVIDENCE 402?

The threshold question in evaluating the admissibility of antitrust compliance policies is whether it is relevant evidence. To be relevant under Fed. R. Evid. 402, evidence must have “a tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence. *Conway v. Icahn & Co., Inc.*, 16 F.3d 504, 511 (2d Cir. 1994). “Evidence which is not relevant is not admissible.” *Jones v. Spentonbush-Red Star Co.*, 155 F.3d 587, 593 (2d Cir. 1998) (*citing* Fed. R. Evid. 402).

Wilsonart argued that defendants’ antitrust compliance policies and their application had no probative value and were thus irrelevant under Fed. R. Evid. 402 because the existence of such policies or alleged violations of such policies do not establish an element of a *per se* section one claim. Plaintiffs argued that relevance was established by the fact that indisputably relevant evidence “contains references to antitrust compliance policies.” Plaintiffs did not identify an element made more likely by the evidence, relying instead on the need to provide context to other evidence which had already been determined to be relevant.

A. Can Antitrust Compliance Policies Be Used As Evidence Of Intent To Violate The Antitrust Law, And Is Willfulness An Element Of A Per Se Claim?

Most price-fixing class actions allege an agreement to fix prices that are illegal *per se*. Willfulness and intent have limited significance in a *per se* civil price-fixing case because “*per se* analysis does not allow inquiry into the intent behind the restraint” *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 773 (8th Cir. 2004). See also *Spectators’ Comm. Network, Inc. v. Colonial Country*

Club, 253 F.3d 215, 220 (5th Cir. 2001) (under *per se* analysis, “even reluctant participants have been held liable for conspiracy.”) Accordingly, when the claim is one governed by the *per se* rule, “the trial court must reject as immaterial and irrelevant defendants’ proffered evidence of their intent, motive and good faith in entering into the agreement” *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 159 (S.D.N.Y.1960).¹⁴⁷ The basis for admission of antitrust compliance policies must thus be based on something other than the need to establish intent.

B. Is Evidence Of Defendants’ Antitrust Compliance Policies Relevant To Show Awareness Of The Antitrust Laws Under Fed. R. Evid. 402?

There is no law holding that awareness of the antitrust laws is an element of a *per se* price-fixing claim. Further, the fact that a defendant’s employee has read his/her company’s antitrust manual does not mean he/she is aware of what conduct is proscribed or allowed by the antitrust laws because compliance manuals are *not* the antitrust laws. Judge Brieant stated in his oral ruling that “practically every major manufacturer in the country has an antitrust compliance guide, [and] that almost always the guide imposes greater restrictions on the sales force than the statute and caselaw does.” (Tr. 4/10/06 at 3.)

Such policies are intended to serve as a guide to employees on what types of conduct may give rise to scrutiny by government agencies and civil plaintiffs, not as a restatement of the contours of

¹⁴⁷ Criminal antitrust cases are different because “a defendant’s subjective intent is a required element of a criminal antitrust violation. . . .” *U.S. v. Andreas*, 216 F.3d 645, 669 (7th Cir. 2000). Accordingly, the evidentiary use of antitrust compliance policies in a criminal context ought have little bearing on the admissibility of such evidence in a civil case.

the Sherman Act. A comparison of the language of Wilsonart’s antitrust compliance policy with governing antitrust law demonstrates the point:

<u>Wilsonart Policy</u>	<u>Governing Law</u>
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<p>“Under no <u>circumstances should you contact a competitor to verify a price.</u> (emphasis in original).”</p>	<p>“The exchange of price data and other information among competitors does not invariably have anti-competitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive.” <i>United States v. united States Gypsum Co.</i>, 438 U.S. 422, 441 n.16 (1978); <i>Blomkest Fertilizer, Inc., v. Potash Corp. of Sask., Inc.</i>, 203 F.3d 1028, 1033-34 (8th Cir. 2000)</p>
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C. Is Evidence Of A Defendant’s Antitrust Compliance Policy Irrelevant Under Fed. R. Evid. 402 As An Improper Attempt To Influence The Jury About The Applicable Legal Standards In This Case?

By introducing testimony about defendants’ antitrust compliance policies, there is a risk that juries could substitute governing antitrust precedent with the summaries of such precedent contained in defendants’ policies. Such witness testimony is not relevant because “[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge.” *Marx &*

Co., Inc. v. Diner’s Club, Inc., 550 F.2d 505, 509-10 (2d Cir. 1977).

II. IS ANTITRUST COMPLIANCE EVIDENCE INADMISSIBLE UNDER FED. R. EVID. 702 AND 703 BECAUSE THE LEGAL NATURE OF THE TESTIMONY IS AN IMPROPER SUBJECT FOR EXPERT TESTIMONY AND BECAUSE THE LAY WITNESSES LACK FOUNDATION?

Expert witnesses are not allowed to testify about the applicable legal standards because “[i]t is a well-established rule . . . that experts are not permitted to present testimony in the form of legal conclusions.” *See United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91, 96 (2d Cir. 1994). This “prohibition extends to testimony regarding the legal significance of documents.” *Bank Brussels Lambert v. Credit Lyonnais S.A.*, No. 93 CIV 6876, CIV 6876, 2000 WL 1694321 at *1 (S.D.N.Y. Nov. 13, 2000). If such expert testimony is inadmissible, it is difficult to see how a party could be allowed to elicit the same testimony from lay witnesses who lack the foundation that an expert possesses. As Judge Learned Hand once warned trial courts: “Argument is argument whether in the [witness] box or at the bar, and its proper place is the last.” *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930).

III. SHOULD EVIDENCE OF THE CONTENT OF OR COMPLIANCE WITH ANTITRUST COMPLIANCE POLICIES BE EXCLUDED PURSUANT TO FEDERAL RULE OF EVIDENCE 403?

Even if a court were to find some probative basis under Fed. R. Evid. 402 to admit evidence regarding antitrust compliance, it

still must weigh that probative value against any prejudice to the party opposing admission under Fed. R. Evid. 403. “[Rule 403] provides in pertinent part that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” *United States v. Cruz*, 363 F.3d 187, 194 (2d Cir. 2004) (citation omitted).

A. Is Evidence Of Non-Compliance With Antitrust Policies An Attempt To Create Unfair Prejudice By Portraying Defendants As “Bad Guys” Who Were Willing To Violate Company Policy, Thereby Creating An Improper Inference Of Wrongdoing Under The Antitrust Laws?

The introduction of evidence regarding violations of antitrust compliance policies can prejudice a defendant by giving the jury the impression that if defendants would violate their own company antitrust policies they would also violate the antitrust laws. This type of argument is governed by Fed. R. Evid. 404(b).

In the HPL case, plaintiffs argued that a witness “knowingly violated his company’s antitrust compliance policy in [a] conversation, and that he admits that the conversation was inappropriate, has a tendency to show that his conversations with competitors were not innocuous locker room talk, but instead, the conspiratorial meetings of co-conspirators.” (Pltf Mem. at 3-4.) This “character evidence” is typically inadmissible pursuant to Fed. R. Evid. 404(b) as “[c]haracter evidence is not admissible to prove conduct.” *Eng. v. Scully*, 146 F.R. D. 74, 77 (S.D.N.Y. 1993). Evidence of alleged violations of company policy will unavoidably paint these employees with the broad brush of rule-breakers and thus is normally excluded pursuant to Fed. R. Evid. 404(b). See *Giles v. Rhodes*, No.

94 Civ. 6385, 2000 WL 1425046, at *14 (S.D.N.Y. Sept. 27, 2000) (excluding evidence pursuant to Fed. R. Evid. 404(b) because “[a]dmitting [such evidence] would serve only to paint [defendant] as a rule violator, an impermissible purpose under 404(b).”) (emphasis added).

Character evidence that an employee previously had violated an internal policy, and thus would violate the antitrust laws, is the sort of “bad man” evidence excluded by the Federal Rules of Evidence. The rationale behind Fed. R. Evid. 404(b) is that:

[C]haracter evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Lombardo v. Stone, 99 Civ. 4603, 2002 WL 113913 at *3 (S.D.N.Y. Jan. 29, 2002) (citations omitted).

B. Could Evidence Of Antitrust Compliance Policies Mislead The Jury As To The Applicable Legal Standards And Confuse The Issues Regarding What Standards Of Conduct Apply?

Another consideration is whether admitting evidence of antitrust policies will mislead and confuse the jury as to whether anything improper occurred under section one of the Sherman Act. The antitrust laws are complex and difficult to understand even for those who practice antitrust on a full-time basis, and it is potentially unreasonable to expect a jury to make such distinctions; especially where the lay “opinions” are inconsistent with this Court’s jury instructions.

1. Could The Inconsistency Between Company Policies And The Antitrust Laws Confuse The Issues And Mislead The Jury?

Expecting a jury to sort out the difference between the antitrust compliance policies and the jury instructions may be unrealistic, especially when measured against the limited probative value. In good faith, companies across the nation have implemented compliance policies in an effort to avoid even close encounters with antitrust enforcement. These policies thus often prohibit actions that antitrust law does not. These blanket prohibitions are a prophylactic effort to avoid litigation, and allowing plaintiffs to turn these policies from a “shield into a sword” could have a chilling effect on companies’ efforts to educate their workforce about the antitrust laws.

