

**In This Issue**

- *Supreme Court Denies Certiorari in 3M Company v. LePage's Inc.*
- *FTC Reverses Dismissal Of Unocal Complaint Alleging Fraud In Standard Setting Process*
- *8th Circuit Affirms Truck Dealer's Multi-Million Dollar Judgment In Robinson-Patman Act Case*
- *DeBeers Submits To U.S. Jurisdiction And Opens On 5th Avenue*
- *Pepsi Gets Bottled Up In Court*
- *FTC Closes Merger Investigation -- Weighs Empirical vs. Anecdotal Evidence*
- *DOJ White Collar Crime Update*

**Recent Activities***DOJ Antitrust Highlights**FTC Antitrust Highlights**FTC Consumer Protection Highlights**International Antitrust Highlights**FCC Antitrust Highlights***SUPREME COURT DENIES CERTIORARI IN 3M COMPANY V. LEPAGE'S INC.**

*Alcoa* and above cost exclusionary predation theory live for another day. On June 30, 2004, at long last, the United States Supreme Court denied the petition for certiorari in *3M Company v. LePage's Incorporated*, \_\_\_ U.S. \_\_\_ No. 02-1865.

The basic allegations of the case were that 3M Company ("3M"), an admitted monopolist with a 90% non-transitory share of the market for transparent tape, maintained its monopoly through a series of "bundled" rebates that induced exclusive dealing by its major customers. This was so albeit that the bundled rebates were above any relevant measure of cost, and thus not subject to attack as below cost predatory pricing under the Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

3M manufactured Scotch brand transparent tape. Until the early 1990's, it had garnered and maintained over 90% of the domestic transparent tape market, which the parties agreed was the relevant market. It was not disputed that 3M was a monopolist in that market. In the early 1980's, LePage's decided to promote and sell a "second brand" transparent tape, as well as a private label line. By the early 1990's, LePage's had garnered approximately 90% of the sales of private label tape.

Also by the early 1990's, the demand for private label tape increased with the growth of office supply super stores and large retailers such as Kmart and Walmart. In order to capitalize on sales in this burgeoning segment of the market, 3M began selling its own private label tape, and introduced its own second brand. It then devised incentive programs in which it offered multi-level "bundled" rebates to customers, conditioned on the customer's level of purchases from each of the segments of 3M's diverse product line. Customers were given targeted growth rates in each product line and segment. The more "targets" the customer met, the larger were its rebates across each product line and in each segment.

LePage's sued 3M, alleging violations of Section 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. The jury returned a verdict for 3M on the exclusive dealing claims under Sherman 1 and Clayton 3, but found in favor

of LePage's on the Sherman 2 monopolization claims. It assessed damages which were trebled by the court to \$68,486,697.00.

A panel of the Third Circuit reversed by 2-1, holding that 3M's above-cost package discounts did not violate Section 2 as a matter of law. LePage's petition for rehearing *en banc* was granted, and a 7-3 *en banc* court issued its decision on March 25, 2003. The 7-3 *en banc* court held that 3M

"used its monopoly power over transparent tape, backed by its considerable catalog of products, to entrench its monopoly to the detriment of LePage's, its only serious competitor, in violation of Section 2 of the Sherman Act". 324 F. 3d 141, 169.

The *en banc* Third Circuit began its analysis by reviewing the general principals of monopolization law, beginning with *Alcoa* and *American Tobacco*, and continuing through *Grinnell*, *Aspen Ski*, and *Brooke Group*. In essence, it distinguished *Brooke Group* by holding that 3M, unlike *Brooke Group*, was not a below cost predatory pricing case, but an exclusive dealing case, akin to tying analysis. At issue was whether conduct by a monopolist, who sells its product above cost, no matter how exclusionary, can constitute monopolization in violation of Section 2. Harkening to the days of *Alcoa* and *American Tobacco*, the court held that a monopolist will be found to violate Section 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification. The court found that 3M had engaged in a "panoply" of exclusionary conduct, all related to its pricing strategy. The court cited *Areeda & Hovenkamp* for the proposition that package discounting may have anticompetitive effects similar to tying, causing a customer to buy a product not because it is cheaper or better than a competing product, but in order to get a

discount on a different product, which the plaintiff does not produce. The Third Circuit concluded that

"the principal anticompetitive effect of bundling rebates as offered by 3M is that when offered by a monopolist, they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer." 324 F.3d at 155.

In its petition for a writ of certiorari, supported by amicus briefs from three trade associations and 19 manufacturers, most of whom have also earned admission to the antitrust hall of fame, 3M argued that the Third Circuit's decision is as amorphous as its *American Tobacco* and *Alcoa* ancestors, and is in itself, economically incoherent, and is likely to create continuing confusion, create false positives, and deter price cutting by firms fearful of the cost of risks of litigation. For this principle, it relied on not only *Brooke Group*, but the Supreme Court's most recent decision in *Trinko*, 124 S.Ct. at 879, 882.

An amicus brief filed by the United States urged that certiorari be denied. It urged that while the Court of Appeals was unclear as to what aspect of bundled rebates constitute exclusionary conduct, and that while neither the Court of Appeal or other courts have definitively resolved what legal principals and economic analysis should control, it should nevertheless be viewed as an exclusionary practices case, and not as a predatory pricing case. Accordingly, *Brooke Group* is an imperfect vehicle for analysis. The United States urged the Supreme Court to wait for a better case to come its way. It held that *Brooke Group* has provided more specific guidance in Section 2 cases, but only in the context of a particular form of potentially exclusionary conduct – aggressive below cost pricing.

Within the last two decades, we have seen numerous game theoretic commentaries on successful above-cost predation engaged in by monopolists. The game theory commentators emphasize the incumbent firm's exploitation of informational asymmetries to signal to a target firm that it should exit the market or reduce output. Related research argues that specific price-cost tests overlook "strategic entry deterrents," by which established firms deter entry or expansion without incurring the substantial cost of predation represented by the traditional predatory pricing model. See, e.g., Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 *Yale L.J.* 284 (1977). A different school, however, which is concerned with the "false positives" issue argues that predatory pricing and most other forms of exclusionary conduct are so rare and irrational that antitrust law should ignore them completely, and let the market decide who lives and who dies. See, e.g., Easterbrook, *Predatory Strategies and Counter Strategies*, 48 *U. Chi. L. Rev.* 263 (1981).

A powerful argument made by the petitioner and its amicus friends was that, akin to *Alcoa*, the Third Circuit's decision favors "small traders and worthy men" over an equally efficient competitor. This, it argues, should be the defining test. Absent evidence that an equally efficient competitor would have been excluded by the bundled rebate policy, it cannot be said that the course of conduct was other than aggressive competition on the merits. And, as Judge Easterbrook wrote in *A.A. Poultry*, "consumers like low prices."

Where are we at the end of the day? Perhaps a new generation of antitrust law students will remember the apt tautology of Judge Learned Hand that "no monopolist monopolizes unconscious of what he is doing". 148 F. 2d 416, 432 (2d Cir. 1945). In the years since *Alcoa*, numerous courts have sought to categorize conduct that can form the basis for a

monopolization claim, and to distinguish it from conduct that is, on balance, consumer welfare enhancing. Until a better vehicle for analysis comes along, we may be trapped in the jungle of jargon in determining whether a given case involves "predatory" or "exclusionary" conduct, as opposed to "welfare enhancing" conduct, or a "legitimate business purpose." What portends the future? In the July 16 edition of the *Wall Street Journal*, it was reported that the Coca-Cola Company had offered to settle a long-running EU antitrust case by agreeing to abandon all specific sales or growth target rebates in areas where it enjoys a substantial market share. With certiorari having now been denied in *3M* as well as *Conwood*, and the market for moist snuff having been rescued from monopoly exploitation, what will the appropriate defining case be like? Gorillas in the mist, beware.

