

In This Issue

- *Medimmune v. Genentech: Noerr-Pennington Doctrine Applies to Patent Settlement and PTO Proceedings*
- *7th Circuit Dispenses Claim Against Seller of Coupon Dispensers*
- *FTC Closes Three-Year Investigation of Consummated Merger in an "Innovation Market"*
- *Dismissal of Price Fixing Claim Affirmed by 11th Circuit*
- *Tortilla Slotting Fees Tested -- Verdict for Defendant*
- *Division's White Collar Crime Crackdown in Construction and Scrap Metal Industries*

Recent Activities

DOJ Antitrust Highlights

FTC Antitrust Highlights

FTC Consumer Protection Highlights

International Antitrust Highlights

FCC Antitrust Highlights

MEDIMMUNE V. GENENTECH: NOERR-PENNINGTON DOCTRINE APPLIES TO PATENT SETTLEMENT AND PTO PROCEEDINGS

The *Noerr-Pennington* doctrine immunizes petitioning conduct protected by the First Amendment from the antitrust laws. It applies even where the petitioning party seeks legislation or other government action that is anticompetitive. The filing and prosecution of lawsuits is a form of petitioning conduct immune under *Noerr-Pennington*. *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972). *Noerr-Pennington* immunity, however, has its limits and those limits were tested in *MedImmune, Inc. v. Genentech, Inc., et al.*, 2003 U.S. Dist. LEXIS 23443 (C.D. Cal. 2003) (amended January 14, 2004).

In *MedImmune*, the Patent and Trademark Office ("PTO") Board of Patent Appeals and Interferences declared an interference between the "Boss" patent of defendant Celltech and a pending continuation application of defendant Genentech, the "new Cabilly patent". After the PTO Board awarded priority to Celltech, Genentech filed a district court action to overturn the Board's priority determination. Genentech sought summary judgment. Judge Chesney of the Northern District Court of California, denied the motion and suggested the parties consider mediation or some other form of dispute resolution. Thereafter, Genentech and Celltech reached a settlement and entered into a license agreement. They submitted a proposed judgment overturning the Board's priority decision to Judge Chesney, which was signed and entered. Genentech then filed the court's judgment with the PTO. The PTO directed that Genentech's continuation application be returned to an examiner. After further proceedings, the examiner issued the new Cabilly patent in 2001.

Plaintiff MedImmune is a biotechnology company that sold a respiratory drug, Synagis, which utilized techniques covered by the patents. It filed suit in the Central District of California alleging that Celltech and Genentech illegally resolved the priority dispute in

such a manner that neither company gave anything up and caused a real loss to others in the industry. Celltech's Boss patent was due to expire in 2006, but the new Cabilly patent covering the same techniques did not expire until 2018. This was because under the law existing at that time, the start date for the new patent was the time the interference was resolved, rather than the time the interference began. Plaintiff thus alleged that the resolution of the priority dispute, the license agreement, and the issuance of the new Cabilly patent operated to create a 29 year monopoly over this technology. Plaintiff asserted claims under federal and state antitrust laws, as well as California's unfair competition laws.

Judge Pfaelzer granted summary judgment for defendants based on *Noerr-Pennington* immunity. After reviewing the basis for the *Noerr-Pennington* doctrine, the court concluded that petitioning activity sufficient for *Noerr-Pennington* is any "attempt to persuade the government to take action". Both the filing of the lawsuit to resolve the priority dispute and the later PTO proceedings to issue the patent were attempts to persuade the government to take action and thus qualified as petitioning under *Noerr-Pennington*. In a footnote, the court stated that *Noerr-Pennington* immunity would still apply even if only one of the two prongs involving petitioning were met since the *Noerr-Pennington* doctrine protects not only petitioning activity but other "related activity" as well, citing *Sessions Tank Liners v. Joor Manufacturing*, 17 F. 3d 295, 299 (9th Cir. 1994). Moreover "where a restraint ...is the result of valid governmental action, as opposed to private action, those urging the governmental

action enjoy absolute immunity from antitrust liability..." *Joor*, 17 F. 3d. at 301 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U. S. 492, 498 (1988)).