For example, companies that are afraid of any hint of wrongdoing or potential litigation from plaintiffs’ attorneys may strictly prohibit their employees from any contact with the employees of competitors. But simply having contact with a competitor’s employees, and even having close relationships and frequent contacts with a competitor’s employees, does not run afoul of the antitrust laws. See *Schwimmer v. Sony Corp. of America*, 677 F. 2d 946, 952-53 (2d Cir. 1982); *H.L. Moore Drug Exchange v. Eli Lilly*, 662 F.2d 935, 941 (2d Cir. 1981). The fact that one employee has a close relationship with a competitor’s employee and has frequent contact with him, while admittedly a violation of a company antitrust policy, does not result in a violation of the antitrust laws. Likewise, to avoid any potential inference of misconduct a company may strictly prohibit meetings or contacts with competitors at trade shows or association meetings. But this prohibition has no relation to the standards of conduct allowed or proscribed by the antitrust laws. See *Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d

41, 44-45 (2d Cir. 1982); *Alpha Lyracom Space Communs. v. COMSAT Corp.*, 968 F. Supp. 876, 894 (S.D.N.Y. 1996)

2. Could Inconsistencies Between Different Defendants' Antitrust Compliance Policies Confuse And Mislead The Jury?

Not only are antitrust compliance policies frequently more stringent than the antitrust laws, but the compliance policies of individual companies can significantly differ from one another. That was certainly the case in the *HPL* litigation:

Wilsonart Compliance Policy

"1. Do not discuss prices, production or terms and conditions of sales with competitors. 2. Do not divide, or discuss division of, customers markets, or territories with competitors."

Competitor's Compliance Policy

"Although certain cooperative activities between competitors are lawful, they may still pose some antitrust risk."

Introducing evidence of the various defendants' antitrust compliance policies would not only require a jury to determine what is appropriate behavior under the antitrust laws and distinguish the prohibitions of the antitrust compliance policies when said policies are in conflict with antitrust laws, but further distinguish between each defendants' individual compliance policy. This distinction upon distinction could easily confuse a jury.

C. Is A Limiting Instruction Regarding Defendant's Antitrust Compliance Policies Sufficient To Prevent Unfair Prejudice?

In the *HPL* case, Judge Brieant found that the unique facts

provided a basis for admissibility, stating that "it is almost essential that [the policies] come in as part of the factual background explaining the reason for and existence of certain exhibits" but that he had made "a Rule 403 ruling . . . conditioned on a limiting instruction being given contemporaneously." (Tr. 4/10/06 at 1-2.)

Judge Brieant delivered the following limiting instruction:

Members of the jury, I'm just reading this to be on the safe side. I did instruct you earlier that it's ordinary and commonplace practice in the industry for corporations to have guidelines and policies for complying with the antitrust laws, and you're instructed that a violation of an antitrust guideline or policy is not necessarily a violation of the federal laws, because the guidelines are ordinarily written to be more stringent than the federal statute in order to avoid any question of a violation of a law.

And you should understand that Wilsonart is not being charged with violating its own antitrust guidelines or the antitrust guidelines or policies of any other company. And the charge here has to do with the federal statute, and I will explain to you at the proper time the Sherman Act provisions that are relevant to this case and what they mean.

(4/12/06 Tr. at 8:24-19:13.)

Limiting instructions have some merit in assisting the jury in evaluating antitrust compliance evidence. However, under a Fed. R. Evid. 404 analysis, "[g]iving [a limiting] instruction may lessen but does not invariably eliminate the risk of prejudice notwithstanding the instruction." *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980). Judge Brieant clearly felt that, given the need for context, the limiting instruction

would be sufficient. He delivered this instruction in one form or another several times contemporaneous with the admission of certain evidence, and again with the closing instructions.

CONCLUSION

It is likely that, absent a need to provide context to specific evidence, antitrust compliance policy evidence ought not be admissible. It is this author's view that efforts to use Judge Brieant's ruling beyond this limited context would be inappropriate. It is hoped that this article will assist those dealing with similar evidentiary issues in the future.

New Guidance for Standard Setting Organizations: *Broadcom Corp. v. Qualcomm Inc. and In the Matter of Rambus, Inc.*

By Dean Harvey,
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According to Greek mythology, two sea monsters threatened ships from opposite sides of a narrow channel. On one side was Scylla, a multi-headed beast who could reach into nearby vessels and devour their passengers. On the other side was Charybdis, an enormous mouth capable of destroying an entire ship. Sailors attempting to pass between Scylla and Charybdis faced a difficult choice: a ship could not avoid one threat without coming closer to the other.

Standard Setting Organizations ("SSOs") face a similar dilemma. To achieve their purpose without running afoul of the antitrust laws, SSOs must create rules strict enough to prevent one participant from gaining monopoly power over a new standard. But as rules become stricter, SSOs risk

¹⁴⁸ Boies, Schiller & Flexner represents Broadcom Corp. in the litigation this article discusses. The author has had no involvement in that litigation. The views expressed are exclusively those of the author.

accusations of illegal collusion. SSOs must sail between the twin antitrust dangers of monopolization and collusion; the dilemma is how to avoid one without running into the other. Two recent decisions, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007) ("*Broadcom*"), and *In the Matter of Rambus, Inc.*, 2006 WL 2330117 (FTC Aug. 2, 2006) ("*Rambus*"), help map a path.

SSOs are voluntary, nongovernmental groups of firms that work to standardize technologies. The activities of SSOs may have substantial procompetitive effects. For instance, when electric power first entered into widespread commercial use, there were a large variety of incompatible wiring devices. The National Electrical Manufacturers Association ("NEMA") adopted the NEMA 1-15 plug – the plug characterized by two flat parallel pins. The NEMA 1-15 became the standard for domestic plugs in the United States. This standard permitted manufacturers of electrical devices (the "upstream market") to invest in new technologies without fear of excluding consumers who used incompatible outlets. The standard permitted consumers (the "downstream market") to compare and choose from a much wider range of compatible and interchangeable products.

In downstream markets, interoperable products help consumers share information concerning the relative merits of competing manufacturers. Because products are interchangeable, switching costs decline, increasing competition among suppliers. Prices decrease and quality improves. In upstream markets, firms are more willing to invest in technologies that are likely to gain widespread use. In addition, standard-setting is itself a competitive process: firms disclose their relevant intellectual property, and compete to have their innovations become part of the new standard.

SSOs may also increase the likelihood of anticompetitive

conduct. SSOs raise antitrust concerns in two ways. First, SSOs may facilitate collusion among their members. Firms have used SSOs to wield their collective buying power to artificially reduce input prices, exclude rival firms from participating in a market dominant standard, and hide a price-fixing conspiracy. Product standardization can facilitate collusion by improving the conspiracy's ability to detect and punish defecting participants, and by creating opportunities to collude.

The second worry is that a participating firm may use the SSO to monopolize. One example is a "patent hold-up." The process by which SSOs decide on a new standard is lengthy and costly. Once an SSO has determined the contours of a new standard, it may later discover that a participating firm owns a patent (or patents) over key technology essential to implementing the new standard. That firm would be in a position to "hold-up" other firms from creating products consistent with the standard. Other participants who have spent large sums and invested substantial energy in developing new products may find it prohibitively expensive to design around the patented technology. The patent owner may then extract supracompetitive royalties from other participating firms.

Allegations concerning the latter fear were the subject of both the *Broadcom* and *Rambus* decisions. In the landmark *Rambus* decision, a unanimous FTC held that deceiving an SSO by failing to disclose key intellectual property rights essential to the adoption of a new standard, and by using information gained through the SSO process to amend pending patent applications to cover essential technology of the new standard, is exclusionary conduct under Section 2 of the Sherman Act and unlawful monopolization under Section 5 of the FTC act. 2006 WL 2330117 at 118.

Rambus Inc. was a member of the Joint Electron Device

Engineering Council ("JEDEC"), an SSO that standardized computer memory technology. The FTC found that Rambus used information gained from its participation in JEDEC to obtain patents over technology essential to the practice of memory standards. Rambus, by hiding its patent position from other participating firms, "was able to distort the standard-setting process and engage in anticompetitive 'hold-up' of the computer memory industry." *Id.* at 1.

In order to prevent the type of conduct described in *Rambus*, SSOs typically require participants not only to disclose intellectual property that is claimed to be essential to implementation of proposed standards, but also to license any such proprietary technology on terms that are fair, reasonable, and non-discriminatory ("FRAND"). FRAND commitments operate as general assurances against hold-up, without embroiling SSOs in detailed discussions of specific licensing terms that could give rise to accusations of unlawful collusion.

The power of a FRAND promise to bind participating firms is the focus of the *Broadcom* litigation. In its recent decision, the Third Circuit examined whether a complaint states actionable antitrust conduct when it alleges that the defendant deceived an SSO into adopting a new standard by committing to license technology on FRAND terms, but later, after firms have locked-in to the new standard, demanding non-FRAND royalties. 501 F.3d at 313.

Broadcom alleged that Qualcomm was a member of the European Telecommunications Standards Institute ("ETSI"), an SSO that created the Universal Mobile Telecommunications System ("UMTS") standard for cellular telephones. *Id.* at 303-04. Broadcom further alleged that Qualcomm committed to license intellectual property that Qualcomm claimed was essential to a new standard on FRAND

terms. *Id.* at 304-05. According to Broadcom's complaint, Qualcomm induced ETSI to include Qualcomm's technology within the standard by falsely promising to license the technology on FRAND terms. Once ETSI included the technology in the standard, Broadcom claimed that Qualcomm breached its licensing commitments. Broadcom contended, among other things, that Qualcomm's deception constituted unlawful monopolization under Section 2 of the Sherman Act.

The Third Circuit held that "(1) in a consensus-oriented standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with and [SSO's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable antitrust conduct." *Id.* at 314. The court added that such deception "harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder." *Id.*

The *Rambus* and *Broadcom* decisions suggest a way for SSOs to decrease the possibility that one participating firm will monopolize a new standard, and also a route SSOs may take to decrease the chances of collusion liability. The *Rambus* decision affords protection to SSOs from a participating firm's attempt to monopolize an emerging standard through deceptive intellectual property disclosure and subsequent patent amendments. Before the Third Circuit's decision in *Broadcom*, it was unclear whether a FRAND promise was sufficiently specific to prevent one SSO participant from gaining monopoly power over the emerging standard. According to *Broadcom*, a FRAND commitment has teeth: a false promise to abide by a FRAND commitment and subsequent breach by a patent

owner may form the basis of a monopolization action.