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## FTC REVERSES DISMISSAL OF UNOCAL COMPLAINT ALLEGING FRAUD IN STANDARD SETTING PROCESS

Conduct that constitutes petitioning under the First Amendment has long been considered immune from the antitrust laws under the *Noerr-Pennington* ("*Noerr*") doctrine unless such conduct is really just a "sham" to cover up anticompetitive activity. Petitioning is defined to include litigation as well as lobbying before legislatures and executive agencies. One hot issue in recent years is whether, and to what extent, misrepresentations are sufficient to satisfy the sham exception or otherwise cause loss of *Noerr* immunity. While there is a general consensus that misrepresentations will not cause loss of immunity in the legislative arena, they may cause loss of immunity in adjudicatory proceedings where the decision maker relies mainly on the parties to provide him or her with the facts necessary to make a decision.

In our December, 2003 issue (Vol. 1, No. 6) of the *Sheppard Mullin Antitrust Review*, we reported on a decision by an Administrative Law Judge (“ALJ”) of the FTC which dismissed a Staff Complaint against Unocal. The Complaint alleged that misrepresentations by Unocal to a government standard setting body, the California Air Resources Board (“CARB”), violated Section 5 of the FTC Act. The ALJ held that the alleged misrepresentations were protected by the *Noerr* doctrine since, CARB was a “quasi-legislative” proceeding. The ALJ further held the Commission lacked jurisdiction to adjudicate the staff Complaint since it involved patent law issues subject to the exclusive jurisdiction of the federal courts.

In a unanimous 56 page decision issued July 7, 2004 and authored by Chairman Muris, the full Commission reversed both ALJ rulings. The Commission held the FTC did have jurisdiction to hear unfair competition claims involving patent law issues, and remanded the case back to the ALJ to resolve disputed facts and issues concerning application of *Noerr* immunity. *In re Matter of Union Oil Company of California, FTC Docket No. 9305*. The Opinion (“Op.”) contains a thorough analysis of whether and when misrepresentations will cause loss of *Noerr* immunity, its relationship to the sham exception, and the criteria to be used to determine whether a particular proceeding is “political or nonpolitical” for purposes of applying the sham exception and *Noerr* immunity principles. The Opinion is a valuable compendium of law and policy, plus it creates an analytical model that may be useful in future cases to determine when misrepresentation will cause loss of *Noerr* immunity. The bottom line, however, is that certain types of misrepresentations will cause loss of *Noerr* immunity when made in the context of standard setting rulemaking proceedings where the decision-maker has limited discretion and relies on the parties for the facts.

The *Unocal* article in our December issue described the background of the CARB proceeding to determine a standard for low emission gasoline, Unocal’s alleged failure to disclose to CARB the existence of certain patents and its affirmative representation that it had no proprietary interest in the standard being promulgated, and its subsequent successful patent infringement suit against other refiners who adopted that standard. We also discussed the *Noerr* doctrine, which is based on both the need to protect First Amendment petitioning and the fact that the antitrust laws do not regulate political, as opposed to commercial, activity.

The Commission began its Opinion by noting that lower courts have found that, in lawsuits and similar adjudicatory proceedings, misrepresentations may cause loss of *Noerr* immunity when they go to the “core” of the proceeding or otherwise affect its legitimacy. (Op. 17). It then noted, citing a series of defamation cases, that the First Amendment does not shelter intentional falsehoods but cautioned against “opening the door” too widely. That is why courts require that misrepresentations go to the core of a lawsuit or affect its legitimacy before *Noerr* immunity is lost. (Op. 20-24). Some courts reach this result by concluding that deliberate falsehoods are not petitioning at all, while other courts view it as part of the sham exception. *Id.*

The sham exception for litigation requires that the lawsuit be both objectively baseless and there be a subjective intent to use the process, not the outcome, to restrain competition. *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993). *PRE* expressly did not reach the misrepresentation issue. *Id.* at n.6. The Commission’s Opinion states, however, that the “rote” application of the *PRE* “outcome” prong to misrepresentations that infect the core of a proceeding would be contrary to the policy objectives of *Noerr*, and the fact that the petitioner desires a particular outcome should not end the

inquiry. (Op. 28). To hold otherwise, said Chairman Muris, would allow one to build a monopoly by blatant lying. *Id.*

The Commission then turned to the ALJ finding that the CARB proceedings were legislative, not adjudicatory. It criticized the ALJ for relying on administrative law statutes and decisions, reframed the issue in terms of “political vs. nonpolitical,” and then stated there should be a more “nuanced” inquiry as to where a particular agency falls in this spectrum. (Op. 30). The Commission identified four factors to be considered in this inquiry: (1) whether there is a government expectation of truthfulness; (2) the degree of government discretion; (3) the extent the government relies on petitioner for the facts; and (4) the ability to determine causality, i.e., was the misrepresentation the cause of the government action which restrains competition. (Op. 31-35). It then stated that the *Noerr* inquiry also requires consideration of the nature of the relevant communications. This requires that the misrepresentation be deliberate, subject to factual verification, and central to the legitimacy of the affected governmental proceeding. (Op. 36).

The Commission applied this analytical model to both the nature of the CARB proceeding and Unocal’s communications. Drawing all inferences in favor of Complaint Counsel, it found that allegations of the Complaint were sufficient on each point, and accordingly, the *Noerr* doctrine did not bar the Complaint as a matter of law. Most significantly, it found, contrary to the ALJ, that Complaint Counsel had alleged substantial limits on CARB’s discretion, that it was required to rely on an evidentiary record, and was subject to judicial review. (Op. 39-41). The Commission concluded that the CARB proceeding was more akin to an adjudicatory proceeding than to a legislative one. As such, case law supported an exception to *Noerr* based on misrepresentations. It further found that Complaint Counsel had alleged deliberate misrepresentations, that such

representations related to specific, verifiable facts – whether Unocal asserted patent rights that it previously claimed either did not exist or would not be asserted – and that, but for the alleged fraud, CARB would not have adopted the regulations that it did. (Op. 43).

The Commission then dealt with two remaining issues: whether Unocal’s communications with industry groups were protected by *Noerr* and the Commission’s jurisdiction over claims that require resolution of substantial questions of patent law. On the former, it rejected the ALJ analysis that such communications were “incidental” to petitioning conduct. It held that Unocal’s communications were direct misrepresentations to private parties, and thus not petitioning entitled to *Noerr* protection. (Op. 46). As to the latter, the Commission found, consistent with prior decisions, that the broad grant of authority in the FTC Act to prevent unfair methods of competition included those arising from the enforcement of patents. The statutory grant of exclusive jurisdiction to federal courts for civil claims arising under patent law, 28 U.S.C. § 1338(a), does not apply, said the Commission, because this Commission proceeding does not arise under the patent statutes and is not a civil action. (Op. 49-54).

In terms of *Noerr* jurisprudence, the Commission’s *Unocal* Opinion makes two significant contributions. First, even where it is the outcome of the proceeding that reduces competition, where that outcome is the result of fraud, the sham exception should apply. Second, its use of the “more nuanced” inquiry focused on the nature of the proceeding and causation to conclude that the CARB proceeding was the type where misrepresentations may cause loss of immunity rather than the administrative law approach used by the ALJ. The Commission, however, was careful to describe its holding as one which applies only in “limited circumstances” (Op. 48) and the decision was purely on the pleadings with the actual merits to be litigated on remand. Thus, despite the reversal of the



ALJ decision, the misrepresentation exception to *Noerr* as adopted by the Commission in *Unocal* remains quite narrow, and recognizes the important First Amendment and other policy considerations underlying the *Noerr* doctrine.

