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MERGERS ON THE RISE

Conventional wisdom suggests that pent up merger demand may be unleashed when assets are cheap, financing is readily available and investor confidence is growing. We are in the midst of that unleashing now. Some argue that this is a good thing in order to achieve efficiencies and cost savings and to reduce overcapacity. Others suggest that mergers eliminate destructive price competition. On the other hand, antitrust-sensitive commentators indicate that any renewed merger wave may raise significant antitrust concerns with long lasting negative competition effects.

Beginning in July, merger activity, both hostile and friendly, hit a fevered pitch unlike anything since 2000. Announced mergers cut across a broad spectrum of industries, including high- and low-tech markets, basic raw material industries, retail markets, food products and consumer goods. Domestic markets for computers, auto parts, office products, trucking, aluminum, pork products, sneakers, and sportswear are all affected by the recently announced deals. International markets are impacted as well. Speculation also exists that the U.S. tobacco operations of R.J. Reynolds and British American Tobacco may be combined. Other important deals remain pending at the FTC and DOJ.

Each newly announced deal raises antitrust issues, some more serious than others, which are likely to be analyzed by regulators here in the United States. Some deals will be examined closely by the European Commission and other foreign antitrust authorities. The announced deals are further complicated by bankruptcy proceedings, in some instances, and the likelihood of competing bidders coming forward or the emergence of "white knight" alternatives. As a consequence, many of these deals may take months, and perhaps as long as a year, to clear all antitrust hurdles. New deals with regulatory problems suggest that current business managers are not adverse to obvious antitrust risks in seeking mergers with significant competitors.

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This is not a normal summer where typically there are few M&A deals; rather, this summer's increased deal-making suggests renewed antitrust activity at both the FTC and DOJ which will continue through the Fall and into the new year. The following is a summary list of current deals up for - or under - review:

Current Deals

Company	Date	Deal	Agency	Overlap/ Antitrust Issue
Alcan/Pechiney	July 7, 2003	Hostile $3.9 billion	DOJ (likely)	Manufacturers of aluminum, alumina, aluminum can stock
VF Corp./Nautica	July 7, 2003	Friendly $585 million	FTC (likely)	Manufacturers of sportswear, active wear, jeans
EMC/Legato Systems	July 8, 2003	Friendly $1.3 billion	DOJ (likely)	Manufacturers of data storage and software for corporate customers
Yellow/Roadway	July 8, 2003	Friendly $966 million	DOJ (likely)	Providers of national less-than-truckload transportation services
ArvinMeritor/Dana	July 10, 2003	Hostile $4.4 billion	FTC (likely)	Manufacturers of auto parts for commercial trucks, axles, brakes, drive chains for OEM
Nike/Converse	July 10, 2003	Friendly $305 million	FTC (likely)	Manufacturers of sneakers, sports footware
Yahoo!/Overture	July 13, 2003	Friendly $1.6 billion	DOJ (likely)	Possible vertical case; potential competition issues; advertising placement on search results distributed by internet service and content providers
Boise Cascade/ OfficeMax	July 14, 2003	Friendly $1.2 billion	FTC (likely)	Wholesale and retail paper products; office supply superstores
Smithfield/Farmland Foods	July 15, 2003	Bankruptcy $363.5 million	DOJ (likely)	Pork production and processing; hog production

Pending Deals

Company	Date	Deal	Agency	Overlap/ Antitrust Issue
GE/Instrumentarium	December 18, 2002	Friendly $2.06 billion	DOJ	Manufacturers of critical care patient monitors
Genesis/Pixelworks	March 15, 2003	Friendly $446 million	FTC	Manufacturers of high-end range processing debit semiconductor chips
First Data/Concord	April 3, 2003	Friendly $6.7 billion	DOJ	Providers of online debit processing, debit networks
Oracle/PeopleSoft	June 6, 2003	Hostile $6 billion	DOJ	Manufacturers of business enterprise applications software
PeopleSoft/J.D. Edwards	June 10, 2003	Friendly $1.75 billion	DOJ (granted early termination on July 14, 2003)	Manufacturers of business enterprise applications software

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WHY EUROPEAN UNION REVIEWS DRAG ON...AND ON...

According to a report released in July by Global Competition Review, in 2002, the antitrust resources at the U.S. Federal Trade Commission and the Department of Justice's Antitrust Division shared an annual budget of $206 million while employing 1,006 staff members and 130 economists. In contrast, antitrust enforcers in the European Union ("EU") had an annual budget of only $69 million and employed 234 staff and 66 economists. This fact begs the following question: is the lack of resources hindering some of the EC's probes? Some argue that resource shortages and difficulties in carrying out cross-border inquiries exacerbate delays in EU antitrust probes.

In July 1999, EC inspectors raided Coca-Cola Co.'s ("Coke") offices in Austria, Britain and Denmark. The officials who staged these dawn raids took away copies of hard disks and 10,000 pages of documents in search of evidence that Coke had offered retailers illegal rebates and incentives to keep rival soft-drinks off European store shelves. Four years have passed since these raids, however, no formal charges have been brought against the world's largest soft-drink maker. Apparently, investigators collected boxes of documents in Danish that no one on the team could read. Then, a French case pushed Coke to the back burner, adding months of delay. EU officials now say it is possible that the Atlanta-based company will be notified of charges in October, which means a verdict remains much further off. Coke and its European bottling partners are cooperating fully with the EC's investigation in hopes that the case will be handled professionally, fairly and diligently.

The EC has also been investigating whether or not Microsoft commands a monopoly position in the software industry for the past four years. In this case, however, some EC officials and lawyers are quick to contend that Microsoft wants to string out the investigation, hoping to stonewall investigators. Microsoft sent 10,000 pages of documents in reply to the formal statement of objections lodged by EU investigators. Furthermore, in response to three additional questions, an EC official received so many boxes of documents from Microsoft that it necessitated the purchase of two additional bookcases.