Judge Pfaelzer rejected MedImmune's argument that *Noerr-Pennington* did not apply since the result could have been achieved without government action by Celltech filing a disclaimer under 35 U.S.C. 253 to cancel the claims of the Boss patent. This was both factually incorrect and without any law to support it. Even if Celltech canceled its claims, the Board's outstanding priority decision would still need to be overturned. Further, there was no case law to support the argument that, if the same result can be achieved without government action, *Noerr-Pennington* would not apply. The court stated that *Noerr-Pennington* immunity is not dependent on there being a nongovernmental way to achieve the anticompetitive result, but depends simply on whether the alleged violation actually involved petitioning.

Judge Pfaelzer also found that Judge Chesney's entry of judgment following settlement was entitled to *Noerr-Pennington* immunity even though apparently neither the settlement nor license agreement was submitted to Judge Chesney for review. All parties agreed that routine court orders following settlements are not entitled to *Noerr-Pennington* protection, and the same is true of private anticompetitive settlements that simply receive a court's stamp of approval. Here, however, Judge Pfaelzer concluded that the anticompetitiveness of the agreement depends on the government exercising its independent

power to decide the priority dispute and issue the new Cabilly patent. *Noerr-Pennington* would apply to that government action. It did not matter that Judge Chesney did not make a "considered, substantive judgment" that Genentech deserved priority as that would require deconstructing the decision making process, an inquiry forbidden by *Joor*, 17 F. 3d. at 300.

Judge Pfaelzer also found wanting the arguments of plaintiff that immunity was lost due to misrepresentations by defendants, both to Judge Chesney about the priority dispute and to the PTO in the later issuance of the continuation patent. While some misrepresentations may cause loss of *Noerr-Pennington* immunity, simply telling the court how the priority dispute should be resolved - the ultimate issue in the case - was not such a misrepresentation, if perhaps one at all. As to the later PTO prosecution of the new Cabilly patent, Judge Pfaelzer found that only actual fraud - not just inequitable conduct - is required to lose *Noerr-Pennington* immunity in that context. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F. 3d 1059 (Fed. Cir. 1998). Here, plaintiff's allegations fell short of that standard. In fact, in response to earlier motions in the case, plaintiffs had characterized their allegations as inequitable conduct falling short of fraud.

The final issue was whether the licensing agreement itself was price fixing. It provided that Celltech would receive royalty payments from Genentech, who would use its best efforts to charge third parties, including plaintiff, at least certain minimum royalties. Judge Pfaelzer

likewise dismissed this claim, holding it was not alleged in the Complaint and plaintiff lacked standing since it had previously signed a license agreement with Genentech for the product in question.

MedImmune is one of the first cases to explicitly apply the *Noerr-Pennington* doctrine to PTO proceedings where no fraud within the meaning of Walker Process or Nobelpharma is alleged. Its application of *Noerr-Pennington* to the court judgment after settlement of the priority case will be controversial as some courts have suggested that *Noerr-Pennington* immunity may not apply unless the court makes a substantive decision on the merits. See, e.g., *In re Ciprofloxacin Antitrust Litigation*, 261 F. Supp. 2d 188, 212-14 (E.D.N.Y. 2003). The key fact underlying the entire decision was that the anticompetitive restraints were the result of government action - entry of the judgment overturning the priority decision and the issuance of the new Cabilly patent - after petitioning and that provides the basis for *Noerr-Pennington* immunity.

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7TH CIRCUIT DISPENSES CLAIM AGAINST SELLER OF COUPON DISPENSERS

The 7th Circuit Court of Appeals on January 9 - in an opinion by Judge Easterbrook - rung up a "no sale" for the antitrust claim by a seller of "at-shelf" coupon dispensers against its much larger competitor. In *Menasha Corp. v. News America Marketing In-Store, Inc.*, 2004 WL 42468, the court concluded that the plaintiff failed to establish the existence of a separate

"relevant market" for "at-shelf" coupon dispensers distinct from the broader market for retail promotional devices.