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## 8TH CIRCUIT AFFIRMS TRUCK DEALER'S MULTI-MILLION DOLLAR JUDGMENT IN ROBINSON-PATMAN ACT CASE

An Arkansas-based dealer of heavy-duty trucks – which claimed that a manufacturer discriminated in the price of its trucks in violation of the Robinson-Patman Act (“R-P Act”) – had its successful jury verdict affirmed on appeal by the U.S. Court of Appeals for the Eighth Circuit. The jury had awarded nearly \$1.4 million on the R-P Act claim, which the trial judge trebled (to nearly \$4.2 million), plus half a million dollars under a state law claim and attorneys fees. In a decision issued July 12 the court upheld the decision that the manufacturer (Volvo) improperly refused to provide the plaintiff with the same level of price concessions offered to other similarly-situated heavy-truck dealers. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 2004 WL 1541788.

The majority of heavy-duty trucks sold by dealers are manufactured only after a retail customer has solicited and accepted bids from several dealers. Consistent with the industry-wide process, during this competitive bidding process, dealers who fill orders through Volvo seek concessions from Volvo for a price below the initial wholesale price (e.g., 8 percent of the published retail price), which then allows the dealers to offer lower prices to their customers. To remain competitive with the other truck manufacturers, Volvo does not reveal its method of calculating concessions. The plaintiff-dealer contended that Volvo offered larger price concessions to favored dealers than to the

plaintiff (which was pursuant to an alleged plan by Volvo to force plaintiff and certain other dealers out of the Volvo business).

The R-P Act provides, in pertinent part:

“It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases are involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.” 15 U.S.C. 13(a).

The plaintiff asserted that a so-called “secondary-line” violation occurred because Volvo’s alleged price discrimination injured competition among its direct customers (*i.e.*, the wholesalers such as the plaintiff).

The court held that the plaintiff successfully proved its claim by showing (1) Volvo discriminated in price between the plaintiff and the favored dealers, (2) the price discrimination substantially affected competition between the plaintiff and the favored dealers, (3) the truck sales occurred in interstate commerce, (4) the trucks sold by the plaintiff and the other dealers were of like grade and quality, and (5) there were actual sales at two different prices to two different Volvo dealers, *i.e.*, a sale to the plaintiff and a sale to another Volvo dealer.

Volvo contended that competitive bidding situations do not implicate the R-P Act because an **unsuccessful** bidder is not a **purchaser**. The court agreed that an

unsuccessful bidder is not a purchaser within the meaning of the Act. However, the plaintiff was more than an unsuccessful bidder. On at least four occasions, it actually purchased Volvo trucks following successful bids on contracts. The plaintiff successfully compared those successful sales to actual sales made by other dealers during the same time period.

An important component of the court's finding of actual competition was its determination that Volvo dealers competed at the same functional level despite the fact that they were assigned to individual geographic territories. The court emphasized that although the plaintiff was assigned to a geographic area (ten counties in western Arkansas and two counties in eastern Oklahoma), "it was free to sell outside that area, and did so." The court further pointed to evidence that the plaintiff looked to the entire continental United States in making its sales, and had sold or delivered trucks in 13 states. The plaintiff also established that end-buyers of the trucks are very mobile and price-shop nationwide.

The court also found that the plaintiff met its burden of showing that the trucks it acquired from Volvo were of "like grade and quality" as the trucks purchased by the other Volvo dealers. Under settled law, products are not of like grade and quality if there are substantial physical differences in products affecting consumer use, preference or marketability. Volvo argued that the sales-to-sales comparisons made by the plaintiff involved trucks with different major components that affected consumer preference and marketability. In rejecting this argument, the court pointed to testimony showing that any differences in components were inconsequential – in all cases the trucks were the same model and same year, with comparable engines and largely similar components. The court emphasized that "the RPA says the commodities involved must be of *like* grade and quality, not *identical* grade and quality." The concept was designed to serve as one of the necessary rough guides for

separating out those commercial transactions insufficiently comparable for price regulation by the statute. The courts are to apply a sensible approach and flexible application of the like grade and quality concept.

Further, although the plaintiff was required to show that the comparative sales were reasonably contemporaneous in time, there is no requirement that the two sales be made at precisely the same time or place. Here, the sales in comparison generally occurred within one to four months apart. This was not too long an interval for purposes of establishing a violation of the R-P Act. Finally, the court held that the price discrimination resulted in "competitive injury" to the plaintiff because there was sufficient evidence for the jury to conclude that the price discrimination resulted in lost profits and sales to the plaintiff.

The result in the Volvo case reinforces the fact that manufacturers that want to streamline and reduce their distribution network need to exercise caution to be sure that differing price concessions between favored and non-favored or less-favored dealers do not run afoul of the R-P Act. In addition, manufacturers should be careful not to assume that dealers assigned to specific territories will not be deemed to compete with one another for purposes of the Act.

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## **DEBEERS SUBMITS TO U.S. JURISDICTION AND OPENS ON 5TH AVENUE**

On July 13, DeBeers Centenary AG ("DeBeers"), the world's largest diamond producer, plead guilty to a price-fixing charge and was sentenced to pay a \$10 million criminal fine for conspiring to raise list prices of industrial diamonds. The plea ends a 10-year-old case and opens the door for DeBeers to re-enter the American market after a half-century absence. The

indictment and plea agreement are available at <http://www.usdoj.gov/atr/cases/debeers.htm>.

The company, founded by British colonial entrepreneur Cecil Rhodes in the 1880s, was criticized by the United States during World War II when it refused to provide industrial diamonds for the war effort. DeBeers faced antitrust cases brought by the Justice Department in 1945, 1957 and 1974. Those cases forced DeBeers out of the American market and it has since used intermediaries to bring diamond products into the United States. In February, DeBeers posted \$5.5 billion full-year sales and earnings of \$676 million.

The July 13 plea agreement resolved a 1994 federal grand jury indictment. The indictment charged DeBeers, headquartered in Switzerland, with conspiring with General Electric to raise list prices of various industrial diamond products worldwide between 1991 and 1992. The two companies were accused of exchanging price information through Philippe Lotier, a French businessman and industrial diamond customer.

Industrial diamonds are manufactured by applying extremely high pressure and temperature to carbon-rich material to transform it into a diamond. Diamond tool manufacturers use industrial diamonds to manufacture cutting and polishing tools used in various applications including road construction, stone cutting and polishing, dentistry, automobile manufacturing, mining and oil drilling.

After a five-week trial, DeBeers' alleged co-conspirator, General Electric, was acquitted on the conspiracy charge, *United States v. General Elec. Co.*, 869 F.Supp. 1285 (S.D. Ohio 1994). Judge George C. Smith found that the government did not have enough evidence to prove a price-fixing scheme. The court also found that the government had failed to prove that Mr. Lotier was working on behalf of

DeBeers when he shared DeBeers price information with General Electric. The Justice Department could not prosecute DeBeers because its operations were outside of the United States and, most importantly, the company refused to subject itself to the jurisdiction of the American courts. As a result of the July 13 plea agreement, DeBeers has consented to jurisdiction to resolve this action.

At the time the offense was committed, DeBeers' Section 1 violation carried a maximum penalty of a \$10 million fine for a corporation. The maximum statutory fine may be increased to twice the gain derived from the crime, or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the Sherman Act maximum.

R. Hewitt Pate, Assistant Attorney General in charge of the Department's Antitrust Division said that the guilty plea "reflects the department's persistence in the fight against illegal price fixing. Although jurisdictional issues prevented the department from litigating the charge against DeBeers Centenary for a decade, this plea indicates our commitment to seeing justice prevail."