These cases are just two examples of seemingly endless undertakings by the EC. It has been investigating Vodafone on mobile phone roaming charges since 2000. Since 2001, it has also been investigating Finmeccanica's policies in giving public aid for helicopters and Clearstream's stock clearing and settlement practices. Furthermore, the EC has been investigating several mobile-phone companies for more than a decade. Unfortunately, by the time the verdicts are handed down in some of the aforementioned cases, many markets will have changed significantly, making the initial reason for the probe irrelevant.

In some ways, the delays in these cases are an anomaly because in other antitrust areas, Europe prides itself on speed. Most mergers are cleared in a month and the more complicated cases are decided in five months. EU officials say they are working to fix the perception that EC antitrust investigations seem to last forever. The solution to this problem, in their view, lies partly in combining merger and antitrust teams, and partly by forming specific industry teams.

For businesses around the globe, lengthy antitrust probes can be frustrating and expensive. In addition to legal bills, cases consume management time that should otherwise be spent on operations. However, given the EC's clout and the growing importance of Europe as a single market, few companies are openly criticizing the European process. One can only hope that the EC will begin implementing some binding deadlines to make the system work efficiently in the future.

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SAFE LANDING FOR AMERICAN AIRLINES: COURT AFFIRMS DISMISSAL OF PREDATORY PRICING CASE

On July 3, the U.S. Court of Appeals for the 10th Circuit in *U.S. v. AMR Corp.*, 2003 WL 21513205, dismissed the U.S. government's predatory pricing case against American Airlines. The case was filed after American lowered its fares and added more passenger capacity (through larger jets and increased numbers of flights) to protect its market share at its Dallas-Forth Worth hub airport in response to competition from low cost carriers. The government alleged that American engaged in "below cost" pricing to carry out this strategy, and that the carrier succeeded because its competitors ultimately abandoned the routes or shut down operations entirely, which allowed American to resume its higher fares and prior capacity levels. The 10th Circuit declined to hold that predatory pricing claims "are implausible and irrational," but found that the government failed to establish a critical element of its claim: namely, that American offered fares that were below an "appropriate measure of cost" to provide the transportation at issue. The case offers important guidance, not only to firms that are considering whether to pursue a predatory pricing claim, but also to companies that want to price their goods and services competitively and aggressively, but not unlawfully.

The primary lesson from the case is that special care must be used in selecting and developing the appropriate cost model for determining whether the seller's prices are, in fact, "below cost." Determining the appropriate level of "cost" is one of the trickiest parts of a predatory pricing case. Most courts and commentators believe that "marginal cost" - the cost incurred from producing an additional increment of output - is the level below which prices should not fall. However, marginal cost is notoriously difficult to measure and cannot be determined from conventional accounting methods. For that reason one or more "proxies" for marginal cost must be selected and developed to establish a claim for predatory pricing. Several courts have approved "average variable cost" ("AVC") as an appropriate proxy. Indeed, the government's own consultant, a renowned antitrust expert, warned it to use AVC for the case against American. But the government rejected this advice, maintaining that this was a case where looking only to a market-wide AVC test would disguise the nature of the predatory conduct at issue.

Unlike the trial court, the 10th Circuit did not conclusively rule out the use of a proxy other than

AVC to determine American's cost basis for the challenged services. However, it concluded that the four proxies (or tests) that the government relied on to determine American's costs were "invalid as a matter of law, fatally flawed in their application, and fundamentally unreliable." The court faulted two of the tests for improperly including fixed costs not related to the operation of a particular flight or route (e.g., city ticket offices, maintenance and station expenses, flight simulator expenses, and general sales and advertising). These tests were therefore "not measures of marginal or incremental costs" but, instead, the "equivalent of applying an average total cost test, implicitly ruled out" by the Supreme Court. A third test was held to be invalid because it included variable costs that did "not vary proportionately with the level of flight activity," but instead were "allocated arbitrarily to a flight or route" by American's internal "decisional-accounting" system. The court stressed that merely because a "cost allocation is a reasonable *accounting* method or technique" does not mean that it properly measures "only the avoidable or incremental cost of " providing the service in question. The court rejected a fourth test because it only indicated that American had failed to maximize short-run profits on a route by performing a "before-and-after" comparison of the route.

In hindsight it appears that the government doomed its case by choosing not to create independent measures of the costs associated with American's capacity additions, but instead chose to confine itself to cost measures already developed by American for use in its internal decisional-accounting system (accounting measures that were used for internal decision making, not financial reporting). The government may have assumed that using American's own cost accounting system would be more convenient and, perhaps, even more damning. But ultimately the internal system was not sufficiently malleable to enable the government to meet the law's high threshold for showing that the prices in question were below a valid proxy for the marginal costs incurred by American to lower its fares and add capacity.

The government also may have been falsely encouraged by its evidence of American's subjective intent to drive out the competitors. The carrier's then-CEO, Bob Crandall (who years before had been caught on tape trying to fix prices with a competitor), had told his organization that: "[i]f you are not going to get them out then no point to diminish profit"; that "more aggressive pricing" would fix the airline's profitability problem "when [American Trans Air] is gone!"; and that the carrier "should match straight up to get them out." The court held that such subjective intent is insufficient without proof (1) that the seller's prices were "below cost" and (2) of a dangerous probability that the seller will recoup its losses by charging supra-competitive prices once the competition has been forced out.

The 10th Circuit neither embraced nor rejected the trial court's suggestion that "meeting competition" could provide a complete defense to a claim of predatory pricing. The lower court borrowed the Robinson-Patman Act's statutory "meeting competition" defense and stated that there "is strong inferential support for the idea that the defense may be appropriate in a given case." The 10th Circuit did not weigh in on this issue but if enough courts adopt

not weigh in on this issue but if enough courts adopt this position it could provide a critical safe harbor to companies to know when they can safely meet a competitor's price, even if it might be below costs.

Finally, the 10th Circuit did not address the trial court's rejection of the government's theory that American improperly used its "reputation" for aggressively low prices to prevent low cost competitors from competing with American. This "bodies on the lawn" phenomenon (so-named because it is akin to a haunted house with an open front door: one may not know what transpired inside but is reluctant to enter because the front lawn is littered with dead bodies) has instinctive merit when applied to predatory pricing cases because it makes sense that prospective competitors will shy away from entering a market if they believe the dominant player will reward them with a bloody price war. But courts have shunned it and continue to do so, largely out of the countervailing desire not to inhibit low prices.