SSOs may maintain their distance from accusations that they serve as a front for collusive activities by avoiding up-front discussion of specific license terms, while protecting themselves against hold-up by continuing to insist and rely upon generalized FRAND commitments as a meaningful safeguard.¹⁴⁹ Even in the absence of a FRAND promise, deceptive conduct of the kind described in *Rambus* may subject a firm to antitrust liability. SSOs accordingly have less incentive to push the boundaries of specific royalty terms beyond a FRAND promise.

Use of Evidence from European Antitrust Investigations in U.S. Litigation

*By Karen Sewell,
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When companies become targets of criminal antitrust investigations in Europe, private suits tend to follow in the United States, where private suits are permitted, discovery is liberal, and the reward of success is especially high. This common cause and effect has created a recognizable pattern of pleading and litigating. Plaintiffs attempt to use the fact of a European investigation to show that the defendants also conspired to violate the U.S. antitrust laws. Two recent cases place limits on this practice.

In *In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007), as support for the theory that defendants had conspired to restrain trade in the United States, plaintiffs alleged that defendants also had been the target of an investigation by the European Commission and Italy. The

¹⁴⁹ A generalized FRAND commitment is not an SSO's only option. See, e.g., U.S. Department of Justice Business Review Letter re Institute of Electrical and Electronics Engineers Request (April 30, 2007), available at <http://www.usdoj.gov/atr/public/busrevi/ew/222978.pdf>.

defendants moved to dismiss on this and other theories of culpability, and the Second Circuit granted dismissal. The court flatly refused plaintiffs' argument that "if it happened there, it could have happened here." *Id.* at *52. The court explained that "absent any evidence of linkage between such foreign conduct and conduct here," plaintiffs' assertions were insufficient to adequately allege a worldwide conspiracy. *Id.*

Though brief, the court's discussion of the European allegations appears to establish that the existence of a European antitrust investigation alone is irrelevant to stating a claim for an antitrust conspiracy in the United States. See *In re Elevator*, 502 F.3d at *52 ("Without an adequate allegation of fact linking transactions in Europe to transactions and effects here, plaintiffs' conclusory allegations do not 'nudge their claims across the line from conceivable to plausible.'") (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)). This is reminiscent of the Supreme Court's declaration in *Empagran S.A. v. F Hoffman-LaRoche, Ltd.*, 542 U.S. 155 (2005), that allegations of a worldwide conspiracy alone, without allegations of an effect in the United States, are insufficient to trigger jurisdiction under the U.S. antitrust laws. Indeed, the *In re Elevator* court cited to the post-remand circuit court decision in *Empagran* as part of its discussion of the inadequacy of plaintiffs' European allegations. See *In re Elevator*, 502 F.3d at *52.

Read together, these decisions mark a brighter line between adequate and insufficient attempts to use evidence of misconduct abroad to show misconduct here. Allegations are sufficient if they show an interdependent, worldwide conspiracy where conduct abroad is necessarily tied to transactions and effects in the United States. In contrast, where the allegations lack a plausible factual link between the European and U.S. transactions and effects, the fact of

a foreign investigation alone is insufficient. *In re Elevator* exposed the failings of the latter.

In re Rubber Chemicals Antitrust Litigation, 486 F. Supp. 2d 1078 (N.D. Cal. 2007), addressed this strategy at the discovery stage. The plaintiff in *In re Rubber Chemicals* requested production of a defendant's statement to the European Commission made pursuant to the Commission's leniency program. The defendant's main objection to production was international comity (and not confidentiality or the 5th Amendment privilege against self-incrimination). In support of that argument, the European Commission Director General of Competition (DG Comp) submitted a letter opposing discovery of the statement. The district court agreed that the interests in international comity weighed against production of the statement, applying a five-part test set out in *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the Southern Dist. of Iowa*, 482 U.S. 522 (1987).

The court determined that the plaintiff had failed to show the importance of the leniency statement to the claims asserted because it was "not clear how relevant or important any admissions the defendant made while seeking leniency from the Commission would be in this case in which plaintiff claims that [the defendant] engaged in a conspiracy to exclude plaintiff from the U.S. rubber chemicals market." *In re Rubber Chemicals*, 486 F. Supp. 2d 1082 (concluding "Thus, I fail to see the importance or relevance of the EC documents to this litigation in which plaintiff claims that [the defendant] sought to exclude it from the U.S. market, not the European market...."). Other factors that persuaded the court were that the statement did not originate in the United States and that the information it contained could be obtained through other means. *Id.* at 1083. When contrasted with the EC's demonstrated interest in safeguarding the leniency

program's confidentiality feature, which encourages greater participation and cooperation in the prosecution of antitrust violations, the discovery request was refused. *Id.* at 1084. *But see In re Vitamins Antitrust Litig.*, No. 99-197, 2002 U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002) (granting motion to compel production of the defendant's submissions to the EC as part of its participation in the leniency program), *see also Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (addressing similar situation but in reverse, where a plaintiff requests production of evidence residing in the United States for use in a foreign proceeding under 28 U.S.C. § 1782).

VIII. CANADIAN DEVELOPMENTS

Continued Focus on Combating International Cartels

*By Christopher Margison,
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During her speech at the CBA/IBA Spring Conference in May 2007, Sheridan Scott, the Commissioner of Competition (the "Commissioner"), reaffirmed her focus on combating international cartels. Specifically, the Commissioner stated as follows:

Cartels are a plague in any market. They merit, and will receive from us, the most strict attention.

This is not something new. I have persisted in making this point at every occasion. And yet? Well, for reasons unknown, there is a myth about the land that the [Canadian Competition Bureau (the "Bureau")] is going soft on international cartels, a myth apparently fostered by our decision to dedicate additional targeted resources to fighting domestic cartels.

Let me play the role of myth-buster today. We have no intention of giving up the pursuit of international cartels. How could we? Markets are increasingly global. Canadian consumers and businesses increasingly depend on the products of supply chains that span continents and industries. And cartels in any link in these chains hit us right in our individual pocketbooks and on our collective bottom line.

We are going to go after major international cartels. Plain and simple. And we are going to do so with new approaches to take account of changing realities on the international front.

...

So when I say that domestic cartels remain one of our priorities for the next year – and they are – don't forget to keep a look over your international shoulder. Our priority areas don't limit our activities; they simply provide a particular focus where we want to be more effective.

The Commissioner's focus on international cartels is evidenced by certain of the developments discussed below. It is also evidenced by the bilateral talks between the Bureau and the Commerce Commission of New Zealand aimed at strengthening co-operation between the agencies to combat international cartels, which concluded last summer. Similarly, while equally applicable to domestic cartels, the Bureau published a new Information Bulletin on its immunity program in October 2007, together with a Policy Backgrounder setting out adjustments to the previous program and revised Responses to Frequently Asked Questions. As discussed elsewhere in this Newsletter, this Information Bulletin sets out the Bureau's current approach to recommending immunity for companies and

individuals who admit having committed offences contrary to the *Competition Act* (the "Act"), and who co-operate in the investigation and the prosecution of those offences. During her speech at the *Fiscalía Nacional Económica Conference*, the Commissioner stated that the immunity program is "[t]he Bureau's single most effective tool for detection and investigation of cartels." The Commissioner also noted that the Bureau has received over 40 immunity applications since the publication of its first immunity program in 2000.

References: Competition Bureau, Speaking Notes for Sheridan Scott, "Looking Forward: The Bureau Priorities for 2007-2008" (Address to the CBA/IBA Spring Conference, 3-4 May 2007); Competition Bureau, News Release, "Reinforcing International Cooperation to Combat Cartels" (20 August 2007); Competition Bureau, Speaking Notes for Sheridan Scott, "Cartels: Detection, Detection, Detection" (Address at the 2007 Competition Day hosted by the *Fiscalía Nacional Económica*, 25 October 2007).

SEC Carbon Pleads Guilty to Conspiracy

On November 9, 2007, the Bureau announced that SEC Carbon, Ltd. ("SEC") of Japan pleaded guilty and was fined Cdn.\$250,000 by the Federal Court of Canada (Trial Division) (the "Federal Court") for participating in a conspiracy in the graphite electrodes market. Graphite electrodes are an essential component in the steel production process.

According to the Bureau's News Release, between 1992 and 1997 the world's major graphite electrode manufacturers, including SEC, agreed to fix prices and volumes sold in various markets, and to divide world markets. SEC supported this international conspiracy in Canada by not selling graphite electrodes to Canada during this period.

In the News Release announcing the conviction, Denyse MacKenzie, Senior Deputy Commissioner of Competition, stated that "[t]his international price-fixing and market allocation conspiracy resulted in artificially high prices for graphite electrodes in our country to the detriment of the Canadian consumer and the Canadian economy. SEC's conviction for the crime of conspiracy demonstrates the resolve of the ... Bureau to pursue foreign companies that participate in illegal agreements that harm the Canadian marketplace."

SEC is the eighth party to be convicted in Canada for participating in the graphite electrodes cartel. Nippon Carbon Co., Ltd., UCAR Inc., SGL Carbon Aktiengesellschaft, Tokai Carbon Co., Ltd., Mitsubishi Corporation and two former UCAR International Inc. executives, Robert P. Krass and Robert J. Hart, were previously fined a total of nearly Cdn.\$25 million for their roles in this international conspiracy. SEC's conviction wraps up the Bureau's investigation of this matter.

Reference: Competition Bureau, News Release, "SEC Carbon Pleads Guilty to Conspiracy" (9 November 2007).

Bayer Group Fined for Role in International Cartels

On October 30, 2007, the Bureau announced that Bayer Group pleaded guilty to participating in three international price fixing conspiracies and was fined a total of Cdn.\$3.645 million. Specifically, Bayer AG was fined Cdn.\$2.9 million for its role in a rubber chemicals conspiracy and Cdn.\$400,000 for its role in a nitrile rubber conspiracy. Bayer Corporation, the wholly-owned U.S. subsidiary of Bayer AG, was fined Cdn.\$345,000 for participating in a conspiracy to fix the price of aliphatic polyester polyols made from adipic acid. In each case, Bayer AG and Bayer

Corporation pleaded guilty to violating section 45 of the Act.