Once the plea agreement was approved and imposition of the recommended sentencing was imposed, the government agreed that it would not bring further criminal charges against DeBeers, related companies, or any of their current or former directors, officers, employees, and agents for any act or offense committed in furtherance of the antitrust conspiracy charged in the indictment. This provision, however, does not extend to civil matters or violations of the federal tax or securities laws.

The plea agreement has already sparked one indirect purchaser action in California and is likely to lead to other private plaintiffs' actions. Section 5(i) of the Clayton Act provides that the filing of a civil or criminal proceeding by the United States suspends the statute



of limitations, during its pendency and for one year thereafter. Private plaintiffs therefore have one year from the date of disposition of the indictment to file their actions.

Due to this antitrust dispute, DeBeers board members faced arrest if they traveled to the United States. The State Department is expected to lift this ban.

Finally, later this year, DeBeers is scheduled to open a store on 5th Avenue. The boutique, in joint venture with LVMH - Moët Hennessy - Louis Vuitton is expected to compete with Tiffany, Cartier, and Van Cleef & Arpels and is scheduled to sell DeBeers exclusive diamond jewelry collection currently available in DeBeers stores in London and Tokyo.

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## PEPSI GETS BOTTLED UP IN COURT

In *Green Country Food Market, Inc. v. Bottling Group, LLC*, No. 02-5076 (10th Cir. June 22, 2004) the U.S. Court of Appeals for the Tenth Circuit, per Judge Ebel, refused to hold that a branded soft drink could constitute its own product market, or that the plaintiff had proved that the distribution of beverages constituted a cluster market. In 1997, the plaintiffs, owners of several local grocery stores in Oklahoma, including Green Country Food Market, realized that their beverage distributor, Beverage Products Corporation (“BPC”), had charged other grocery stores less for Pepsi soft drinks and other beverages. In 1999, the retailers sued under Oklahoma state antitrust laws, alleging price discrimination. One month later, Pepsi, having bought BPC, informed the plaintiffs that Pepsi would no longer distribute any beverages to them, citing a “distinct decrease in the level of trust.” The plaintiffs then added the claims of attempted monopolization and refusal of access to an essential facility to their complaint.

The district court granted summary judgment to Pepsi. The plaintiffs appealed, arguing that (1) Pepsi had a monopoly by virtue of its control of Pepsi products, thus making Pepsi’s refusal to cooperate anticompetitive or, in the alternative, (2) the distribution of the 155 products provided by BPC constituted a cluster market, and BPC’s refusal to deal constituted attempted monopolization. The Tenth Circuit first refused to allow the plaintiffs to amend the complaint to include the state claim for unilateral restraint of trade. It noted that the plaintiffs had only mentioned the relevant statutory section in the reply brief and had not brought up the new claim until late in the litigation, thus making any introduction of the claim unduly prejudicial to Pepsi.

The court next looked at whether the plaintiffs’ evidence could show either that Pepsi soft drinks constituted their own product market or that the distribution of beverages was a cluster market, essential components for the claims of attempted monopolization and denial of essential facility. The court first noted that the Oklahoma Supreme Court follows federal interpretations of the Sherman and Clayton Acts when deciding Oklahoma state antitrust claims. The court, quoting the Supreme Court’s decision in *United States v. E.I. du Pont de Nemours*, 351 U.S. 377 (1956), set forth the legal definition of a relevant product market. “A relevant product market consists of ‘products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered.’” The court also held that “[t]he interchangeability of products is measured by, and is substantially synonymous with, cross-elasticity.” Finally, the court noted that the Supreme Court recognized that submarkets could exist within a larger product market. The factors for determining the submarkets were “(1) industry or public recognition of the submarket as a separate economic entity, (2) the product’s peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, and (6) sensitivity to price changes and specialized vendors.” (quoting *United States v. Brown Shoe*, 370 U.S. 294 (1962)).

The court looked at whether Pepsi products could constitute a product market unto themselves. Although noting that the Supreme Court had recognized a few cases where a branded product constituted its own product market, such as the market for Kodak brand replacement parts, the court also noted that such products were the exception rather than the rule. In *du Pont*, the Supreme Court, in *dicta*, labeled soft drinks as the perfect example of a market of readily interchangeable brands. “[T]his power that...soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly.”

The court next examined whether the distributor could have market power over a “cluster market,” defined as where “a seller provides a full line of products or services that create a separate product market consisting of that ‘cluster’ of products or services.” By terminating the supply contract with the plaintiffs, the distributor had eliminated the plaintiffs’ wholesale access to 155 different beverages. The court, after noting that “[a] cluster market exists only when the ‘cluster’ is itself an object of consumer demand,” determined that the distribution of beverages did not constitute a cluster market.

The court first held that there was no evidence of a separate demand for the product cluster rather than the products individually. Looking first at consumers, the court found “[p]laintiffs have presented no evidence that the 155 different products distributed by Bottling Group together constitute a cluster that is itself the object of consumer demand, as our precedent requires.” Next, looking at wholesale purchasers, the court concluded that the plaintiffs had failed to show a product cluster, despite plaintiffs’ arguments that retailers valued purchasing multiple beverage products from a single source. “Plaintiffs offer no evidence establishing that the package of grocery products distributed by Bottling Group appeals to grocery stores on a different level than Pepsi, Dr.

Pepper, Slice, etc. considered separately. . . . Nor have they introduced evidence that grocery stores significantly benefit from purchasing Dr. Pepper products and Pepsi products as a package rather than individually.” The court determined that the plaintiffs, lacking evidence of either consumer or retail benefits from clustering of products, had failed to establish that the distribution of beverages constituted a “cluster” market.

The court next held that even if beverage distribution did constitute a cluster market, the plaintiffs would still not have properly plead a monopoly abuse claim. The court noted that the plaintiffs had failed to assert that the distributor had market power in the provision of the products in the geographic area. Without an allegation of market power, the fact that the distributor sold a clustered product was irrelevant. “Plaintiffs appear to misunderstand the significance of a cluster market – the fact that an entity distributes a number of different products does give it monopoly power in a ‘cluster market’; it merely defines the product(s)/service(s) offered by the distributor as a package and then limits the relevant product market to those entities that can offer a competitive package.” Although the plaintiffs had argued that Pepsi had significant market power in the wholesale distribution of specific products, they failed to assert market power in the distribution of the clustered product. Therefore, even if wholesale distribution of beverage products was a cluster market, the plaintiffs could not survive summary judgment.

Although the decision does foreclose the possibility that a soft drink manufacturer’s brand could be its own product market, the decision is not clear as to whether the distribution of beverages will ever constitute a cluster market or if the plaintiffs simply failed to supply adequate proof that it did. The court’s admonishments of the plaintiffs’ court filings, including their failure to assert the unilateral restraint claim and their failure to assert that the distributor had market power in the

cluster market, may show that the plaintiffs were poorly prepared for litigation. The decision indicates that the court rejected the existence of a cluster market based primarily upon a lack of evidence, as every substantive sentence in the decision's paragraph concerning cluster markets begins by asserting that the plaintiffs failed to present any or adequate evidence to support the components of the claim. Unlike the court's discussion of the branded product market, the court does not foreclose the possibility that a properly prepared plaintiff could show that beverage distribution is a cluster market.

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## **FTC CLOSES MERGER INVESTIGATION -- WEIGHS EMPIRICAL VS. ANECDOTAL EVIDENCE**

On July 1, the Commissioners voted 3-2 to close their investigation of the consummated merger between Provena St. Therese Medical Center and Victory Memorial Hospital. Both were competing hospitals in Waukegan, Illinois. In closing the investigation, the Commission stated that it had failed to obtain sufficient evidence of consumer harm resulting from the merger.