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SHARMAN NETWORKS' COUNTERCLAIM AGAINST CONTENT OWNERS FOR ANTITRUST VIOLATIONS IS DISMISSED

On July 3, Judge Stephen V. Wilson of the U.S. District Court of Central California granted the plaintiff's motion to dismiss the defendant Sharman Networks' alleged antitrust counterclaims in the copyright infringement suit against the owner of the peer-to-peer (or "P2P") file trading network, Kazaa. *See MGM Studios, Inc. et. al. v. Grokster, Ltd. et.al. and Jerry Lieber et. al. v. Consumer Empowerment BV d/b/a Fasttrack et. al.,* 2003 WL 21537832 (C.D. Ca.). The collective plaintiffs in this litigation allege that the named defendant, along with the owners of the Morpheus and Grokster networks, violated the Digital Millennium Copyright Act by facilitating the illegal downloading of music and movie files. As such, the claims alleged by these plaintiffs are the same ones employed by the major record companies against Napster, Inc. a couple of years ago. *In re Napster Litigation*, Docket No. MPL00Y1369MHP. Moreover, the collective defendants have also raised the very same antitrust counterclaim against the plaintiffs that Napster raised in this previous lawsuit. In essence, the defendants asserted that the plaintiffs colluded in refusing to license any copyrighted works for legal, paid distribution using the Kazaa and other P2P networks.

The result of Judge Wilson's decision seems to conflict with Judge Marilyn Patel's decision in the Napster case, which was in the U.S. District of Northern California. Judge Patel sided with the defendants in the previous case, stating that the record before the court revealed the possibility of anticompetitive conduct on the part of the collective plaintiffs in conjunction with the setting up of two joint ventures that were to compete with Napster's planned paid music distribution service. In contrast, Judge Wilson granted the plaintiffs' motion to dismiss these same allegations as raised by Sharman Networks (the parent company of the popular P2P

network and software provider Kazaa). By doing so, Judge Wilson effectively precluded the defendants from raising these allegations again in the proceedings.

At first blush, Judge Wilson's decision may seem like a direct contradiction to Judge Patel's earlier findings. However, very subtle differences between the software and P2P technologies of the named defendants and Napster were critical to the granting of the dismissal motion. Rather than providing copyrighted works for digital distribution (which was Napster's proposed business model), Sharman contracted with third party Altnet to receive fees in exchange for Altnet's distribution of the files to Kazaa network users.

According to Judge Wilson, Sharman was therefore not a participant in the market for digital distribution of copyrighted works and therefore did not suffer from antitrust injury as required for recovery by private parties under Sherman Act § 1. Moreover, Judge Wilson concluded that Sharman was also not the "primary target" of the purported actions on the part of any of the named plaintiffs for this same reason. As a result of this and other related findings, Judge Wilson dismissed Sharman's antitrust counterclaims because the company lacked standing to sue under the antitrust laws. As such, the decision did not elaborate on whether or not the record contained any evidence on anticompetitive conduct on the part of the plaintiffs.

Although the defendant's antitrust counterclaims were dismissed, there is still some remaining vestiges of activity in the area of antitrust law and digital media distribution. The Department of Justice has yet to announce any formal actions with respect to its ongoing investigations into the MusicNet and press*play* joint ventures, which were each formed by assorted alliances between major record companies and technology companies to license and distribute music online. As a result, questions relating to whether or not anticompetitive collusion did exist with respect to licensing terms for digital music or other media content remain unanswered. Industry and legal experts continue to both participate as well as watch from the sidelines of this highly contentious public debate. However, it may take some time to actually reach a resolution on the copyright and antitrust issues related to online media distribution, as technologies continue to change and develop and additional networks spring onto the scene.

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DOJ ANTITRUST DIVISION CONTINUES TO TAKE A BITE OUT OF CRIME

R. Hewitt Pate Speaks Out On Criminal Antitrust Enforcement

On July 24, Assistant Attorney General R. Hewitt Pate, Chief of DOJ's Antitrust Division, briefed the

punishing, and deterring criminal antitrust violations such as price-fixing, bid-rigging, and market allocation remains a core priority for the Antitrust Division.

In fact, during the current fiscal year, the Division has obtained almost $60 million in fines with convictions of 11 corporations and 17 individuals. The Division has continued a recent trend toward longer prison terms for individual offenders. Indeed, the average individual defendant received sentences of over 18 months in the last fiscal year. Moreover, Mr. Pate indicated that he supports longer and more certain prison terms because fines are often viewed by bad actors as the cost of doing business.

According to Mr. Pate, the corporate leniency, or amnesty program continues to be the most active originator of criminal investigations. The amnesty program enables a corporation that reports its illegal antitrust activity at an early stage to avoid criminal prosecution if the company meets the requirements of the leniency program. Undoubtedly, the leniency policy has increased the Division's ability to crack collusive cartels in recent years. Mr. Pate also attributed the Antitrust Division's success in criminal enforcement to increased use of search warrants and the increased assistance provided by foreign antitrust authorities including coordinated searches in multiple jurisdictions around the world.

Antitrust Scrutiny Leads to Enforcement Actions Against White Collar Defendants on Related Offenses

The DOJ's long-running investigations into the retail video duplicating and replicating industries in the Michigan area and the graphics materials and advertising industry in New York have yielded new indictments of white collar defendants. Both industries have been plagued by accusations of illegal kickback schemes, fraud, price fixing, bid rigging, and customer allocation. The latest indictments issued by the DOJ's Cleveland and New York field offices send a strong message to corporate executives that conduct related to antitrust violations yield serious consequences as well.

For example, on July 10, Larry E. Bennett, the president of Premiere Video Inc., a Livonia, Michigan company, was charged with wire fraud in connection with a kickback scheme used to defraud a Troy, Michigan audio-visual company.