Rubber chemicals are mainly used in the production of tires, but are also used to produce other consumer products such as hoses, rubber mats, car parts and surgical gloves. Nitrile rubber is a synthetic rubber used in hoses, gaskets, seals, adhesives, footwear, construction materials and conveyor belts. Aliphatic polyester polyols made from adipic acid are combined with other chemicals to make polyurethane products. These products are used in an array of consumer products, including furniture, synthetic leather and surface coatings.

In the News Release announcing the conviction, Denyse MacKenzie stated that "[t]he ... Bureau will not hesitate to prosecute any business, whether in Canada or abroad, that participates in price fixing cartels in the Canadian market. Such conspiracies prevent Canadians from reaping the benefits of a competitive marketplace, such as product choice and lower prices."

Reference: Competition Bureau, News Release, "Bayer Group Fined \$3.645 Million for its Role in Three International Cartels" (30 October 2007).

Japanese Company Pleads Guilty to Price Fixing in Canada

On September 19, 2007, the Bureau announced that Ibiden Co. Ltd. of Japan ("Ibiden") pleaded guilty under section 21 of the *Criminal Code* and was fined Cdn.\$50,000 for aiding and abetting a conspiracy to fix the price of isostatic graphite products. Isostatic graphite is commonly used in electrical discharge machinery to make dies for the continuous casting of metals and in the manufacture of semiconductor chips and other mechanical applications.

According to the Statement of Admissions filed with the Federal Court, representatives of Ibiden and other significant participants in the isostatic graphite industry

(collectively, the "Producers"), including certain of their most senior officers, met on at least 15 occasions between July 1993 and June 1997 and "entered into an anti-competitive agreement to set specific volumes of ... isostatic graphite that each company would supply into Canada and elsewhere ... and to fix the prices they would charge." The Statement of Admissions also indicates that "there were numerous local meetings convened in North America and Europe to work out local issues in conformity with the 'harmony' agreed to amongst the Producers" and that "at various times during the period of the Agreement, representatives of Ibsiden engaged in conversations and attended further meetings with representatives of other producers and suppliers of isostatic graphite blocks in order to implement, confirm, adjust and maintain the Agreement." These meetings "included 'working' discussions at which the participants would resolve specific price, marketing, supply or production issues."

According to the Crown's submissions to the Federal Court, while Ibsiden was a conscious and voluntary participant, its actual involvement in the conspiracy as it related to North America was minimal. For example, Ibsiden did not exercise a leadership role in formulating, monitoring or policing the Agreement in either Canada or the United States. In fact, it is worth noting that Ibsiden did not sell isostatic graphite blocks directly to purchasers in Canada and therefore did not control the final price at which its products were sold to Canadian customers. Instead, Ibsiden generally negotiated the price for these products with an independent, unaffiliated trading company that took possession of the products in Japan.

Ibsiden provided significant and early cooperation to the Commissioner in connection with her investigation of the isostatic graphite conspiracy. In the absence of Ibsiden's agreement to plead guilty and cooperate with the

Commissioner, the Crown likely would have sought a significantly higher fine.

Ibsiden is the third company to plead guilty in Canada in relation to the isostatic graphite conspiracy. In 2003, Toyo Tanso USA Inc. pleaded guilty to charges of attempting to maintain prices and was fined Cdn.\$200,000. In 2001, Carbone of America Industries Corp. pleaded guilty to fixing prices and was fined Cdn.\$300,000. Ibsiden's conviction wraps up the Bureau's investigation into the isostatic graphite conspiracy.

References: Competition Bureau, News Release, "Japanese Company Pleads Guilty to Price Fixing" (19 September 2007); *R. v. Ibsiden Co. Ltd.*, No. T-1611-07, Indictment, September 11, 2007 (F.C.T.D.); *R. v. Ibsiden Co. Ltd.*, *supra*, Statement of Admissions by an Accused Pursuant to Section 655 of the Criminal Code, September 11, 2007; *R. v. Ibsiden Co. Ltd.*, *supra*, Submissions of Her Majesty The Queen Regarding the Accused, September 11, 2007.

Du Pont Performance Elastomers Fined for Role in Price Fixing Agreement

On July 19, 2007, the Bureau announced that DuPont Performance Elastomers L.L.C. ("DPE") pleaded guilty and was fined \$4 million by the Ontario Superior Court of Justice for its role in an international conspiracy to fix prices of polychloroprene rubber ("PCP"). PCP is a type of synthetic rubber that is used in the manufacture of a wide range of consumer products in the automotive, adhesive and construction industries, such as hoses, transmission belts and cables.

According to the Bureau's News Release, DPE and its co-conspirators met on a number of occasions between August 1999 and April 2002 to discuss sales information and pricing of PCP. Through these meetings, several agreements were reached to fix

the prices of PCP sold in the North American market. DPE subsequently issued price increase announcements and quotations in accordance with these agreements.

In the News Release announcing the conviction, Denyse MacKenzie stated that "the ... Bureau protects consumers and businesses against price fixing agreements and does not hesitate to prosecute any business, whether located in Canada or abroad, that engages in these illegal activities affecting the Canadian market".

Reference: Competition Bureau, News Release, "Du Pont Performance Elastomers Fined \$4 Million for Its Role in an International Price Fixing Agreement" (19 July 2007).

Newfoundland Court Confirms Dismissal of Conspiracy Charges in St. John's Taxi Case for Failure to Establish a Relevant Market

On June 26, 2007, the Newfoundland and Labrador Supreme Court – Trial Division denied an application by the Crown for judicial review of a discharge of the accused at the preliminary inquiry. A number of companies and individuals were charged with a conspiracy to prevent or lessen competition "unduly" in relation to an agreement among suppliers of taxi services in St. John's, Newfoundland to collectively refuse to bid on contracts for the exclusive supply of taxi services at certain locations, such as the local airport. At the preliminary inquiry, the presiding judge concluded that the evidence led by the Crown was insufficient for a reasonable jury, properly instructed, to determine that all of the elements of the conspiracy offence had been established. This is a low standard that does not call on the presiding judge to weigh or assess the reliability of the evidence. The key issue on review was whether the Crown had led sufficient evidence

at the preliminary inquiry to establish the relevant market with respect to which the undue lessening of competition is to be assessed.

Initially, the Crown argued that proof of competitively injurious behaviour is sufficient to establish an "undue" lessening of competition. However, the reviewing judge confirmed that the Crown must establish an acceptable competitive market as a precondition to the assessment of undue. With reference to prior case law, the reviewing judge held that it is imperative to first define the relevant market and "judicial care must be taken to guard against the Crown artificially limiting the market ... to suit the available evidence". Having said that, the reviewing judge added that "if the market is too broadly stated, evidence which, while not proving the full breadth of the market definition on indictment, will not defeat the Crown, provided there is enough evidence referable to an acceptable competitive market".

In the case, the accused were charged with conspiring to unduly prevent or lessen competition in the purchase of contracted rights to operate taxi cab services from or on the premises of contracting businesses and public institutions in the City of St. John's and elsewhere in the Province of Newfoundland and Labrador. At the preliminary inquiry, the Crown's expert witness asserted that the relevant market was "the market for rights to privileged access by the taxi businesses to establishments to and from which large numbers of people pass, in the City of St. John's".

Under cross-examination, however, the Crown's expert acknowledged the existence of substitutes for privileged access taxi service (e.g., any taxi could deliver passengers to these locations and customers could call any taxi to come and pick them up at such locations). Further, the expert did not identify or quantify those substitutes, nor all the locations involving privileged

access. Nor did the expert identify the number of taxis servicing such locations or their revenues.

In contrast to a situation where the Crown may overstate the relevant market, in this case, the Crown expert's evidence indicated that privileged access taxi services were a segment of a larger market. The reviewing judge stated that "the evidence does not direct itself to the measurement and the means of measurement of each of the impugned activities of this un-delineated and un-quantified market". Accordingly, the relevant market was not made out by the Crown's evidence in a manner sufficient to allow the undue assessment to be engaged.

That finding was sufficient to confirm the discharge of the accused. However, the reviewing judge noted a number of additional points of interest:

- The accused were charged despite internal disagreements both at Transport Canada and within the Competition Bureau about whether to prosecute the case.
- The defendants had been encouraged by the local airport manager to combine to form a legal entity to serve the total taxi requirements at the airport.
- The Competition Bureau had advised the taxi owners that they could bid together so long as the arrangement was disclosed.
- There may have been only one potential bidder for at least some of the exclusive supply contracts in any event.

Reference: *R. v. Bugden's Taxi (1970) Ltd.* (2007), 74 W.C.B. (2d) 804 (Nfld. S.C.).

Competition Bureau Settles Case Involving Alberta Auto Body Shops

On February 16, 2007, the Bureau announced that it had settled a price fixing and price maintenance case involving six auto body repair shops in Fort McMurray, Alberta. The

settlement will ensure that auto body repair shops comply with the Act and that consumers benefit from competitive labour rates for auto body repair services.

As part of this settlement, the defendants agreed to a binding Federal Court order requiring a change in their conduct regarding the setting of labour rates for auto body repair work. Among other things, the order prohibits the defendants from (a) engaging in any communication or exchange of information of any kind with each other relating to pricing of products or services to customers or insurance companies or (b) entering into any agreement or arrangement of any kind relating to pricing of products or services to customers or insurance companies with any person engaged in the sale and supply of auto body repair services in Fort McMurray. The order also (a) prohibits the defendants from committing any acts that could contravene the conspiracy or price maintenance provisions of the Act; (b) requires the defendants to develop a competition law compliance policy and provide annual training to their directors, officers, affiliates and employees; and (c) requires the defendants to place a copy of the order in a visible location in their primary places of business and to publish a summary of the order in a major local newspaper. Each of the provisions in the order that relates to the defendants has a term of five years.

In the News Release announcing the settlement, Denyse MacKenize stated that "conspiring to fix prices and price maintenance are criminal offences with serious consequences. Criminal cartels cause damage to our economy and can drive up prices for Canadian consumers."