St. Therese and Victory merged their operations in 2000 to create Vista Health. The FTC initiated its investigation of the consummated transaction approximately one and a half years after the merger and collected data and information from numerous sources. Central to the Commission's decision to close the case was an empirical study that compared price increases resulting from the merger to a "control group" of other hospitals in Northern Illinois. According to the statement of the three Commissioners who

voted to close the matter, the study showed that the post-acquisition price increases of the merged firm were no higher than similar price increases of other hospitals in the area. In addition, third-party payors did not appear to have buyer power and refused in some instances to renegotiate contracts at higher prices with Vista. Evidently, the third party payors had alternative hospitals to turn to. Moreover, evidence existed that St. Therese and Victory were losing market share to these competitors.

The dissenters disagreed and voted to keep the investigation open and active. A statement from Commissioners Thompson and Jones-Harbour highlights the debate concerning the role of empirical analysis in assessing merger cases and likely anticompetitive effects. According to the dissenting Commissioners, the empirical pricing analysis relied on by three Commissioners voting to close the matter was inconclusive with respect to the question of whether the price increases were the direct result of the merger. However, other important evidence elicited during the investigation pointed to potential antitrust concerns. For instance, according to the dissenters, company documents and industry testimony showed that the combined entity possessed market power, and that prior to the merger the hospitals were aggressive head-to-head competitors. Moreover, other anecdotal evidence indicated that many patients did not have access to alternative treatment facilities after the merger.

This investigation and resulting FTC action (or more appropriately FTC inaction) illustrate the debate regarding the relative usefulness of empirical data in determining anticompetitive effects, but they provide little additional guidance as to the appropriateness and quality of the evidence needed. Indeed, the joint FTC/DOJ Merger Guidelines contain no specific pronouncements regarding empirical data as evidence

of anticompetitive effects. However, the reliability of empirical data was critical to the Eighth Circuit in overturning the lower court's decision to enjoin the acquisition of Doctors' Regional Medical Center by Tenet Health Care, a merger that affected the Poplar Bluffs region in Missouri. *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, C.A.8 (Mo.) 1999. The Eighth Circuit opinion in the *Tenet Health* case provides an indication that empirical data is important to judges who are called on to determine the propriety of mergers, particularly in health care markets. But the Eighth Circuit's opinion, like the Commissioner's statement in the *Vista* matter, is not instructive as to what should be done in a merger analysis where the empirical data itself is inconclusive.

Departing FTC Chairman Muris placed substantial emphasis on empirical data. Indeed, in 2003, the Chairman criticized the GAO study of past oil mergers citing, in particular, the data errors and methodological mistakes that made the GAO analysis unreliable. Moreover, in 2003, the Bureau of Economics released a summary of "best practices" relating to the gathering and presenting of empirical data by parties during merger investigations. More recently, Chairman Muris sided with three other Commissioners in voting to challenge the acquisition of Highland Park Hospital by Evanston Northwestern Hospital Corporation, which was shown by way of reliable empirical data to have raised prices to third-party payors in the Evanston, Illinois market. See *In the Matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, FTC File No. 011-0234, Docket No. 9315.

As the Chairman leaves the Commission, many may wonder whether his successor will continue to emphasize empirical data as a central component of merger analysis. Or, on the other hand, will the new Chairman place appropriate emphasis on so-called anecdotal evidence, such as company testimony,

internal company documents, and third-party statements? In any event, merging parties should be prepared to present strong, pro-competitive empirical data to thwart anticompetitive concerns.

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## DOJ WHITE COLLAR CRIME UPDATE

The Antitrust Division obtained a guilty plea from another player in the rubber chemicals industry.

### **Rubber Chemicals Industry Giant Bayer AG Pleads Guilty to Sherman Act Violation**

German manufacturer of rubber chemicals, Bayer AG ("Bayer"), agreed to plead guilty and pay a \$66 million fine in response to a one-count felony charge, filed July 13 in the U.S. District Court in San Francisco by the Justice Department. The indictment alleged that Bayer participated in an international conspiracy with unnamed rubber chemical producers to fix prices in the rubber chemicals market. According to DOJ, the alleged conspiracy to suppress and eliminate competition for certain rubber chemicals sold in the United States and elsewhere occurred from 1995 to 2001.

Rubber chemicals are used to improve the elasticity, strength, and durability of rubber products, such as tires, outdoor furniture, hoses, belts, and footwear. They consist of a group of additives and fillers. Roughly \$1 billion of rubber chemicals are sold annually in the United States.

In particular, the Division alleged that Bayer and its co-conspirators carried out the conspiracy by:

- 1) participating in meetings and conversations to discuss prices of certain rubber chemicals to be sold in the United States and elsewhere;

- 2) agreeing, during those conversations and meetings, to raise and maintain prices of certain rubber chemicals to be sold in the United States and elsewhere;
- 3) participating in conversations and attending meetings concerning implementation of and adherence to the agreements reached;
- 4) issuing price announcements and price quotations in accordance with the agreements reached; and
- 5) exchanging information on the sale of certain rubber chemicals in the United States and elsewhere.

The charges against Bayer are the result of an ongoing investigation being conducted by the Antitrust Division's San Francisco Field Office and the Federal Bureau of Investigation in San Francisco. The Bayer plea follows the guilty plea for conspiracy to fix prices in the rubber chemicals market by Crompton Corp. of Middlebury, Connecticut on May 27, 2004.

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## **RECENT ACTIVITIES**

### **DOJ ANTITRUST HIGHLIGHTS**

- On July 20, the Antitrust Division and Oracle presented closing arguments in the Antitrust Division's challenge to Oracle's proposed acquisition of Peoplesoft. U.S. District Judge Vaughn Walker is expected to rule on the merger by September.
- The Antitrust Division issued a statement on July 20th after it announced the closing of its investigation into UnitedHealth Group Inc.'s proposed acquisition of Oxford Health Plans Inc. The statement read as follows: "The facts did not support a conclusion that this merger will give a combined United/Oxford market power or monopsony power in the markets in which they compete. The two companies are not particularly close competitors, and consumers will have a number of other choices after the merger. The two companies also do not account for a large percentage of physician or hospital reimbursements in the markets in which they compete. Although this particular transaction should not threaten to harm competition or consumers, we will continue to be vigilant in our enforcement of the antitrust laws in this area." While the Antitrust Division decided not to challenge the deal, it is important to note that the Division scrutinized this transaction between health insurance companies and focused on monopsony issues.

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## RECENT ACTIVITIES

### FTC ANTITRUST HIGHLIGHTS

- On July 20, Chairman Muris announced his resignation, effective August 15<sup>th</sup>. Below is the statement he issued.

I have resigned as Chairman of the Federal Trade Commission, effective August 15. By announcing his intention to appoint Deborah P. Majoras as an FTC Commissioner and the next Chairman, the President ensures the FTC's ability to continue its strong record of competition and consumer protection achievements.

Debbie is a highly talented and experienced lawyer, and will be an excellent Chairman. I am confident that she will provide continuity to the FTC's important missions. Additionally, the President has announced his intention to appoint Jonathan Leibowitz as a Commissioner. Jon brings many talents to the FTC, including a legislative and antitrust background. He will be an impressive Commissioner.

Serving as Chairman of the Commission has been the greatest honor of my professional career. It has been a privilege to serve with such talented fellow Commissioners and staff.

- On July 30, the FTC issued a decision authored by Commissioner Thompson which denied the motion of the South Carolina State Board of Dentistry to dismiss a case on the ground that the Board's conduct was protected by the state action doctrine. The Commission concluded that the Board's "emergency regulation," which required dental preexaminations in school settings and hindered access to preventive dental care to thousands of economically-disadvantaged children in the state, appeared to contravene state law and that dismissal on state action grounds was therefore inappropriate. The Commission retained jurisdiction over the matter, however, and remanded the case to an administrative law judge for further findings on the Board's separate ground for dismissal concerning whether the Board is likely to reimpose the dental preexamination requirement in light of recent amendments to state law.