Mr. Bennett allegedly paid money via wire transfer to an executive of the Troy audio-visual company. As part of the scheme, the Troy company executive allegedly obtained money in exchange for his continued support in the contract negotiations between the Troy company and Premiere for duplicating and distributing videotapes and to prevent Premiere's position as a vendor with the company from being jeopardized.

The wire fraud charge resulted from the Antitrust Division's Cleveland Field Office's ongoing federal antitrust investigation of anticompetitive conduct in the retail video duplicating and replicating industries in the Michigan area. The investigation is being conducted with the assistance of the Detroit offices of the FBI and IRS, Criminal Investigation Divisions.

Barry Holland, a former executive of Transportation Displays Inc., an outdoor advertising company, which became part of Viacom Inc. in 2001, pled guilty to a fraud charge relating to his involvement in a conspiracy where he received approximately $176,000 in kickbacks from The Color Wheel Inc., a Manhattan supplier of printing and graphic services. The kickbacks were allegedly paid in exchange for steering contracts to The Color Wheel from approximately 1991 through 2000.

According to the one count charge, other legitimate vendors were foreclosed from selling printing to Transportation Displays Inc. because of the illegal conspiracy between Mr. Holland and The Color Wheel Inc. The conspiracy also resulted in Transportation Displays paying higher prices for printing than it would have if Mr. Holland had aggressively solicited competitive prices from other vendors. In March, Haluk K. Ergulec, the former owner of The Color Wheel Inc., was sentenced to 37 months in prison and ordered to pay $1.5 million in restitution, $100,000 of which was to be paid to Viacom Inc. for his participation in the kickback scheme involving Mr. Holland.

The charge against Mr. Holland is the latest to arise from the Antitrust Division's New York Field Office's ongoing federal antitrust investigation of bid rigging, bribery, fraud, and tax-related offenses in the advertising and printing/graphics industries in New York.

The Antitrust Division's continued vigilance in conducting criminal investigations and seeking indictments and pleas on charges related to antitrust violations such as bribery, fraud, conspiracy, and money laundering sends a message to all corporate executives that related offenses will not be ignored.

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RECENT ACTIVITIES

DOJ ANTITRUST HIGHLIGHTS

- On July 25, the Antitrust Division won a major victory in a favorable decision that prohibits UPM-Kymmene Oyh from acquiring Bemis Co. Inc.'s Morgan Adhesive Company. The Antitrust Division sued to block the deal on April 15 and the trial ended last month. United States District Judge James B. Zagel ruled that the merger was illegal under a "coordinated interaction" theory, which means that the merger was illegal because the likely effect of the merger would be increased price coordination among label stock firms. The decision is noteworthy because it signifies the importance of coordinated effects in merger analysis. The companies have decided to abandon the deal rather than to appeal the decision.

- As mentioned above, on July 24, Assistant Attorney General R. Hewitt Pate, Chief of DOJ's Antitrust Division, briefed the House Judiciary Committee's Antitrust Task Force on the Division's recent developments in criminal, merger, and civil non-merger enforcement activities.

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DOJ Antitrust Highlights *(Continued)*

- With regards to criminal enforcement, Mr. Pate indicated that the Antitrust Division is still strongly pursuing investigations of cartel activity.

- With regards to merger enforcement, Pate asserted that mergers have slowed down. Indeed, the Antitrust Division has only received premerger notification filings for 1,187 transactions in FY 2002 and filings for over 800 so far this fiscal year--compared to over 4,500 in each of the previous two fiscal years. Mr. Pate attributed part of the reduction to the enactment of the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 2000, which raised the HSR filing thresholds. Despite the reduction, however, the Antitrust Division opened 75 preliminary investigations, issued second requests for additional information to the parties in 16 of those investigations, and challenged 13 mergers. Mr. Pate added that significant ongoing merger investigations include News Corp./DirectTV, First Data/Concord, and GE/Instrumentarium.

- With regards to the civil non-merger arena, Mr. Pate asserted that the Antitrust Division continues to actively monitor Microsoft's compliance with its consent decree and he described a few other civil non-merger actions that should protect consumers. The civil non-merger investigations discussed included suits against: 1) NT Media and Village Voice Media, where the Antitrust Division charged them with unlawful market allocation in violation of Sherman Act §1, 2) Mountain Health Care, an independent physicians organization in Asheville, N.C., where the Antitrust Division charged that it was restraining price and other forms of competition among physicians in Western North Carolina by adopting a uniform fee schedule governing the prices of its participating physicians and negotiating with health plans on their behalf, resulting in higher rates charged to health plans, and 3) The MathWorks Inc. and Wind River Systems Inc., to stop them from allocating markets for software that designs dynamic control systems.

- On July 24, Mr. Pate also announced the appointment of Makan Delrahim as the new deputy assistant attorney general responsible for international, policy and appellate matters in the Antitrust Division. Mr. Delrahim has worked for the Senate Judiciary Committee since 1998, serving as Majority Counsel and Supervisor of the Antitrust, Business Rights and Commercial Law unit from 1998 to 2000 and as the Staff Director and Chief Counsel since 2001. Mr. Delrahim is a patent lawyer with extensive experience in the biotechnology, recording, and motion pictures industries. He is a member of the California and District of Columbia Bars and is admitted to practice before the U.S. Patent and Trademark Office.

- The Antitrust Division on July 16 advised the FCC that it could not support SBC's re-filed application to provide long distance services in Michigan because the DOJ claims that serious questions remain regarding

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DOJ Antitrust Highlights *(Continued)*

the accuracy of SBC's wholesale billing. The DOJ, however, did not foreclose the possibility that the FCC could satisfy itself that these concerns have been adequately addressed prior to the conclusion of its review of the re-filed application. While voicing its concerns, the DOJ also noted that SBC has made significant strides in opening Michigan markets, that SBC had made progress in improving its billing accuracy, and that SBC had satisfactorily addressed many of the issues raised in the Division's earlier evaluation. The DOJ provided its competitive analysis in an evaluation of SBC's application to provide long distance services in Michigan under Section 271 of the Telecommunications Act of 1996. A copy of the Department's evaluation will be available at: http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm.