References: Competition Bureau, News Release, "Competition Bureau Settles Case Involving Auto Body Shops" (16 February 2007); *The Commissioner of Competition v. Pete's Custom Coachwork* (1998) Inc., No. T-440-

01, Prohibition Order, February 15, 2007 (F.C.T.D.).

Commissioner Recommends Changes to Conspiracy Provisions

On July 12, 2007, the Canadian Government established the Competition Policy Review Panel (the "Panel"). The Panel's mandate is to consider how Canada's competition and foreign investment laws impact the country's domestic and international competitiveness. The Panel is scheduled to deliver its report by June 30, 2008.

The Panel formally launched its public consultation process on October 30, 2007, with the release of a discussion paper titled "Sharpening Canada's Competitive Edge". The discussion paper sets out a series of questions for each of the Panel's four focus areas, namely investment policies, competition policies, promoting Canadian direct investment and promoting Canada as a destination for talent, capital and innovation.

In her written submissions to the Panel, the Commissioner stated that while a number of competition-related issues merit consideration by the Panel, "[she] believes that a recommendation to reform section 45 (the conspiracy or anti-cartel provision) is the most significant proposal for reform that could be made at this time." As she has done in the past, the Commissioner stated that "[Canada's] anti-cartel provision neither effectively deters some blatant instances of hard-core cartel conduct nor is it properly circumscribed so as to avoid chilling the formation of potentially beneficial alliances between firms." The Commissioner then stated as follows:

Any model for a reformed section 45 should be narrowed to prohibit hard-core cartels, namely agreements among competitors to fix prices, allocate markets or restrict output making them criminal offences per se (i.e.,

without the additional requirement on the Crown to establish harm to competition, as in the current bid-rigging provision). This would efficiently and effectively proscribe the most egregious forms of cartel agreements and provide the certainty that Canadian businesses require to cooperate in the current global environment. In addition, a prohibition on hard-core cartels would more closely align our law with those of the United States and European Community, an important consideration given the international scope of business activity and anti-cartel enforcement.

... reforms to section 45 should also include a non-criminal or "civil track" to address other agreements among competitors that may harm Canadians' welfare but which should not be prohibited outright. Under such an approach, only those agreements between competitors that are found to be anti-competitive could be subject to an order of the Tribunal.

Overall, such reforms would be consistent with international best practices and would bring our laws regarding hard-core cartels in line with those of our major trading partners. Such consistency is important as it provides a common and predictable threshold for firms whose activities span the global market.

The Bureau is currently in the process of developing a proposal to reform section 45 along these lines.

References: Government of Canada Discussion Paper "Sharpening Canada's Competitive Edge" (30 October 2007). Submission by the Commissioner of Competition to the Competition

Policy Review Panel (11 January 2008). Copies of these documents are available on the Panel's website at www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/home.

Cross-Border Price Maintenance Pitfalls- Conflicting Can-Am Laws Can Trap the Unwary

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1. Introduction

While much has been written about the U.S. Supreme Court's historic decision in *Leegin Creative Leather Prods., Inc. v. PSKS*,¹⁵¹ which overturned the federal *per se* rule against minimum price maintenance, the emphasis has focussed on the impact of this decision on pricing practices within the U.S.¹⁵² The decision in *Leegin* has generally been viewed as providing suppliers with greater latitude to control resale pricing and many suppliers are in the process of setting minimum resale prices for their products, though the practice is still subject to possible condemnation under a "rule of reason" analysis. However, just as U.S. suppliers must be aware of the potential inconsistent enforcement approach to minimum price maintenance as

¹⁵⁰ Mr. Nicholson is the head of and Mr. Hersh is a partner in the Cassels Brock & Blackwell LLP competition law group.

¹⁵¹ 127 S. Ct. 2705 (2007).

¹⁵² It is worth noting that in late-October 2007, a Senate bill, sponsored by Democrat senators, Hillary Clinton, Herbert Kohl and Joe Biden was introduced seeking to again make agreements on minimum sale prices illegal by changing the wording of the Sherman Act to include all possible agreements between manufacturers, retailers, wholesalers and distributors. In the text of the legislation, the senators say the bill is meant to "correct the Supreme Court's mistaken interpretation of the Sherman Act in the *Leegin* decision."

between federal and state antitrust authorities and courts, they must also be wary of the very significant differences between the U.S. and Canadian treatment of price maintenance under their respective laws.

2. Overview

By eliminating the *per se* rule against resale price maintenance in U.S. federal antitrust law, *Leegin* provided suppliers with considerable leeway in controlling the price at which their products are sold to consumers. This decision compliments the so-called *Colgate* exception,¹⁵³ which allows a supplier to unilaterally establish a policy that sets minimum advertised prices and requires sellers to adhere to that policy as a condition of doing business with the supplier. As a result of the decision in *Leegin*, under U.S. federal law, U.S. suppliers can now exercise significant control over the pricing and advertising practices of the firms that sell their products.¹⁵⁴

While *Leegin* is clearly important law, it does not apply in Canada. Neither does *Colgate*. Practically, this means that the implementation of a program in Canada that complies with either of these cases would put a supplier offside of Canadian competition law. In this article, we summarize a number of important differences between Canadian and U.S. price maintenance laws that should be kept in mind when developing and implementing a pricing and advertising policy in a cross-border business.

This difference in the cross-border treatment of price maintenance is especially relevant given that one of the significant changes flowing from the free trade arrangement between

Canada and the United States has been the reorganization of many businesses to integrate their Canadian operations into U.S. business units. While Canadian head offices exist for reporting or administrative purposes in many cases, the North American (or at least Canadian and U.S.) operations are conducted without regard to national borders.

This integration of operations can raise significant Canadian competition law compliance issues in areas where the laws of Canada are more restrictive than those of the US. Fortunately, these areas of divergence are relatively rare. An area of significant divergence, however, involves price-related vertical restraints. The decision in *Leegin* has made that divergence wider.

3. Canadian Price Maintenance Law

It remains a *per se* criminal offence in Canada for a supplier to maintain prices at which products are sold or advertised by a non-affiliated seller.¹⁵⁵ While the practice is not listed as one of the Canadian Competition Bureau's enforcement priorities, there have been several recent investigations under the price maintenance provisions. The last four investigations (the most recent being in July 2007) resulted in one guilty plea and three consent prohibition orders (broadly similar to consent decrees). In three of these cases, significant fines, rebates or voluntary payments were made – in amounts ranging from CAD\$250,000 to \$2.3 million.

The offence of price maintenance under Canadian competition laws has the following elements:

a. Agreement or Coercion

The price maintenance must occur "by agreement, threat, promise or any like means". To the extent that an agreement (for example, a distribution agreement)

deals with downstream pricing, to avoid the potential for contravening the price maintenance provisions, it should be clear that the prices suggested by the supplier are suggestions only, that the reseller can sell for less and that the reseller's relationship with the supplier will not be harmed in any way because of its pricing practices.¹⁵⁶ It is similarly illegal to refuse to supply or discriminate against a reseller simply because it is a known discounter.

b. Corporate Price Advertising

If the supplier wants to undertake any corporate advertising activities, it must ensure that the appropriate disclaimer language is used to "make it clear" to the public that resellers or franchisees may sell for less than the advertised price¹⁵⁷. In this regard, minimum advertised price policies that are legal in the U.S. would violate the Canadian price maintenance provisions. The one exception to both the prohibition on mandatory adherence to the manufacturer's suggested retail prices and corporate price advertising is with respect to prices that are "affixed or applied to a product or its package or container".¹⁵⁸

c. Reseller Concerns/Conditions Relating to Low Pricing of Others

In addition to the general prohibition on the use of agreements or coercion to influence resale pricing, it is similarly illegal for a reseller to attempt to require the supplier not to do business with another reseller as a condition of doing business¹⁵⁹. Practically, this element of the price maintenance provisions is designed to prevent larger retailers from preventing suppliers from selling to known discounters as a condition of doing business with them.

¹⁵³ *United States v. Colgate & Co.* 250 U.S. 300 (1919).

¹⁵⁴ Subject to considerations of market power/rule of reason analysis and state antitrust laws, M. Lindsay, *Resale Price Maintenance and the World After Leegin*, Antitrust, Fall 2007, Vol. 22, No. 1, pp. 32 – 40.

¹⁵⁵ *The Competition Act, R.S.C. 1985, c. C-34, as am. (the "Act"), § 61(2).*

¹⁵⁶ *Id.* § 61(1), (2).

¹⁵⁷ *Id.* § 61(4).

¹⁵⁸ *Id.* § 61(5).

¹⁵⁹ *Id.* § 61(6).

d. Exceptions/Defences

In addition to the exemptions for affiliated companies and pricing affixed to packages, there are other exceptions and defences to the general prohibition on price maintenance. One significant exception is that the price maintenance provisions do not apply to situations where a supplier provides goods for resale on a consignment basis (i.e., the supplier retains title/risk of loss until the product is sold to the end purchaser).¹⁶⁰

In addition to the exceptions discussed above, supply can be terminated where the supplier has “reasonable grounds” to believe that the reseller was engaging in a “practice”¹⁶¹ of dealing with the products in a way that could be viewed as problematic by the seller (for example: using the product as a loss-leader; making misleading representations with respect to the product; and failing to provide adequate levels of service that purchasers of the product(s) in question might reasonably expect).¹⁶² It is important to note that this defence only applies to actual termination on the grounds listed above and not to the threat of termination.

The overall effect of Canadian prohibition on price maintenance is to make it very difficult for suppliers to influence the prices at which third parties resell their products – regardless of whether there is a sound business justification for doing so. Because

¹⁶⁰ While the use of consignment sales and/or appointing distributors as sales agents may allow a firm to control the resale pricing of its products without offending the price maintenance provisions of the Act, these types of arrangements are often not desirable or practical from a business perspective.

¹⁶¹ Under Canadian competition law, a “practice” generally requires more than a single instance of the conduct in question, and does not apply to a reseller’s policy of meeting/beating competitor pricing, etc.