In September 2003, the Commission filed an administrative complaint against the Board alleging that the Board had violated federal law by illegally restricting the ability of dental hygienists to provide preventive dental services, including cleanings, sealants, and fluoride treatments on-site to children in South Carolina schools. The FTC alleged that the Board acted unlawfully in adopting an emergency regulation that reimposed a requirement that dentists preexamine patients before dental hygienists could provide treatment in school settings. The complaint alleged that the Board's actions hindered competition and deprived thousands of school children – particularly economically disadvantaged children – of the benefits of preventive oral health care.

- On July 28, the FTC announced that it closed its investigation into whether the proposed joint venture between Bertelsmann AG and Sony Corporation of America may substantially lessen competition in violation of Section 7 of the Clayton Act or Section 5 of the FTC Act. The European Commission ("EC") also reviewed this proposed merger. Throughout the course of their respective investigations, the FTC and the EC Competition Directorate's staff consulted and cooperated with each other under the terms of their 1991 cooperation agreement and 2002 Best Practices on Cooperation in Merger Investigations. The Commission closed the investigation without taking any enforcement action. A separate concurring statement was issued by Commissioner Thompson.
- On July 28, after a long and detailed investigation, the FTC allowed France's Sanofi-Synthelabo's ("Sanofi") \$64 billion acquisition of Aventis, provided the companies divest certain assets and royalty rights in the overlapping markets for

## RECENT ACTIVITIES

### FTC Antitrust Highlights (Continued)

factor Xa inhibitors used as anticoagulants, cytotoxic drugs for the treatment of colorectal cancer, and prescription drugs used to treat insomnia. The consent agreement will be subject to public comment for 30 days. Specifically, the consent order requires that Sanofi: (1) divest its Arixtra factor Xa inhibitor and related assets to GlaxoSmithKline, plc (“Glaxo”); (2) divest to Pfizer, Inc. (“Pfizer”) key clinical studies for the Campto® cytotoxic colorectal cancer treatment that Aventis is currently conducting, along with certain U.S. patents and other assets related to areas where Pfizer markets Camptosar®; and (3) divest Aventis’ contractual rights to the Estorra insomnia drug either to Sepracor, Inc. or another Commission-approved buyer within 90 days. Sanofi’s acquisition of Aventis, which was announced in January of this year, will result in the third-largest pharmaceutical company in the world, behind Pfizer and Glaxo.

Headquartered in Paris, Sanofi was created in 1999 by the merger of French pharmaceutical companies Sanofi and Synthelabo. Sanofi ranks among the world’s top 20 drug manufacturers, with 2003 sales of more than \$10.1 billion. Aventis, headquartered in Strasbourg, France, was created by the 1999 merger of Hoechst AG’s and Rhone-Poulenc’s pharmaceutical and agricultural businesses. It ranks seventh among the world’s pharmaceutical companies, with 2003 sales of more than \$21 billion.

- On July 27, Chairman Muris announced that Todd Zywicki, Director of the Office of Policy Planning would leave the Commission, effective July 29, to return to his post as professor of law at the George Mason University School of Law and as a senior fellow of the James Buchanan Center Program on Philosophy, Politics, and Economics. During the 2004-05 academic year, he will serve as a visiting professor at the Georgetown University Law Center in Washington, DC. Maureen Ohlhausen, currently the Deputy Director of Policy Planning, was named Acting Director.
- On July 23, the FTC and the DOJ issued a joint healthcare and competition report entitled “Improving Health Care: A Dose of Competition.” It informs consumers, businesses, and policy-makers on a range of issues affecting the cost, quality, and accessibility of health care. Culminating a two-year project, the report reviews the role of competition and provides recommendations to improve the balance between competition and regulation in health care. The report provides significant recommendations and observations on a variety of topics, including the availability of information regarding the price and quality of health-care services; cross-subsidies; physician collective bargaining; insurance mandates; hospital merger analysis; managed care organizations’ bargaining power; and hospital group purchasing organizations. The report is based on 27 days of FTC/DOJ Joint Hearings on Health Care and Competition Law and Policy, held from February through October 2003; an FTC-sponsored workshop in September 2002; and independent research. The hearings gathered testimony and written comments from more than 300 participants, including representatives of various provider groups, insurers, employers, lawyers, patient advocates, and leading scholars on subjects ranging from antitrust and economics to health-care quality and informed consent. The key recommendations in the report are the following:
  1. Private payors, governments, and providers should continue experiments to improve incentives for providers to lower costs and enhance quality, and for consumers to seek lower prices and better quality.
  2. States should consider efforts to decrease barriers to entry into provider markets, including: whether Certificate of Need Programs best serve their citizens’ health-care needs; broadening the membership of state licensing boards; and implementing uniform licensing standards to reduce barriers to telemedicine and competition from out-of-state providers.
  3. Governments should reexamine the role of subsidies in health-care markets because their inefficiencies and potential to distort competition.

## RECENT ACTIVITIES

### FTC Antitrust Highlights (Continued)

4. Governments should not enact legislation permitting independent physicians to bargain collectively.
  5. States should consider the potential costs and benefits of regulating pharmacy benefit manager transparency.
  6. Governments should reconsider whether current mandates best serve their citizens' health-care needs or reduce competition in the market.
- On July 23, the Commission approved a request for an extension of time pending Commission action on a petition to reopen and modify the final decision and order in the 2003 transaction involving Nestlé Holdings Inc., (File No. 021-0174, Docket No. C-4082) which concerned Nestle's acquisition of Dreyer's Grand Ice Cream Holdings, Inc. According to their filing, the respondents petitioned the FTC on behalf of CoolBrands International, Inc. and its subsidiary Integrated Brands, Inc., the Commission-approved divestiture buyer in this proceeding. The respondents requested that the Commission extend the deadlines contained in the order until the Commission acts on respondents' petition to reopen and modify the final order to amend certain provisions of existing agreements with CoolBrands, as well as to allow CoolBrands and Dreyer's to enter into a new "Trademark License Agreement" for Whole Fruit fruit bars that will last for an additional 18 months.
  - On July 23, the Commission authorized the filing of a joint amicus brief with the DOJ in *Andrx Pharmaceuticals, Inc. v. Kroger Company, et al.* (U.S. Court of Appeals for the Sixth Circuit). This case concerns a private antitrust matter involving an interim settlement of a pharmaceutical patent infringement case, in which the alleged infringer agreed not to market its product while the infringement litigation was pending. The Sixth Circuit held that this was a per se antitrust violation, arguably creating a conflict with a separate ruling by the Eleventh Circuit. Andrx subsequently filed a petition for certiorari, and the Supreme Court then invited the U.S. Solicitor General to submit a brief explaining the views of the United States. In joining the Solicitor General in filing the brief, the FTC presented its investigation of the agreement in question, concluding that the petition for a writ of certiorari should be denied and that review by the Supreme Court of the question presented may be premature at this time.
  - On July 15, the FTC announced a consent order requiring Aspen Technology, Inc. ("AspenTech") to divest the overlapping assets in the antitrust market for process engineering simulation software. AspenTech obtained these assets through its \$106.1 million 2002 acquisition of Hyprotech, Ltd., its closest competitor in developing and supplying this specialized software. In August 2003, the Commission filed a complaint alleging that the acquisition was anticompetitive and sought relief that would restore competition. The consent order, which addresses the Commission's allegations, settles the charges and resolves the administrative court action, is subject to a 30-day public comment period. The main requirements of the consent order include AspenTech's sale of the Hyprotech process engineering software and the AspenTech operator training software business to a buyer that obtains the Commission's prior approval and the sale of Hyprotech's AXSYS integrated engineering software business to Bentley Systems, Inc., a technology firm that provides software for a variety of building, industrial, and civil engineering applications.
  - On July 7 the FTC reinstated charges that the Union Oil Company of California violated antitrust laws by defrauding the California Air Resources Board in connection with regulatory proceedings regarding development of reformulated gasoline. See article in today's *Sheppard Mullin Antitrust Review* at p. 3.