Plaintiff and defendants are competing sellers of "at-shelf" coupon dispensers, with defendant enjoying considerably greater market share. The plaintiff accused its competitor of violating antitrust laws by locking up retailers in long-term exclusive contracts, and by playing "dirty tricks" (including ripping plaintiff's coupon devices off the shelves) to otherwise keep plaintiff's competing at-shelf coupon dispensers out of retail stores.

As a preliminary matter, Judge Easterbrook credited the plaintiff for "sensibly" abandoning its claim for *per se* treatment, intoning that "competition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress." The court refused to accept that manufacturers and retailers would "shoot themselves in the feet by signing (retailers) or favoring (manufacturers) exclusive contracts that entrench [defendant] as a monopolist that then can apply the squeeze." Rather, the fact that "retailers and manufacturers like exclusive deals implies that they serve the interests of these, the consumers of couponing services." The court added that "[w]hen the consumers favor a product or practice, and only rivals squawk, the most natural inference is that the complained-of-practice promotes rather than undermines competition, for what helps consumers often harms other producers such as" plaintiff.

But the plaintiff failed to make a claim under the alternative "rule of reason" standard because

there was no showing that the sale of at-shelf coupon dispensers constitutes a separate "relevant market". This was fatal because it meant that if the defendant cut output of at-shelf coupon dispensers, manufacturers could add more newspaper or on-package coupons, or stores could hold more sales, or a third competitor could supply more adds that draw attention to products, or stores could conduct more demonstrations and offer samples (with or without coupons handed out live). Ultimately, "[t]he number of ways to promote a product is large, and even a stranglehold over at-shelf coupon dispensers would affect only a tiny portion of these means."

In finding no relevant market for at-shelf coupon dispensers, the court faulted plaintiff for failing to establish a link between the price levels for at-shelf coupon dispensers and that of promotional devices generally: the "prices of at-shelf coupon dispensers rise when the prices of other couponing systems rise, then they are probably in the same market; but if the price of one couponing system varies while the others stay the same, then they probably are different markets." Yet no analysis of the "covariance of prices" was introduced.

The court also rejected the plaintiff's reliance on a "potpourri of survey research and armchair economics," primarily in the form of a survey by a "journalist who asked friends and acquaintances whether they like at-shelf coupons better than other kinds of coupons." The court explained that the survey was akin to one showing that most people favor vanilla ice cream over other flavors. But it does not follow that vanilla ice cream is a separate market such that a rise in the price of vanilla would not cause

consumers to switch to other flavors. For a closely related reason the conclusion that at-shelf coupons uniquely appeal to "impulse shoppers" (that is, shoppers who do not prepare in advance by clipping coupons from the Sunday supplements) does not identify an economic market. Attributes of shoppers do not identify markets.

The court similarly admonished that a relevant market cannot be defined based on an "assumption" as to how the market functions. The plaintiff tried to show a relevant market by assuming that at-shelf coupons are a market (that is, that consumers do not substitute between these and other devices). In this manner it is the assumption, and not the events under study, that ends up "defining" the market. The court dismissed this approach as "garbage in, garbage out."

Finally, the court rejected the contention that a jury could infer market power from the fact that the defendant's prices rose with its share of at-shelf coupons and that defendant is consistently able to sell its dispensers at more than marginal cost: "plaintiff calls these facts evidence of market power. And that might well be if they were facts, which as far as we can tell they are not. What plaintiff calls 'price' is the list price of the dispensers, and it is undisputed that few if any dispensers sell for list price. [Defendant] offers evidence that transaction prices have fallen, and plaintiff has no effective counter. What plaintiff calls 'cost' is not the marginal cost of deploying the dispensers - a measure of cost that includes the wages and commissions of large sales and service staffs, which are variable rather than fixed costs - but the cost of manufacturing the dispensers."