¹⁶² *The Act*, § 61(10).

of the specific statutory language, merely attempting to influence a reseller to increase prices can constitute an offence – regardless of whether the reseller actually increases their prices. Further, as discussed above, there is no Canadian equivalent to the U.S. *Colgate* doctrine, which permits U.S. companies to implement minimum advertised pricing policies and unilaterally refuse supply to resellers who do not abide by them. Because of the threat of termination contained on the face of a “Colgate policy”, its publication to Canadian distributors or resellers would likely be construed as illegal price maintenance under Canadian competition laws.

4. **Practical Implications**

The significant differences between U.S. and Canadian price maintenance laws means that US-based suppliers with Canadian resellers and U.S. businesses that have integrated Can-Am business units need to appreciate these differences when dealing with their Canadian distributors, resellers or franchisees. These differences are particularly relevant to four areas of the supplier/reseller relationship:

(a) the terms of the supply agreement relating to resale pricing;

(b) corporate/supplier advertising initiatives;

(c) dealing with complaints by resellers regarding the low pricing of other resellers and/or demands by resellers not to supply other resellers due to low pricing as a condition of doing business; and

(d) communications with resellers regarding resale pricing.

a. The Supply Agreement

A supply agreement entered into with a Canadian reseller cannot contain any language that allows the supplier to set the reseller’s minimum retail prices. In most cases, it is advisable to include a provision in the Canadian supply agreement specifically stating that the reseller is free to set their retail prices, regardless of

any pricing suggestions made by the supplier. Further, it is advisable for the supply agreement to explicitly state that the reseller’s decision not to accept the supplier’s suggested pricing will have no negative impacts on the supplier/reseller relationship. However, it is perfectly acceptable for the supplier to stipulate a maximum resale price for its products.

b. Corporate/Supplier Advertising

Any advertising initiatives coordinated by the supplier that include pricing must contain an appropriate “dealers may sell for less” type of disclaimer – the exception being if the advertised price is clearly intended to be the maximum resale price. In addition, resellers should be aware that they do not have to participate in pricing promotions initiated by the supplier and that a refusal to participate will not negatively impact their business relationship with the supplier.

c. Reseller Concerns/Conditions Relating to Low Pricing of Others

In many cases, it is resellers who take issue with the low pricing of competing resellers. Often in these cases, resellers will complain to the supplier and ask the supplier to counsel or sanction a low pricing reseller. Both the supplier and complaining reseller must take care to avoid offending the price maintenance provisions. As discussed in detail below, suppliers must exercise appropriate caution when discussing appropriate resale prices with third party resellers. Similarly, the complaining reseller must exercise caution in any communications it may have with the low pricing reseller. As a rule, it is prudent for the supplier to tell the complaining reseller not to speak directly with the low pricing reseller due to the potential compliance concerns under both the price maintenance and conspiracy provisions.

In some cases, a reseller will try to impose a condition on a supplier that prohibits the supplier from selling to other resellers with a tendency to discount pricing. For example, a large retailer may attempt to require a supplier to refrain from selling certain products to discounters (either specific discount chains or as a general category) as a condition of doing business with the supplier. Where the attempt to restrict supply can be characterized as being motivated by the low pricing policy of the reseller against whom the restriction is sought, both the supplier and the reseller seeking to restrict the supply can be found guilty of an offence under the price maintenance provisions. As discussed above, merely attempting to influence supply in this manner – regardless of whether the desired outcome was achieved – can be sufficient grounds for the commencement of an investigation and a criminal conviction.

This type of situation should be contrasted with exclusive supply arrangements, which are (i) dealt with as a civil matter and (ii) generally permitted under Canadian competition law.¹⁶³

d. Communications With Resellers Regarding Resale Pricing

This is the area that generates the greatest compliance concerns. Specifically, because of the language of subsection 61(4), any communications by suppliers regarding suggested retail pricing (in particular, where the suggested pricing is higher than current pricing) must be done in such a way that resellers are both aware and reasonably believe that they can reject the supplier's price

¹⁶³ Section 77 of the *Competition Act* contains the non-criminal provision prohibiting exclusive dealing only where the exclusive supply arrangement in question is or is likely to lessen competition "substantially" which requires an assessment of the competitive impact of the conduct at issue on the relevant market.

suggestions without fear of retaliation or negative repercussions.

Because the statutory language includes attempts to influence prices upward by "agreement, threat, promise or any like means," care must be taken not only to avoid making overt threats, but to avoid statements or conduct that could reasonably be interpreted by a reseller as threatening. A reseller's reasonable belief that failing to follow a supplier's price "suggestion" could alienate the supplier and negatively impact the supplier/reseller relationship (for example; the renewal of the supply agreement, shipments of supplies, rebates, participation in co-operative advertising initiatives) can be sufficient grounds for a complaint and/or the initiation of criminal proceedings. In this regard, Canadian courts have convicted firms of price maintenance where the reseller reasonably believed (based on its subjective position and the particular facts of the case) that they had no practical alternative but to increase prices/cease discounting.¹⁶⁴ These cases indicate that whether the conduct at issue constitutes a "threat" is subjective and must be assessed based on the relationship between the supplier and reseller, including any power the supplier may have over the business of the reseller.¹⁶⁵

This means that suppliers must take appropriate care when making price suggestions to resellers. It is perfectly legal for a supplier to make pricing suggestions to resellers and to try to convince resellers to accept the suggested pricing. A caveat is that the reseller must feel that it is free to set its own prices and that the

¹⁶⁴ See for example, *R. v. Shell Canada Products Ltd.* (1989), 25 C.P.R. (3d) 101 (Man. Q.B.); varied (1990), 45 B.L.R. 231.

¹⁶⁵ For example a supplier may be viewed as having a significant degree of power over a reseller where there is a readily terminable contract of supply, the reseller leases its premises from the supplier, etc.

supplier will not retaliate in any way if the reseller does not accept the suggested pricing.

5. Maximum Prices

While Canadian price maintenance laws prohibit setting minimum prices, they do permit setting maximum prices. The ability to establish maximum prices is often useful to suppliers who want to maintain relatively consistent pricing of their products (for example, to preserve brand status or to encourage resellers to direct their competitive efforts towards taking share from competing brands, etc.).

6. Summary

Post *Leegin*, it is more important than ever for U.S. suppliers with Canadian resellers or US suppliers with integrated Can-Am business units to be aware of the very significant differences between the U.S. and Canadian price maintenance laws. The practical implication of these differences is that U.S. suppliers should take appropriate steps to ensure that their supply or franchise agreements, corporate advertising initiatives and communications with resellers regarding retail pricing comply with Canadian price maintenance laws.

While the ability to influence franchisee pricing is much more limited in Canada than is now the case under U.S. federal law, there are several initiatives that businesses can undertake to promote appropriate pricing by Canadian resellers. However, because of the breadth of Canadian price maintenance laws, as well as the possible criminal sanctions and attendant civil liability, suppliers should consider involving Canadian antitrust counsel at an early stage to ensure that any initiatives aimed at influencing Canadian resale pricing comply with Canadian laws.

Antitrust Immunity in Canada: The Sequel

By James Musgrove,
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Introduction

Canada was an early adopter of immunity programs for antitrust offences. It established an explicit policy in 2000, but had operated informal immunity policies for a number of years prior to that. The result has been a significant number of criminal convictions, and fines levied, due to international cooperation and the operation of the Canadian immunity policy. At the end of this note, as Schedule A, is an informal summary of antitrust convictions and penalties over the last decade, virtually all of which resulted from guilty pleas precipitated and made more likely by immunity applicants.

While the existing policy has worked well, the Canadian Competition Bureau has determined that an update is in order. On October 10, 2007, the Bureau released its revised Information Bulletin on the Immunity Program under the *Competition Act*. This Bulletin updates the Bureau's 2000 policy respecting immunity under the *Competition Act*. It makes a number of significant changes to the Bureau's pre-existing policy, including:

- Eliminating the interim step of a Preliminary Grant of Immunity.
- Not automatically extending immunity to all past officers, directors, or employees.
- Eliminating the requirement of restitution.
- Not disqualifying for immunity those who "instigated" the conduct.

This note provides an overview of the new Immunity Policy, but the full policy is accessible on the Bureau's website at <http://www.competitionbureau.gc.ca>.

Like the predecessor policy, the goal of the updated Immunity

Program is to assist the Bureau in bringing to light anticompetitive activity – most frequently cartels – by granting incentives to participants to assist the government in prosecuting others. Like most antitrust immunity programs around the world, it works on the basis of providing incentives to be "first in" to bring improper conduct to the attention of the authorities.

Requirements for Immunity

To obtain full immunity (that is, no criminal conviction or penalty) the immunity applicant must:

1. Be the **first to approach the Bureau** with information with respect to the offence, and that the Bureau either be previously unaware of the offence or not in possession of sufficient evidence for a referral of the matter to the Director of Public Prosecutions for prosecution.
2. **Terminate its participation** in the illegal activity.
3. **Not have coerced** others to become a party to the illegal activity.
4. **Not be the only one involved** in the conduct. That is, one cannot get immunity for reporting an offence committed only by the reporting party.
5. Provide **complete, timely, and ongoing cooperation** in the Bureau's investigation and prosecution of others.
6. **Reveal all illegal Competition Act conduct** in which it has engaged.
7. **Not publicly reveal** an application for immunity without the consent of the Bureau, unless required by law.
8. Do everything it reasonably can to obtain the **cooperation of employees, officers, and directors**, at its own expense.

How does the current policy vary from the Bureau's pre-existing Immunity Policy?