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## RECENT ACTIVITIES

### FTC CONSUMER PROTECTION HIGHLIGHTS

- On July 30, the FTC updated its quarterly online summary of the agency's steps to curb telemarketing fraud and abuse. The list highlights case developments and provides consumers with information about actions involving the use of the telephone to market goods or services. The quarterly enforcement update can be found at: <http://www.ftc.gov/bcp/conline/edcams/telemarkfraudenforcement/update04jul.htm>.
- According to a July 30 court order, the sellers of 'Girls Gone Wild' DVDs and videos will pay almost \$1.1 million as consumer redress, a civil penalty and are further barred from certain actions. The defendants, Mantra Films, Inc. and its sole shareholder, officer, and director Joseph R. Francis, were charged with violating the FTC Act, the Electronic Fund Transfer Act, the Unordered Merchandise Statute, and previous FTC rulings that shipping unordered merchandise and seeking payment for, or return of, merchandise shipped without the consent of the recipient are deceptive practices. The defendants sold 'Girls Gone Wild' DVDs and videos as part of a continuity program, whereby consumers who responded to advertisements for a single video or DVD received additional, unordered merchandise and the consumers' credit and debit cards were charged for each delivery until consumers actively stopped the shipments. The order prohibits the defendants from such action in the future. According to the court order, defendants must obtain consumers' informed consent before submitting their billing information for payment, and must clearly disclose all material terms and conditions of membership in continuity programs before enrolling consumers.
- On July 29, the FTC charged five Florida corporations - Debt Management Foundation Services, Inc. ("DMFS"), One Star Marketing, Inc., Debt Specialist of America, Inc., Ameridebt Group, Inc., and Credit Counseling Specialists of America, Inc. and the three individuals that control them (Dale Buird, Jr., Dale Buird, Sr., and Shawn Buird) with violating the FTC Act, the Telemarketing Sales Rule, the Gramm-Leach-Bliley Act and the Privacy Rule. According to the FTC's complaint, DMFS and its affiliates, marketed as "Debt Management Foundation" and "Ameridebt Group," misled consumers into paying up-front fees for debt consolidation services, although DMFS did not provide such services but sent customers to apply through another entity. A district court judge issued a temporary restraining order against the majority of the defendants prohibiting them from engaging in such activities, freezing their assets, and appointing a receiver to manage the business. The FTC's complaint asks the court to permanently enjoin the defendants from such practices and award consumer redress.
- On July 29, a federal judge found that Canadian telemarketers violated the FTC Act and the Telemarketing Sales Rule by operating an illegal foreign lottery scam that targeted United States' senior citizens. According to the FTC, the telemarketers told consumers that (1) it is legal to buy Canadian lottery tickets, (2) that the customer had a good chance of winning the Canadian lottery if they invested with the telemarketers, and (3) some consumers already won a large prize and should send money to redeem the gift. The court ordered the telemarketers to pay \$19 million in consumer redress and to permanently stop the scam.
- On July 28, the FTC charged Integrated Capital, conducting business as National Student Financial Aid ("NSFA"), and its principal, Alan Wilson, with violating an August 2003 settlement banning misrepresentations while marketing and selling college financial aid services. The August 2003 settlement resulted from NSFA's misrepresentations that customers would receive substantially more financial aid than they could get on their own, that students were selected based on their qualifications, and that customers who did not obtain \$2,500 in financial aid to attend a state college or \$3,000 to attend a private college would be refunded the price of these services. The settlement prohibited the defendants from marketing or selling any academic good or service and from making false representations. The FTC

## RECENT ACTIVITIES

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

now alleges that NSFA and Mr. Wilson are engaging in the same misleading practices that they were charged with in 2003 and subsequently had agreed to cease. The agency asked the Nevada District Court to find the defendants in contempt of court, to rescind consumer contracts entered into since August 2003, to refund money consumers paid to NSFA during the contempt period, and to modify the settlement so defendants are permanently prohibited from selling any academic goods or services.

- On July 12, the FTC issued the Consumer Alert, "Dubious 'Gas-Saving' Gadgets Can Drive You to Distraction," informing consumers about effective strategies in addressing rising gas prices as well as questionable gas-saving devices. The U.S. Environmental Protection Agency tested over 100 such devices and found that few are beneficial and some actually cause engine damage or increased emissions. To deal with rising gas prices, the FTC suggests: (1) only using the octane level indicated in the owner's manual, (2) driving efficiently by staying within speed limits, using overdrive gears and cruise control for highway driving, avoiding quick starts, stops, and unnecessary idling, and removing excess weight from the trunk, (3) maintaining the vehicle, by keeping the engine tuned, inflating and aligning the tires, changing the oil, and regularly replacing the air filters, and 4) driving a fuel efficient vehicle. The alert is available at [www.ftc.gov/bcp/conline/pubs/alerts/gasalrt.htm](http://www.ftc.gov/bcp/conline/pubs/alerts/gasalrt.htm).

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## INTERNATIONAL ANTITRUST HIGHLIGHTS

- On July 27, Judge Bo Vesterdorf, the President of the European Court of First Instance in Luxembourg, Europe's second highest appeals court, set September 30 and October 1, 2004 as the dates for the oral hearing concerning Microsoft's request for the suspension of sanctions imposed by the European Commission ("EC" or "Commission") earlier this year for violation of the European antitrust rules. Mario Monti, the EU competition commissioner, decided in March that Microsoft violated EU competition law by abusing its dominant position in the market for personal computer operating systems. The Commission argued that Microsoft shut out competition in adjacent markets such as servers and media player programs and ordered the company to offer European computer manufacturers a version of its Windows operating system without its Media Player program. Microsoft was also told to share more information with other software companies. The company argues that these sanctions should be suspended until a fully-empowered European Court of First Instance rules on the substance of the case. The ruling on the suspensions is likely to come within weeks of the two-day hearing, which could have a decisive impact on Microsoft and the Commission. An adverse decision for Microsoft would threaten its strategy of expanding into adjacent software markets. Alternatively, a lifting of the sanctions would deal a blow to the Commission's competition directorate and effectively freeze other investigations into Microsoft's business practices.
- The current European Competition Commissioner, Mario Monti, has not been renominated to serve as Italy's representative on the EU's executive body. On July 23, the Italian government nominated European Affairs Minister, Rocco Buttiglione, to become Italy's next European Union commissioner. Mr. Monti, who is well respected in Brussels, implemented new rules on antitrust enforcement and merger control and has been a tough enforcer of Europe's



## RECENT ACTIVITIES

### International Antitrust Highlights (Continued)

competition rules. He blocked the merger of General Electric and Honeywell in 2001 and, more recently, fined Microsoft \$603 million. He has also pursued the French government in particular for its illegal aid to various state companies. If reappointed, he would have become the most experienced member of the incoming Commission.

José Manuel Barroso, the new European Commission president, is expected to allocate jobs for the 25 commissioners put forward by the 25 national governments of the Union in the coming weeks. There is speculation that Peter Mandelson, Britain's next commissioner to the EU, and a former trade minister and close ally of Prime Minister Tony Blair, will be his replacement in the high profile competition department.