Practice pointer: To some extent the plaintiff was undone by having presented an economist expert that Judge Easterbrook respected, because of the omission by the expert of evidence that the court needed to hear to find for the plaintiff. The judge observed that the plaintiff "introduced no econometric evidence of any kind, even though it engaged a group of specialists in industrial organization * * * and presented a lengthy expert report signed by * * * an economist well suited to provide such evidence if any existed," and were favorable to the plaintiff. Since the expert presented no such evidence, the court assumed it did not exist.

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FTC CLOSES THREE-YEAR INVESTIGATION OF CONSUMMATED MERGER IN AN "INNOVATION MARKET"

On January 13, the FTC voted to close its investigation into the 2001 acquisition of Novazyme Pharmaceuticals, Inc. ("Novazyme") by Genzyme Corporation ("Genzyme"). At the time that the acquisition was consummated, both companies were in clinical stages of testing therapies for Pompe disease using enzyme-replacement therapies ("ERTs"). However, neither Novazyme nor Genzyme was actually marketing these types of therapies for the treatment of Pompe disease. Pompe disease is a rare, often terminal, disease that occurs in infants and children. Because the disease is so rare, the Orphan Drug Act ("ODA") governs the approval of these therapies. Under the ODA, unless and until subsequent therapies are proven to be superior treatment options, the first Pompe disease therapy to receive FDA

approval obtains seven years of exclusivity to market the drug.

FTC Chairman Timothy Muris drafted a statement supporting the agency's decision, and Commissioner Mozelle Thompson drafted an explanation as to why he decided to disagree with the other three Commissioners on their decision to close the transaction. Instead, Commissioner Thompson was of the opinion that the agency should have issued an administrative complaint, seeking to block the transaction. According to Commissioner Thompson, the consummated merger resulted in a merger to a monopoly in the market for research and development into ERTs used to treat Pompe disease, for which the presumption of anticompetitive effects was not rebutted. Furthermore, Commissioner Thompson reasoned that this "innovation merger" extinguished incentives to compete to develop superior ERT technologies to treat Pompe disease, and that the facts raised some concern about Genzyme's motives in acquiring Novazyme.

In contrast, Chairman Muris stated in the opinion supporting the closing of the investigation that the effects of the merger were uncertain, given the existing failures of firms, including Genzyme, to develop and produce ERT therapies for the treatment of Pompe disease. According to Chairman Muris' statement, even though Genzyme's current clinical trials for the product in development have reached Phase III, a significant number of products that reach that stage of development never receive FDA approval. Chairman Muris also noted the merger may not have negatively affected the parties' incentives to innovate, but could possibly have increased these incentives. In

addition, the merger may have made possible many synergies that could result in increasing development of Pompe disease therapies.

Although newly-appointed Commissioner Pamela Jones Harbour abstained from voting because the FTC's review of the merger was in its last stages, she provided her perspective on innovation and antitrust in a separate opinion, expressing some concern given that the merger occurred in pharmaceutical markets where competition to innovate is of utmost importance.

A couple of points relating to this investigation are important to note for those monitoring antitrust policy developments. First, the fact that an investigation occurred is telling in that, once again, it provides evidence that the federal antitrust agencies will look into consummated mergers. Second, the closing of the investigation provides an interesting "twist" in the story to the extent it demonstrates how the agencies will analyze mergers in innovation markets, where products are not currently on the market. The FTC did articulate a theory of potential harm to innovation markets in its complaint accompanying the consent order in *Amgen-Immunes*, FTC File No. 021 0059. However, that transaction involved other relevant product markets where competition did exist in addition to an innovation market. In contrast, the Genzyme-Novazyme transaction was one where the only relevant product market was an innovation market. Like the products involved in the transaction itself, the FTC's specific theories of competitive harm relating to innovation markets will only be readily available sometime in the future.