As the above points illustrate, the new Immunity Policy is similar in key respects to the pre-existing policy. However, there are a number of significant differences, including the following items:

9. The previous policy denied immunity to those who "instigated" the conduct, whereas the current policy only denies immunity to those who "coerced" others into the conduct. This change is consistent with the approach favoured internationally, and recognizes the difficulty in determining, after the fact, who was the instigator.
10. The previous policy required, on its face, that the applicant be willing to make restitution to those injured, whereas the current policy is silent on that point, leaving restitution to civil claims under the *Competition Act*.
11. The new Immunity Policy requires applicants to reveal any *Competition Act* offence they may have committed, whereas the previous policy purported to require applicants to reveal any offence, whether under the *Competition Act* or otherwise. This requirement proved to be unworkably broad.
12. The current policy denies immunity if the applicant is the only firm to have committed the offence. The predecessor policy denied immunity if the applicant was the only firm to have benefited by the commission of the offence within Canada. That phrase was, at least in some cases, vague and difficult to apply, and may have unfairly penalized Canadian participants in international cartels.
13. While current officers, employees, and directors who admit their involvement and cooperate will, as with the predecessor policy, be eligible for immunity, former directors, officers, and employees will only qualify for immunity on a

case by case basis. This is a departure from the previous policy. Similarly, agents may also qualify for immunity on a case by case basis.

Difference in process between the previous immunity policy and the new immunity policy

The key difference in the formal process between the prior Immunity Policy and the new policy is that the process to obtain immunity is simplified. The predecessor policy involved granting of a marker by the Competition Bureau, followed by a preliminary grant of immunity (PGI) by the Department of Justice (now the Director of Public Prosecutions) and finally a full grant of immunity. The new policy has eliminated the interim preliminary grant of immunity process, recognizing that the grant of immunity is always subject to a requirement of ongoing cooperation by the immunity applicant and can be revoked if the applicant fails to meet the criteria for the Immunity Policy or fails to continue to cooperate. The preliminary grant of immunity was found to be a redundant step in the process.

What is unchanged from the previous process?

Most of the basic elements of the immunity process are, if not identical to, at least consistent with the prior Immunity Program, starting with the fundamental requirement to be the first to reach the Bureau.

As before, seeking **immunity from other international antitrust authorities does not provide any immunity or marker with respect to the Canadian situation.**

As with the previous policy, to obtain a "marker", which establishes one's place in line for immunity, one must contact the Senior Deputy Commissioner of Competition for Criminal Matters (or, in the appropriate case, Fair Business Practices). They will provide a marker on a hypothetical

basis. Then the applicant will proceed with a proffer detailing the illegal activity, again typically on a hypothetical basis.

The need to admit, fully and frankly, the wrongdoing involved and the need to reveal any other *Competition Act* offences, and the need to cooperate fully with the authorities, remains.

The process may be (and usually is) pursued on a "paperless" basis with the Competition Bureau and Director of Public Prosecutions.

Future Developments – Leniency

The Competition Bureau has announced that it anticipates soon releasing a further policy on *Competition Act* leniency. Leniency affects those firms which do not qualify for full immunity, but which may be second or third to report unlawful conduct and agree to cooperate. By so doing, they seek to earn some leniency from the penalties they would otherwise face. The Bureau/Director of Public Prosecutions have typically offered leniency to such firms in the past, but without a formal policy addressing process there was considerable uncertainty. The Bureau has announced its intention to create a formal leniency policy, likely early in 2008.

SCHEDULE A
PENALTIES FOR PRICE FIXING UNDER THE CANADIAN COMPETITION ACT (1997-2007)

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
1.	Ibiden Co. Ltd.	Guilty Plea	September 19, 2007	Isostatic graphite	\$300,000 (US\$)	\$50,000	15%
2.	DuPont Performance Elastomers L.L.C. (DPE)	Guilty Plea	July 19, 2007	Polychloroprene rubber	\$35 million (During the relevant period, DPE had approximately 70% market share in a \$50 million Canadian market)	\$4 million	11%
3.	Shamrock Maintenance & Hotshot Services Ltd., Pete's Custom Coachwork, Birchwood Auto Body, Alberta Motor Products Ltd., Noral Motors and Lane's Auto Shop	Settlement	February 16, 2007	Auto body repair services		Prohibition order only.	
4.	Sotheby's and Sotheby's (Canada) Inc.	Guilty Plea	August 28, 2006	Auction services		\$800,000 (Payment of Bureau's investigative costs)	
5.	Cascades Fine Papers Group Inc.	Guilty Plea	January 9, 2006	Carbonless sheets	Sales by the parties to the illegal agreements, including the three conspirators, in Ontario and Quebec, during the relevant time period were in excess of \$40,000,000.	\$12,500,000	93.75%
6.	Domtar Inc.	Guilty Plea	January 9, 2006	Carbonless sheets		\$12,500,000	
7.	Unisource Canada, Inc.	Guilty Plea	January 9, 2006	Carbonless sheets		\$12,500,000	
8.	Nippon Carbon Co., Ltd. (aiding and abetting s. 46(1) offence)	Guilty Plea	December 8, 2005	Graphite Electrodes		\$100,000	
9.	Ajinomoto Co. Inc.	Guilty Plea	August 30, 2005	Nucleotides (flavour enhancers in soups, sauces, spices, other foods)		\$1,500,000	

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
10.	CJ Corp.	Guilty Plea	August 30, 2005	Nucleotides (flavour enhancers in soups, sauces, spices, other foods)		\$175,000	
11.	Mitsubishi Corporation	Convicted at Trial	March 31, 2005	Graphite Electrodes		\$1,000,000	
12.	Robert J. Hart, Fmr. Senior Vice President (UCAR International Inc.)	Guilty Plea Cooperated with Bureau	March 2, 2005	Graphite Electrodes		\$50,000	
13.	Royal Group Technologies (Quebec) Inc.	Guilty Plea Cooperated with Bureau	November 15, 2004	Polyvinyl chloride (PVC) window coverings (vertical blinds or valances)		\$200,000	
14.	Nippon Electrodes Company, Ltd.	Guilty Plea	November 9, 2004	Cathode blocks used in the production of primary aluminium	\$1,500,000	\$225,000	15%
15.	VAW Carbon GmbH	Guilty Plea	September 22, 2004	Cathode blocks used in the production of primary aluminium	\$3,570,000	\$500,000	14%
16.	The Morgan Crucible Company	Guilty Plea Obstruction of justice charges laid under the Criminal Code. Former senior executives of Morgan Crucible and some of its subsidiaries interviewed and falsely denied participating in, or having knowledge of, a conspiracy to fix prices	July 16, 2004	Carbon brushes and current collectors used in public transit vehicles		\$550,000	

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
17.	Morganite Canada Corp., also known as National Electrical Carbon Canada (foreign directed conspiracy – Canadian affiliate of The Morgan Crucible Company)	Guilty Plea	July 16, 2004	Carbon brushes and current collectors used in public transit vehicles	\$2,000,000	\$450,000	22.5%
18.	Crompton Corporation	Guilty Plea First in to cooperate with Bureau	March 15, 2004	Rubber Chemicals		\$9,000,000 (payable over 6 years beginning in 2004)	
19.	Robert P. Krass, Chief Executive Officer, Chairman (UCAR Inc.)	Guilty Plea Cooperated with Bureau	September 18, 2003	Graphite Electrodes		\$70,000	
20.	Arteva Specialties S.a.r.l.	Guilty Plea First in to cooperate with Bureau	August 29, 2003	Polyester Staple Fibre		\$1,500,000	
21.	Bioproducts Incorporated	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	August 18, 2003	Choline Chloride		\$600,000	
22.	Akzo Nobel Chemicals BV	Guilty Plea Voluntarily submitted to Canadian jurisdiction	August 18, 2003	Choline Chloride	*Akzo had no sales in Canada during the relevant period (Nov 1992-April 1994) but was convicted for its involvement as a party (along with BASF, UCB, Bioproducts, Chinook, and DuCoa) to an unlawful market allocation agreement	\$1,000,000	

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
23.	Akzo Nobel Chemicals BV	Guilty Plea Voluntarily submitted to Canadian jurisdiction	August 18, 2003	Monochloroacetic Acid and Monochloroacetate (MCAA) (chemical ingredient used in herbicides, pulp and paper, plastics)	\$4,200,000	\$1,900,000	45%
24.	Toyo Tanso USA, Inc., an indirect subsidiary of Toyo Tanso Co., Ltd.	Guilty Plea Cooperated with Bureau	April 15, 2003	Isostatic Graphite	\$200,000	\$200,000	100%
25.	Rhône-Poulenc Biochimie S.A. (wholly owned subsidiary of Aventis S.A.)	Guilty Plea First in to cooperate with Bureau	February 27, 2003	Methylglucamine (chemical ingredient used in medical x-rays)		\$500,000	
26.	The Nippon Synthetic Chemical Industry Co., Ltd. (Nippon Gohsei)	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau (last of group)	December 18, 2002	Sorbates	\$250,000	\$100,000	40%
27.	Degussa A.G.	Guilty Plea	October 16, 2002	Bulk Vitamins (Vitamin B3)		\$2.5 million	
28.	Lonza A.G.	Guilty Plea	October 16, 2002	Bulk Vitamins (Vitamin B3)		\$1.1 million	
29.	Nepera Inc.	Guilty Plea	October 16, 2002	Bulk Vitamins (Vitamin B3)		\$240,000	
30.	Reilly Industries Inc.	Guilty Plea	October 16, 2002	Bulk Vitamins (Vitamin B3)		\$35,000	
31.	Dr. Kuno Sommer (former Senior Executive at Hoffman-LaRoche Ltd.)	Guilty Plea	October 16, 2002	Bulk Vitamins and Food additives		\$150,000	