- On July 14, the DOJ cleared PeopleSoft Inc.'s acquisition of J.D. Edwards & Co., complicating Oracle Corp.'s hostile bid to take over PeopleSoft. PeopleSoft has since closed on the J.D. Edwards purchase, a transaction valued at about $1.8 billion. Oracle has extended its tender for PeopleSoft and indicated that it is fully committed to acquiring PeopleSoft, with or without J.D. Edwards, but antitrust issues have become central to the three-way merger. PeopleSoft and Oracle have been battling for the number 2 position in the market for application software for managing financial accounting, human resources and customer relationships for years; however, both lag far behind the market leader, SAP AG of Germany. J.D. Edwards is considered to be the number 4 competitor in the market, while Microsoft is an emerging participant. Meanwhile, the DOJ has asked for more information about the Oracle and PeopleSoft deal and the investigation is still ongoing.

- The Antitrust Division issued a letter urging the Rhode Island Senate to reject a proposed bill that would prevent nonlawyers from competing with lawyers to perform real estate closings on June 30. The Division's letter expressed concern that the bill would likely cause Rhode Island consumers and businesses to pay more for real estate closings and prevent them from benefiting from competition from out-of-state and Internet lenders that could provide more convenient closing services. On June 25, the Rhode Island House of Representatives passed the bill. If the bill is also passed by the Senate and signed into law, it will end competition between Rhode Island lawyers and settlement companies to close real estate deals and raise prices to consumers. The bill covers virtually all real estate transactions, including residential and commercial deals, purchases, refinancings, second mortgages and other transactions. A similar bill was introduced last year but did not become law. The Division had urged the Rhode Island legislature to reject that bill as well.

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FTC ANTITRUST HIGHLIGHTS

- On July 31, the FTC issued a unanimous policy statement on the use of monetary equitable remedies in antitrust cases, specifically those cases involving violations of the HSR Premerger Notification Act, the FTC Act, and the Clayton Act. Such monetary equitable remedies include disgorgement and restitution. The Commission's statement identifies three factors it will consider in determining whether to seek disgorgement or restitution.

  - The underlying violation must be clear.
  - There must be a reasonable basis for calculating the amount of the remedial payment.
  - The FTC will consider the value of seeking monetary relief in light of other remedies, including private actions and criminal proceedings.

  Overall, the FTC remains sensitive to duplicative recoveries by injured persons or excessive multiple payments by defendants for the same injury.

- On July 28, the FTC announced that two additional Counsels for Intellectual Property, Armando Irizarry and Thomas Mays, will join the Commission's Bureau of Competition in July and September, respectively. Mr. Irizarry, who currently teaches IP law at Michigan State University, previously practiced patent litigation at the firm of Fish & Neave. Mr. Mays joins the Commission after serving most recently in private practice specializing in the procurement and licensing of intellectual property. Earlier in his career, Mr. Mays worked as a patent examiner at the United States Patent & Trademark Office and later as the Director of the Office of Technology development at NIH's National Cancer Institute. Mr. Irizarry and Mr. Mays join FTC Chief Counsel of Intellectual Property Suzanne Michel, and Counsel for Intellectual Property Lore Unt. Before joining the FTC, Ms. Michel worked in the Civil Division of the DOJ, where she defended the United States in patent infringement litigation. Ms. Unt recently joined the Commission and has focused on enforcement matters in the health care industry.

- On July 28, the FTC upheld the Administrative Law Judge's decision that several subsidiaries of Vivendi Universal, S.A. illegally agreed with Warner Communications Inc. to restrict competition for audio and video products featuring "The Three Tenors." The “Three Tenors” are Jose Carreras, Placido Domingo and Luciano Pavarotti. Chairman Muris, who authored the unanimous opinion on behalf of the Commission, found that

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FTC Antitrust Highlights (*Continued*)

PolyGram Holdings, Inc., a predecessor to Vivendi, improperly agreed with Warner to restrict discounting and advertising on certain recordings of the tenors' concerts. Chairman Muris and the Commission determined that "restraints on price discounting and advertising are inherently suspect" and such moratorium agreements not to disorient are "simply a form of price fixing." Chairman Muris' opinion is worth noting since it traces the historical development of antitrust doctrine governing horizontal restraints.

- On July 22, the FTC accepted a proposed current agreement with a Baton Rouge, Louisiana independent practice association ("IPA"), three orthopedic medical practice groups, the IPA's agent, and the agent's managing director relating to Commission charges that the respondents allegedly fixed prices and other terms on which they would deal with a health insurance company. The IPA, Professional Orthopedic Services, Inc., consists of 28 physicians who provide approximately 70% of the orthopedic medical services in Baton Rouge.

- On July 21, the Commission accepted an agreement containing a proposed consent order with a network of doctors and hospitals in northeast Maine that resolves FTC charges that the Maine Health Alliance ("MHA") engaged in illegal collusion that raised health-care costs in five Maine counties. This is the first case brought by the FTC involving charges that a provider organization engaged in anticompetitive collusive conduct in providing hospital services. MHA, which consists of 325 physicians and 11 hospitals, allegedly agreed to limit competition among themselves by negotiating contracts collectively with third-party payors. In addition, MHA members refused to contract individually with payors unwilling to meet MHA collective terms. The member doctors represented over 85% of the doctors on staff at the MHA-member hospitals, which represented 70% of the hospitals in the five-county, Maine geographic region.

- On July 17, the FTC announced that David Scheffman, Director of the FTC's Bureau of Economics, will leave the agency on August 1st to return to the private sector as an economic consultant and adjunct professor at Vanderbilt University. Dr. Scheffman has served as Director of the Bureau of Economics since June 2001. He will be replaced by Luke Froeb, an Associate Professor of Entrepreneurship and Free Enterprise at the Owen Graduate School of Management at Vanderbilt University. Prof. Froeb previously served as an economist with the DOJ's Antitrust Division.