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DISMISSAL OF PRICE FIXING CLAIM AFFIRMED BY 11TH CIRCUIT

According to a decision by the U.S. Court of Appeals for the Eleventh Circuit (*Prewitt Enterprises, Inc. v. Organization of Petroleum Exporting Countries*, 11th Cir., No. 03-11580, 12/18/03), there are no means available under the Federal Rules of Civil Procedure ("FRCP") to serve the Austrian headquarters of the Organization of the Petroleum Exporting Countries ("OPEC") with a complaint of illegal price fixing, absent the consent of OPEC. In *Prewitt*, the court found that the lower court correctly held it lacked jurisdiction over such a case because service of process on OPEC was ineffective and alternative service of process was impossible without OPEC's consent. Hence, Judge Rosemary Barkett upheld the dismissal of a complaint filed against OPEC pursuant to Section 1 of the Sherman Act.

The complaint was filed by Prewitt Enterprises, Inc. ("Prewitt"), an Alabama corporation that buys gasoline and other refined petroleum products for resale at its gasoline service station in Birmingham, Ala. Prewitt sought to represent all persons or entities who had indirectly purchased petroleum or petroleum products from OPEC in the United States since 1999. The complaint accused OPEC of coordinating an international conspiracy to limit the production and export of petroleum in order to fix prices at a supracompetitive level. The alleged conspirators were OPEC, its member states (Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates, and Venezuela), and four non-OPEC members (Norway, Mexico, the Russian Federation, and Oman).

At Prewitt's request, the district court sent a copy of the summons and complaint to OPEC at its headquarters in Vienna by international registered mail, return receipt requested. OPEC officials in Vienna ignored the mailing until the district court entered a default judgment and an injunction barring enforcement of the price fixing agreement for a period of 12 months. OPEC then appeared and filed a motion to set aside the default judgment. After the district court granted this motion, OPEC filed another motion seeking dismissal of the complaint on various grounds, including insufficient service of process. The district court initially dismissed the case without prejudice, based on a finding that Prewitt had failed to serve OPEC properly under the FRCP. The court then denied a motion for alternative means of service because it found that OPEC could not be effectively served with the complaint in this case under the FRCP.

In affirming the lower court's decision, the court of appeals ruled that the attempted service of OPEC by registered mail at its Vienna headquarters was ineffective. Although FRCP 4(f)(C)(ii) authorizes service by registered mail if it is not prohibited by foreign law, the court determined that vehicle was ineffective in this case because Austrian law expressly prohibits all service of process on OPEC at its headquarters unless the Secretary General consents. OPEC's consent to service by mail is required by the Austrian/OPEC Headquarters Agreement, which has been codified into law by resolution of the Austrian Parliament. The fact that OPEC had actual notice of the filing of the suit is irrelevant.

The court also found that service by registered mail was not authorized by FRCP 4(f)(2)(A),

which permits service "in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction." Prewitt was relying on provisions in Austrian law that related to service by Austrian courts on persons in Austria and abroad, but these provisions were trumped by §11(2) and §12(1) of the Austrian Service Act, which specifically address service from authorities abroad. The Austrian Service Act requires mediation by the Federal Ministry for Foreign Affairs to effectuate service. If service had gone to the Austrian Federal Ministry of Foreign Affairs, the court assumes that the Ministry would have applied the laws of its own country and obeyed the dictates of the Austrian/OPEC Headquarters Agreement prohibiting service without OPEC's consent.

The court of appeals also declined to construe FRCP 4(f)(3) as giving the district court discretion to effect service. Rule 4(f)(3), which authorizes a district court to effect service not otherwise prohibited by international agreement, cannot save service that is specifically prohibited under Rule 4(f)(2).