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
32.	Pfizer Inc.	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	October 24, 2001	Sodium Erythorbate (food preservative)		\$1.5 million	
33.	Yoshiyuki Ebara (Ueno Executive)	Guilty Plea Voluntarily submitted to Canadian jurisdiction	July 30, 2001	Sorbates		\$150,000	
34.	Ueno Fine Chemicals Industries Ltd.	Guilty Plea Voluntarily submitted to Canadian jurisdiction	July 30, 2001	Sorbates	\$8 million	\$1,250,000	16%
35.	Carbone of America Industries Corp.	Guilty Plea	March 1, 2001	Isostatic Graphite	\$1.64 million	\$300,000	18.3%
36.	Tokai Carbon Co. Ltd. (s.46)(aiding and abetting s.45 offence)	Guilty Plea Cooperated with Bureau	February 5, 2001	Graphite Electrodes	Agreed not to sell in Canada	\$250,000	
37.	Freyssinet Limitee (bid rigging)	Guilty Plea Cooperated with Bureau	January 8, 2001	Concrete reinforcement for Hibernia rig		\$800,000	
38.	VSL Corporation/ICS Inc. (bid rigging)	Guilty Plea Cooperated with Bureau	January 8, 2001	Concrete reinforcement for Hibernia rig		immunity – first to approach Bureau	
39.	Daicel Chemical Industries, Ltd.	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	September 19, 2000	Sorbates	\$8 million	\$2,460,000	31%

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
40.	Takatasu Miyasaka (Daicel Director of Organic Chemicals)	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	September 19, 2000	Sorbates		\$250,000	
41.	La Cie de pavage d'asphalte Beaver (a division of Devesco Ltée), Excavation Loïselle et freres Inc., Giguère et Geoffroy Inc., Nepcon Inc., Roxboro Excavation Inc., 9014-6135 Quebec Inc.	Guilty Plea	August 30, 2000	Snow removal	\$4.6 million	\$1 million	22%
42.	SGL Carbon Aktiengesellschaft (foreign-directed conspiracy – s.46)	Guilty Plea Cooperated with Bureau Agreed to make restitution	July 18, 2000	Graphite Electrodes		\$12.5 million+ restitution	
43.	Notaries' Association of Rivière-du-Loup	Guilty Plea	April 26, 2000	Real estate services offered by notaries		\$25,000	
44.	Shakemaster Manufacturing Inc.	Guilty Plea	April 25, 2000	Timber permits bid-rigging		\$15,000	
45.	King Pape Holdings Limited (Bid Rigging) (s. 47)	Guilty Plea	March 31, 2000	Electrical contracting industry		\$300,000	
46.	Standard Electric (Toronto, 1985) Inc. (Bid Rigging) (s. 47)	Guilty Plea	March 31, 2000	Electrical contracting industry		\$65,000	
47.	VanJohn Ltd. (Bid Rigging) (s. 47)	Guilty Plea	March 31, 2000	Electrical contracting industry		\$12,500	
48.	Merck	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	March 30, 2000	Bulk vitamins (C and Biotin)	\$4.5 million	\$1 million	22%

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
49.	Takeda Chemical Industries, Ltd.	Guilty Plea	March 1, 2000	Bulk vitamins B2 and C	\$32 million	\$5.2 million	16.25%
50.	Andreas Hauri, executive (Hoffman-LaRoche)	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	October 27, 1999	Bulk vitamins Citric acid		\$250,000	
51.	Roussell Canada Inc. (foreign-directed conspiracy – s.46)	Guilty Plea Cooperated with Bureau	October 26, 1999	Vitamin B12	\$1.85 million	\$370,000	20%
52.	Hoechst AG	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	October 26, 1999	Sorbates	\$12 million	\$2.5 million	21%
53.	Eastman Chemical	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	October 26, 1999	Sorbates	\$3.9 million	\$780,000	20%
54.	Roland Bronnimann, executive (Hoffman-LaRoche)	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	October 25, 1999	Bulk vitamins Citric Acid		\$250,000	

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
55.	Chinook Group Limited	Guilty Plea Cooperated with Bureau	September 24, 1999	Choline Chloride (vitamin B4)		\$2.25 million	
56.	BASF AG	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	September 22, 1999	Choline Chloride Bulk Vitamins	Forbearance from sales in Canada	\$1 million \$18 million	
57.	Hoffmann-LaRoche Ltd.	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	September 22, 1999	Bulk vitamins (A&E) Citric Acid		\$48 million \$2.9 million	
58.	Rhône-Poulenc S.A.	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	September 22, 1999	Bulk vitamins (A&E)		\$14 million	
59.	Eisai Co., Ltd.	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	September 22, 1999	Bulk vitamins (Vitamin E)		\$2 million	

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
60.	Daiichi Pharmaceutical Co., Ltd.	Guilty Plea Voluntarily submitted to Canadian jurisdiction Cooperated with Bureau	September 22, 1999	Bulk vitamins (B5 and B6)		\$2.5 million	
61.	Russel Cosburn (Chinook)	Guilty Plea Cooperated with Bureau	September 17, 1999	Choline Chloride		9 month jail sentence (to be served in the community) and 50 hours of community service	
62.	Ampere-Edko Limited (Bid Rigging) (s. 47)	Guilty Plea	July 30, 1999	Electrical contracting industry		\$20,000	
63.	Akzo Nobel Chemicals B.V.	Guilty Plea	July 23, 1999	Sodium Gluconate (for cleaning, metal treatment and concrete work)	part of \$2.6 million	\$350,000	27%
64.	Glucona B.V.	Guilty Plea	July 23, 1999	Sodium Gluconate	other part of \$2.6 million	\$350,000	27%
65.	Roquettes Frères	Guilty Plea	May 25, 1999	Sodium Gluconate	\$2.5 million	\$700,000	28%
66.	UCAR Inc. (foreign-directed conspiracy – s.46)	Guilty Plea Cooperated with Bureau	March 18, 1999	Graphite Electrodes		\$11 million+ \$19 million restitution	
67.	Fujisawa Pharmaceuticals Co. Ltd.	Guilty Plea	February 15, 1999	Sodium Gluconate	\$1.8 million	\$360,000	20%

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
68.	Pavage Rolland Fortier Inc. (and 5 others) (bid rigging)	Guilty Plea	January 13, 1999	Snow removal		\$325,000 (total fine for all conspirators of \$1 million on sales totalling \$4.6 million)	22%
69.	Les Emterprises P.B.E. Ltee (bid rigging)	Guilty Plea	January 13, 1999	Snow removal		\$590,382	
70.	Jean Leclerc Excavation Inc. (bid rigging)	Guilty Plea	January 13, 1999	Snow removal			
71.	Les Constructions du Saint-Laurent Ltee Constructions T.C.L. (1990) Inc. (bid rigging)	Guilty Plea	January 13, 1999	Snow removal		\$677,404	
72.	Henri Labbe & Fils Inc. (bid rigging)	Guilty Plea	January 13, 1999	Snow removal		\$415,287	
73.	Union des Carrieres & Pavage Ltee (bid rigging)	Guilty Plea	January 13, 1999	Snow removal		\$25,000	
74.	Les Constructions Bé-Con Inc. (bid rigging)	Guilty Plea	January 13, 1999	Snow removal		\$650,000	
75.	Jungbunzlauer International A.G.	Guilty Plea Cooperated with Bureau	October 21, 1998	Citric Acid Sodium Gluconate	\$800,000	\$1.9 million \$100,000	12%

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
76.	Haarmann & Reimer Corporation (Bayer)	Guilty Plea Cooperated with Bureau	October 21, 1998	Citric Acid	\$34 million	\$4.7 million	14%
77.	Ajinomoto Co. Inc.	Convicted at Trial	July 23, 1998	Lysine		\$3.5 million	
78.	Sewon America Inc.	Guilty Plea Cooperated with Bureau	July 23, 1998	Lysine		\$70,000	
79.	Kyowa Hakko Kogyo Co.	Guilty Plea First in to cooperate with Bureau	July 23, 1998	Lysine		Prohibition order only	
80.	Archer Daniels Midland Company (ADM)	Guilty Plea Cooperated with Bureau	May 27, 1998	Citric Acid Lysine (food additive)	\$17 million \$48 million	\$2 million \$14 million	12% 29%
81.	Smith and Long Limited (Bid Rigging) (s. 47)	Guilty Plea Cooperated with Bureau	February 27, 1998	Electrical contracting industry		\$100,000	
82.	Dunmore Wood Preservers Ltd./ Jennifer Brotzell (Bid Rigging) (s. 47)	Guilty Plea	February 10, 1998	Timber lot bids		\$5,000, 50 hours community service, 3 year prohibition order	
83.	Natal Forest Products Ltd./ George F. Knight (Bid Rigging) (s. 47)	Guilty Plea	February 10, 1998	Timber lot bids		\$5,000, 3 year prohibition order	
84.	Rinke & Sons Lumber Ltd./ Carmen Douglas Rinke (Bid Rigging) (s. 47)	Guilty Plea	February 10, 1998	Timber lot bids		\$5,000, 3 year prohibition order	

	Party	Circumstances as Known	Date	Product Involved	Sales (by conspirator in Canada during the period of conspiracy)	Penalty	
						\$	% of Sales
85.	Blaine Lloyd Whittaker (Bid Rigging) (s. 47)	Guilty Plea	February 10, 1998	Timber lot bids		\$3,000, 25 hours community service	
86.	Guild Electric (Bid Rigging) (s.47)	Guilty Plea	December 29, 1997	Electrical Contractor		\$300,000	
87.	Plan Electric (Bid Rigging) (s.47)	Guilty Plea Cooperated with Bureau	December 19, 1997	Electrical Contractor		\$700,000	
88.	Ainsworth Inc. (Bid Rigging) (s.47)	Guilty Plea Cooperated with Bureau	December 19, 1997	Electrical Contractor		\$700,000	
89.	Serge Briere Robert Caron	Guilty Plea	June 29, 1997	Waste Disposal		One year of imprisonment (to be served in community)	
90.	Mitsubishi Paper Mills Ltd.	Guilty Plea	February 17, 1997	Thermal facsimile paper		\$850,000	
91.	Jacques Perrault (conspiracy and related offences)	Convicted at Trial	September 9, 1996	Driving School		One year of imprisonment	

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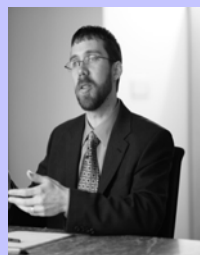
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