- The Senate Commerce, Science and Transportation Committee, on July 17, 2003, reported the nomination of Pamela Jones Harbour to be a Commissioner of the FTC. Ms. Harbour, currently a partner in the New York office of Kaye Scholer, LLP, has counseled many clients on competition and consumer protection issues. Ms. Harbour also served in the Office of the New York Attorney General and served as a Deputy Attorney General supervising both its Antitrust and Consumer Protection Bureaus. She will succeed Commissioner Sheila Foster Anthony whose term expired on September 25, 2002.

Recent Activities

FTC Antitrust Highlights (*Continued*)

- The FTC settled charges on July 11 that a large physicians' organization in St. Louis, Missouri engaged in price-fixing on behalf of its members. Established in 1993, the Washington University Physician Network ("WUPN") is a non-profit corporation that includes Washington University, its 900 faculty physicians, and 600 community physicians who provide health care services in St. Louis and four neighboring counties. While the Commission's negotiated order will allow WUPN to engage in legitimate conduct on behalf of its members, it will prohibit WUPN from entering into or facilitating any agreement between or among physicians.

- On July 10, Joseph Simons announced his resignation as Director of the Bureau of Competition effective August 1. Susan Creighton, Deputy Director of the Bureau, will assume Simon's duties as Director following his departure. Barry Nigro of Fried, Frank, Harris, Shriver & Jacobson will join the FTC as Deputy Director of the Bureau.

- On July 9, the Commission issued three complaints against associations in Alabama, Kentucky and Mississippi relating to the collective filing by competing household goods movers of rates for interstate moving services in those states. According to the three complaints, the Alabama Trucking Association, the Kentucky Household Goods Carriers Association, and the Movers Conference of Mississippi violated the FTC Act by engaging in collective action in the form of filing tariffs containing collective rates on behalf of their members. The state action doctrine, articulated in *Parker v. Brown*, 317 U.S. 341 (1943), which immunizes from antitrust scrutiny certain private firm activity conducted under state authority will be the focus of this litigation. The Commission and the courts will use these cases as a way to further clarify the uses of the state action doctrine as a defense under the antitrust laws.

- Again, on July 9, the FTC issued an administrative complaint against California Pacific Medical Group, Inc., doing business as Brown & Toland, a San Francisco physician's organization, for allegedly fixing the prices and terms under which its doctors would contract with payors to provide services to Preferred Provider Organization ("PPO") enrollees. The Commissioner's complaint charged that Brown & Toland organized a horizontal agreement under which its competing member physicians agreed collectively on the price and other terms that they would enter into contracts with health plans or other third-party payors. Also, Brown & Toland allegedly directed its member physicians to end their pre-existing contracts with payors, required its physician members to charge specified prices in all PPO contracts, and approached other physician organizations to invite them to enter into similar price-fixing arrangements. This behavior had the purpose and effect of raising prices for physician services in San Francisco, according to the FTC complaint.

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

RECENT ACTIVITIES

FTC CONSUMER PROTECTION HIGHLIGHTS

- On July 24, the FTC announced that South Carolina resident Darrell Richmond was banned from engaging in work-at-home opportunities or business ventures as part of a settlement with the Commission. The FTC alleged that Richmond, using various company names, deceptively marketed his envelope stuffing business opportunity to consumers over the Internet. The FTC's complaint also indicated that he misrepresented earning claims and costs and that he offered consumers assistance but failed to provide it. A consent judgment, entered in the U.S. District Court for the District of South Carolina (*FTC v. Richmond*, D.S.C., No. 3:02-3979-22, 7/18/03), bars Richmond from any work-at-home related sales activity. The proposed settlement also prohibits him from misrepresenting earnings claims, costs, and the type of assistance to be provided in connection with the sale of any good or service. In addition, the proposed settlement prohibits Richmond from selling his customer lists.

- On July 22, the FTC issued its first summary announcement that details its aggressive enforcement efforts against telemarketing fraud. A new webpage containing the enforcement summary also contains a list of cases involving telemarketing that have had developments since October 1, 2002, with links to press releases concerning each of these cases. The new web page is located at http://www.ftc.gov/bcp.conline/edcams/telemarkfaudenforcement/index.html.

- The FTC recently filed settlements that would bar several manufacturers of three popular electronic abdominal exercise belts from making unsubstantiated efficacy claims and ordered the manufacturers to pay over $5 million in consumer redress. The settlements were filed in the U.S. District Court for the District of Nevada on July 21 (*FTC v. United Fitness of America*, D.Nev., No. CV-S-02-0648-KJD, 7/21/03; *FTC v. Hudson Berkley Corp.,* D. Nev., No. CV-S-02-0649-PMP-RJJ, 7/1/03). United Fitness of America, LLC; eBrands Commerce Group, LLC; Tristar Products, Inc; and their principals were uncovered in May 2002 as part of the "Project ABSurd" enforcement initiative. The FTC complaints alleged the defendants falsely advertised that their products would cause fat loss and inch loss and would produce well-defined "washboard," or "six pack" abdominal muscles without exercise. Both proposed settlements would require the defendants to possess competent and reliable scientific evidence to substantiate claims about the health benefits, performance, efficacy, safety, or side effects of any dietary supplement, food, drug, cosmetic, or device. The proposed settlements would also bar the defendants from making false establishment claims or misrepresenting test or research results.

- On July 21, the FTC issued a press release detailing a proposed settlement with an identity thief defendant. The defendant, a minor, allegedly used hijacked corporate logos and deceptive spam to con consumers out

RECENT ACTIVITIES

FTC Consumer Protection Highlights (*Continued*)

of credit card numbers and other financial data. Under the terms of the settlement, the defendant will be barred for life from sending spam and be required to repay up to $3,500 in ill-gotten gains. The FTC alleged that the scam called "phishing" involved a two-step process. First, the "phisher" steals a company's identity. Then, the "phisher" uses it to victimize consumers by stealing their credit identities.