- On July 20, the European Commission cleared the proposed €5bn joint venture involving Sony and BMG, which will see the two music majors combine their recorded music businesses. The Commission said that it lacked sufficiently strong evidence to oppose the deal. The deal reduces the number of music majors from five to four, and, therefore, drew close scrutiny. The Commission found relatively close price parallelism for CDs released and, certain features that could facilitate tacit collusion. However, it concluded that the evidence was not sufficient to demonstrate in a successful way that co-coordinated price behavior existed; and it also found that a reduction from five to four major recording companies would not yet create a collectively held dominant position in the national markets for recorded music. The Commission also examined the merger's impact in online music licenses and distribution, and the vertical relationship between Sony BMG's recorded music and Bertelsmann's downstream TV and radio activities, but in these respects it concluded to the absence of serious competition problems. Approval of the deal has generated criticism from independent record labels, and Impala, which represents 2,000 of the independents, said that there was a "good chance" that an appeal would be lodged.
- On July 26, the European Commission sent two separate "statements of objections" to two UK mobile/cellular network operators ("MNO"s): O2 and Vodafone. The objections relate to the rates that both O2 and Vodafone charged other MNOs for international roaming at the wholesale level. Other MNOs needed to roam on O2's and Vodafone's UK networks in order to enable their own subscribers to use their cellular phones while in the UK. This situation is known as international roaming. The high roaming fees have been deemed detrimental to consumers traveling to the UK. On the basis of the evidence gathered during inspections carried out in July 2001, the Commission investigation revealed that the roaming services in question yielded profits several times higher than other comparable services supplied by MNOs. In particular, the pricing of roaming calls exceeded by far the prices that Vodafone and O2 had applied during the above mentioned period for similar calls made on their respective networks by UK subscribers of "Independent Service Providers", to whom both O2 and Vodafone had supplied wholesale airtime access.
- On July 23, the Commission launched its own-initiative antitrust probe in the financial services sector. Commission officials, assisted by officials from the Member States' National Competition Authorities, launched simultaneous unannounced inspections at the premises of Euronext and, certain financial services companies in Paris, Amsterdam and London. The probe follows allegations that Euronext's price-cutting policy was anti-competitive.
- On July 7, the EC fined Swiss-Swedish carton packaging company Tetra Laval B.V. €90,000 for providing incorrect or misleading information when it requested regulatory approval for its acquisition of French company, Sidel. The Commission re-affirmed that it was of the utmost importance that merger partners comply with the notification requirements outlined in the filed merger form, the so-called Form CO, and provide full and correct information

## RECENT ACTIVITIES

### International Antitrust Highlights *(Continued)*

regarding their respective activities, especially in view of the tight legal deadlines for merger reviews. This is only the fifth time that the Commission has fined a company in this way. It should also be noted that the new Merger Regulation that came into force on May 1, 2004, foresees that companies can be fined up to 1% of their aggregate turnover for supplying incorrect or misleading information as opposed to a fine of €1,000 to €50,000 under the old regulation, which still applied in this case.

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## FCC ANTITRUST HIGHLIGHTS

- The FCC on July 27 entered into a consent decree with the Verizon Telephone Companies to resolve two Commission investigations into whether Verizon violated certain accounting safeguards and non-discrimination requirements under Section 272 of the Communications Act. In the consent decree, Verizon has agreed to make a voluntary payment of \$300,000 to the United States Treasury and to take additional specific measures to ensure future compliance with the requirements of Section 272. Under section 272 a Bell Operating Company (“BOC”) that has received authority to provide in-region interLATA telecommunications service pursuant to Section 271 of the Act must provide that service through a separate affiliate. Moreover, it establishes certain structural, transactional, and nondiscrimination safeguards that govern the relationship between a BOC and its 272 affiliate. On September 8, 2003, the Commission released a Notice of Apparent Liability proposing a forfeiture of \$283,800 against Verizon for apparent violations of Section 272. This consent decree resolves the investigation that led to that Notice as well as a subsequent, similar investigation.
- On July 23, in comments made to the FCC to assist the agency in preparation of its annual cable-competition report for Congress, Comcast Corp. (“Comcast”) is seeking the end of federal program-access rules. But DirecTV (“DirecTV”) Inc. and Verizon Communications (“Verizon”) are rejecting the proposal as premature and potentially threatening to competition. Comcast is taking aim at rules that require cable companies to sell their programming to pay TV rivals at fair prices. The rules, which sunset in October 2007, are restricted to satellite-delivered networks that are affiliated with cable companies. They do not apply to terrestrially delivered cable networks, such as Comcast SportsNet. Based on robust competition in the pay TV market, especially from the direct-broadcast satellite industry, Comcast is urging the FCC to “initiate a review and eliminate the prohibition” on exclusivity between cable MSOs and their satellite programming affiliates. Comcast offered a backup plan to full repeal. “At the very least, the [FCC] should modify the rule so that it cannot be invoked by a [pay TV distributor] with more than 10 million customers, or that by itself distributes programming on an exclusive basis,” the MSO said. Comcast’s fallback position would write DirecTV and EchoStar Communications Corp. out of the program-access regime, as both serve more than 10 million subscribers. It might even capture Verizon, a reseller of DirecTV programming packages, one of which is the NFL Sunday Ticket National Football League out-of-market package, which is off-limits to cable operators. DirecTV urged the FCC to retain the program-access rules and consider expanding them to terrestrially delivered networks. DirecTV has said that Comcast refused to sell Comcast SportsNet unless it agreed to “outrageous carriage offers.” “If DirecTV’s continuing ability to win customers from cable is threatened by innovative packages or lower cable prices, that is DirecTV’s problem. If, however, it is threatened because cable-affiliated programmers withhold regional sports programming from their affiliates’ competitors, that is a public-policy problem,” DirecTV said in its FCC comments. In its comments, Verizon

## RECENT ACTIVITIES

### FCC Antitrust Highlights *(Continued)*

called on the FCC to broaden, or ask Congress to broaden, the program-access rules to include cable-affiliated terrestrial networks.

- On July 16, in connection with its review of Cingular's proposed acquisition of AT&T Wireless, the FCC sent requests for information to six other wireless carriers. The Commission asked Verizon Communications, the majority partner in the current biggest carrier Verizon Wireless, Deutsche Telekom AG's T-Mobile USA unit, Nextel Communications Inc., Sprint Corp., Alltel Corp., and U.S. Cellular Corp. for data about their offerings in 52 markets. In addition, it seems that a few days earlier the FCC requested highly detailed, extensive information on both carriers' customers, the amounts customers spend on various services, and other significant market information. Both requests came as the FCC's deadline for less detailed information was approaching. The \$41 billion transaction was originally announced on February 17 and combines the nation's No. 2 and No. 3 wireless carriers. On April 19 the companies received a second request for additional information and the deal continues to undergo regulatory scrutiny by both the DOJ and the FCC. The companies are seeking to close in the fourth quarter of 2004.
- On July 9, the FCC announced that AT&T Corporation ("AT&T") has agreed to make a voluntary payment of \$490,000 to settle charges by the Commission that the company made telemarketing calls to consumers whose numbers were on AT&T's "Do-Not-Call" list. The settlement marks the first time a company has made a payment under the agency's Do-Not-Call rules. FCC rules require companies to make a Do-Not-Call list available for consumers who wish to avoid receiving telemarketing calls. Companies can then be fined for calling numbers on that list. While common carriers can be fined up to \$120,000 per violation. In addition to paying the fine, AT&T has also agreed to perform "quality control monitoring" of its telemarketing calls for at least two years. Under the agreement, the company is required to monitor at least 40,000 telemarketing calls per month. That minimum can increase or decrease, depending on the company's overall telemarketing volume. The telephone company is also required to take disciplinary action or require training where an employee or vendor fails to follow Do-Not-Call policies.

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