- Last April, the FTC filed suit against pest control product marketer Global Instruments. The FTC charged Global Instruments with making unsubstantiated claims about six of its products' abilities to repel or eliminate pests and rodents from users' homes. A proposed consent agreement, announced July 18 for public comment, prohibits Global from making efficacy representations for any pest control device without reliable scientific evidence. This is the FTC's second consent order addressing pest control claims obtained this year. The first order, against Lentek International, was issued in March 2003.

- On July 18, the FTC announced a settlement from a lawsuit filed against several Florida-based advance fee credit card promoters as part of April 2002's "Operation Dialing for Deception" law enforcement sweep. The consent judgment was entered in the U.S. District Court for the Southern District of Florida (*FTC v. Capital Choice Consumer Credit, Inc.,* S.D. Fla., No. 02-21050-CIV 5/21/03). In its suit, the FTC charged defendants with engaging in unfair or deceptive practices in connection with the sale of advance-fee credit cards and violating FTC Act § 5 and the Telemarketing Sales Rule ("TSR") by causing consumers' bank accounts to be debited without their authorization. As part of the settlement, three of the defendants, E-Credit Solutions, Inc., Scott A. Burley (the sole officer and director of E-Credit), and Zentel Enterprises, Inc., agreed to pay over $600,000 in redress for defrauding of consumers and were banned from the sale of advance-fee credit cards, or violating, or assisting others in violating, the TSR in the future. The Commission, however, continues to pursue charges against the remaining defendants in a trial that began on June 30.

- The FTC issued a press release on July 16 announcing a federal district court order that bars defendants Alyon Technologies, Inc., Telcollect, Inc. and Stephanie Touboul, from seeking payment from thousands of consumers that were billed for Internet videotext services the consumers did not agree to purchase. The order, issued by U.S. District Court Judge R.W. Story in the Northern District of Georgia, also requires Alyon to pay restitution to consumers who have already filed written complaints with Alyon and the FTC protesting the bills within 90 days of the order.

- On July 14, the FTC announced a settlement from a lawsuit filed against a grant-matching business and its principals as part of "Operation No Credit," a joint law enforcement campaign targeting a wide range of credit-

RECENT ACTIVITIES

FTC Consumer Protection Highlights (*Continued*)

related frauds. The complaint alleged that defendants operated a grant-matching business in which they falsely represented that consumers could obtain grants from charitable foundations for virtually any reason. As part of a settlement with the FTC, announced July 14, Grant Search, Inc. and Grant Pac, Inc. and their principals have agreed to pay $296,000 in consumer redress to settle charges that they engaged in deceptive business practices. In addition, the defendants are banned from selling any product or service that purports to provide or assists consumers in obtaining a grant.

- On July 10, the FTC announced a settlement with a group of infomercial marketers charged with making false and unsubstantiated claims in violation of the FTC Act for three herbal products - Bloussant, sold for breast enhancement; EnerX, sold for men's virility, and D-Snore, sold to relieve snoring. The FTC charged that none of the marketers' claims about the three products' safety and efficacy had been clinically proven. In fact, the FTC claimed that the EnerX herbal supplement could have harmful side effects, such as increasing blood pressure and interacting adversely with other drugs. The settlement includes $3.2 million for consumer redress. Wellquest International, Inc. and Tony Hoffman Productions, Inc., the defendants, agreed that they would avoid unsubstantiated claims, improve their refund policies, and stop tacking on additional products with a negative-option-charge structure ("upsell") to their sales calls. Under the terms of the settlement, defendants are also required to comply with the FTC's newly amended TSR.

- A primary distributor of the Brake Guard aftermarket braking device has agreed to settle FTC and DOJ charges that he made false and unsubstantiated safety and performance claims for the product. On July 7, the government filed a proposed consent judgment in the U.S. District Court for the Western District of Washington (*U.S. v. Brake Guard Products, Inc.,* W.D. Wash., No. C01-686P, 7/7/03). The proposed settlement bars false and unsubstantiated performance claims for aftermarket braking products and contains a $100,000 civil penalty for violations of a 1998 FTC order regulating advertising practices in the brake sector. The civil penalty has been suspended in its entirety.

For more information on any of these activities, please contact Joanna Day at (202) 218-0033 or June Casalmir at (202) 218-0027 or at jcasalmir@sheppardmullin.com.

INTERNATIONAL ANTITRUST HIGHLIGHTS

- On July 29, it was reported that European regulators have given tentative approval for General Electric Co.'s ("GE") acquisition of Finnish medical-equipment maker Instrumetarium Corp. GE had previously announced

RECENT ACTIVITIES

International Antitrust Highlights (*Continued*)

that it had a viable solution in the works for the competition problems posed by its $1.9 billion acquisition of Instrumentarium. GE has offered concessions, including selling Instrumentarium's Spacelabs Medical business and some anesthesia monitoring technology of Instrumentarium's Datex-Ohmeda unit. GE is also expected to agree to behavior concessions to ensure that its patient monitoring systems remain open to interfacing with technology of competitors, particularly Philips NV and Siemens AG. The EC has until August 6 to hammer out the details with GE if the transaction is to be approved by September 11th.

- According to a decision by the Guam Supreme Court announced on July 23, a trial court must reconsider whether the termination of a Mobil franchisee was properly grounded on the Petroleum Marketing Practices Act ("PMPA") and complied with the statutory notice and procedural requirements. (*See Mobil Oil Guam, Inc. v. Lee,* Guam, No. CVA02-007, 7/9/03). Chief Justice F. Philip Carbullido overturned a trial court ruling that Mobil complied with the requirements of the PMPA. Mobil cited two statutory provisions in support of the termination but the court ruled that one of them was plainly insufficient. The court did, however, uphold a summary judgment for Mobil on a breach of contract claim arising from the franchisee's failure to pay for the fuel according to the terms of the franchise agreement.

- The EC announced on July 16 that it had appointed Professor Lars-Hendrik Röller as the Chief Competition Economist in its Directorate-General for Competition. Mr. Röller is currently Professor of Economics at Humboldt University in Berlin. He is also Director of the Institute for "Competitiveness and Industrial Change" at the Wissenschaftszentrum Berlin für Sozialforschung. Since 1996, he has been the program director of the industrial organization group of the London-based Center for Economic Policy Research. Professor Röller is expected to start in this position on September 1. He will report directly to the Director General of Competition and have a dedicated staff of approximately 10 specialized economists.

- On July 16, musical instruments manufacturer Yamaha was fined 2.56 million euros by the EC for restricting trade within the EU and fixing resale prices in certain EU states for pianos, guitars, and oboes. The EC determined that the restrictions were serious in nature. However, the restrictions seemed to be limited to certain dealers, products, and countries--instead of the result of a deliberate strategy--and appeared not to have been implemented in full. The EC also noted that, as soon as it intervened, Yamaha took steps to end the restrictions and to redesign its European distribution system. Yamaha sells a wide range of traditional and electronic musical instruments and equipment in Europe under a selective distribution system. These items include pianos, electronic organs, guitars, saxophones, and violins. The company is the European market leader for most musical instruments.

RECENT ACTIVITIES

International Antitrust Highlights (*Continued*)

- EU officials said on July 15 that they were going on the offensive to push for enforcement of new rules against the worsening problem of unsolicited e-mails. EU Enterprise and Information Society Commissioner Erkki Liikanen said the new EU rules against spam were a "priority" and should be adopted into national lawbooks ahead of their October 31 effective date.

- Although it found that Konica's proposed acquisition of Minolta raised anticompetitive concerns in the photometer market, the EC authorized the transaction on July 11, subject to a divestiture commitment. Both companies are Japanese manufacturers of cameras, photocopiers, and other imaging products. The EC expressed concern that the parties' activities may pose a dominant position in the market for photometers, which are devices used by professional photographers to measure light exposure. However, Konica offered to divest its roughly 40 percent stake in Sekonic, a Japanese manufacturer of photometers, which removed the anticompetitive concern. According to the findings of the EC's investigation, the activities of Konica and Minolta are largely complementary, although they overlap in several product markets--namely photocopiers, compact cameras, digital cameras, and photometers. Hence, the EC found no anticompetitive concern in the market for photocopiers and cameras because the merged entity would still lag behind market leaders Ricoh and Canon in the photocopiers sector, and Olympus in the cameras sector.

- On July 10, Japan and the EU signed a comprehensive agreement to reinforce cooperation in antitrust enforcement and encourage closer exchanges of information. For the EU, the accord marks the third such agreement after similar executive agreements with the United States and Canada. For Japan, this is the second such agreement after the current executive agreement with the United States. Japan is preparing to sign a similar agreement with Canada. The accord, which was signed in Brussels and will become effective on August 9, calls for reciprocal information exchange on the enforcement activities of each authority. Like the EU and the United States, the JFTC is actively coaxing other countries to cooperate in antitrust enforcement because of increasing cross-border and multilateral extension of business activities requiring extraterritorial enforcement of Japanese competition laws.

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

Recent Activities

FCC ANTITRUST HIGHLIGHTS

- The FCC's changes to broadcast-ownership regulations are expected to take effect on September 4, or 30 days after publication in the Federal Register. The freeze on assignments and transfers at the FCC should also be lifted at the same time, as the Office of Management and Budget will have approved the new transfer application forms by then. Several merger transactions, including the Univision-HBC merger, will then be able to move towards FCC approval.

- MCI's pending emergence from bankruptcy may be hindered by new charges that it collected "in-state recovery fees" on calls that it rerouted in order to avoid the fees, as alleged by rival AT&T in a July 28 filing with the bankruptcy court. Though MCI and Verizon settled a dispute over routing fees, wherein Verizon agreed to not oppose MCI's bankruptcy plan, Verizon joined its rivals, AT&T and SBC Communications, in an effort to have MCI barred from conducting business with the Federal Government. AT&T crafted a provocative opposition to the bankruptcy settlement that raised the routing issue while hinting at a possible breach of security. MCI unequivocally refuted an implication that government calls were sent over non-encrypted lines. The AT&T filing had its intended impact when House Energy and Commerce Committee Chairman Billy Tauzin (R - La.) requested extensive documentation on the issue from the FCC and called for a hearing on the allegations in September. MCI maintains that the practice was conducted with commercial clients in the past, but has ended under the stewardship of its new Chairman and CEO, Michael Capellas.

- On July 23, new media ownership rules came under an attack in both the House and Senate. Despite a veto threat from the White House, the House passed a spending bill, by a vote of 400-21, which included a provision that would reset the television ownership limit at 35%, rather than the 45% cap set by the FCC in its June 2 vote. Bi-partisan support to roll back the FCC's rules has been voiced in the Senate as well. While the House and Senate spending bills will need to be reconciled in conference, which is where the White House plans to have the House provisions dropped, Sen. Trent Lott (R-Miss.) and Byron Dorgan (D-N.D.) plan a September vote on a resolution of disapproval that could also roll back the new rules.

RECENT ACTIVITIES

FCC Antitrust Highlights (*Continued*)

- On July 8, despite the freeze on ownership transfer applications, the FCC sent a 10 page Initial Information and Document Request to News Corp. and General Motors Corporation, the ultimate parent corporation of DirecTV, requesting more information on the proposed acquisition. As the DOJ continues its review of the proposed acquisition, the FCC has stepped up its investigation as well. The timing of the FCC's review may ultimately be delayed by the political battle being waged over the new media ownership rules.

- As the political gamesmanship continues over the FCC's new media ownership rules, Chairman Powell has steadfastly defended his agency's actions while being forced to deny that he is stepping down. According to Time Magazine's June 28 edition, Chairman Powell has told those close to him that he plans to resign in the fall. Through a spokesman, the FCC refuted the report.

For more information on any of these activities, please contact Richard Trimber at (202) 218-0006 or at rtrimber@sheppardmullin.com.

The Sheppard Mullin Antitrust Review is intended to apprise readers of noteworthy developments involving antitrust matters. Its contents are based upon recent decisions, but should not be viewed as legal advice or legal opinions of any kind whatsoever. Legal advice should be sought before taking action based on the information discussed.

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