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TORTILLA SLOTTING FEES TESTED -- VERDICT FOR DEFENDANT

On December 23, in a strongly worded opinion, United States District Judge, Kenneth M. Hoyt of the Southern District of Texas (Houston Division), granted defendant's motion for summary judgment and dismissed plaintiffs' antitrust case (*El Aguila Food Products Inc. v. Grama Corp.*, S.D. Tex., No. H-03-0427, 12/24/03). Plaintiffs' case challenged the

payment by the nation's largest tortilla manufacturer, Grama Corp., of slotting allowances to retailers in return for favorable shelf space. Brought by several small tortilla manufacturers, the antitrust case attacked the propriety of defendant's shelf space and slotting allowances in a market for the sale of tortillas in retail supermarket chains in northern and southern California, Arizona, Texas and Michigan.

Plaintiffs are numerous small regional tortilla manufacturers operating in the relevant geographic markets. They alleged in the complaint that Grama's shelf space arrangements, including slotting payments with retailers (*i.e.*, customer marketing agreements or CMA Agreements) were illegal under Sections 1 and 2 of the Sherman Act by using exclusionary conduct for the purpose of monopolizing or attempting to monopolize the retail sale of tortillas. The exclusionary conduct, in particular, resulted from the CMA Agreements with retail supermarkets.

Under the CMA Agreements, Grama paid as an incentive an "up-front" payment or "slotting fee" to the retailer to manage and control retail placement of all tortilla products on the retailers' shelves. According to the complaint, these financial payments allowed Grama to control the placement, location, availability, visibility, and promotional activity of all retail tortilla products - its own as well as competing products. The plaintiffs also alleged a Section 2(a) claim under the Robinson-Patman ("RP") Act. In the complaint, Grama was accused of engaging in discriminating practices "either by paying something of value to retailers or by requiring the plaintiffs to purchase corn flour at different prices in different states."

With respect to the Sherman Act Section 1 claim, the court found that defendant's agreements with retailers actually intensified competition in the industry, which led to new product introductions and increased shelf space for tortillas. The court also found that the evidence produced at trial showed that many retailers carried the plaintiffs' products and that prices were set by the retailers. Finally, the court found that many plaintiffs who actually lost shelf-space did so because they chose not to compete, rather than through any anticompetitive exclusionary conduct by defendant.

With respect to the Sherman Act Section 2 claim, the court found no evidence that Grama used slotting fees to create, maintain or attempt to create a monopoly. Grama's significant market share, the court noted, was due to its size and ability, and there was no evidence that Grama had market power over price or output. Similarly, with respect to its RP Section 2(a) claim, the court found no evidence that price variances from city to city or state to state were the result of Grama's predatory activity.

What was most interesting in this case was not the granting of Grama's motion for summary judgment, but that Judge Hoyt struck all the expert evidence offered by plaintiffs. The testimony of both plaintiffs' expert witnesses, marketing expert Gregory T. Gundlach and damages expert Kenneth G. McCain, was labeled by the court as unreliable and based on unsupported assumptions.

Dr. Gundlach offered his expert opinion on behalf of the plaintiffs that slotting fees inherently resulted in exclusivity and permitted greater shelf facings than sales would otherwise

dictate. He also testified that preferential space and display positions restricted competitive promotions and reduced competition. Dr. Gundlach formed his opinion exclusively on the recent FTC study, "Slotting Allowances in the Retail Grocery Industry - Study 2003." He did not interview a single retailer. The court found that many plaintiffs never had shelf space in the retailers' stores and never tried to obtain shelf space. Any loss of sales suffered by the plaintiffs, the court found, was not caused by Grama's CMA Agreements with retailers, as alleged by plaintiffs, but rather by their refusal to negotiate with retailers for increased shelf space. As a result of Dr. Gundlach's limited inquiry, the court found that his testimony did not establish antitrust injury and did not link injury to the challenged conduct. Since Dr. McCain's damages calculations assumed that Dr. Gundlach's testimony established causation between the challenged conduct and antitrust injury, the court ruled Dr. McCain's expert opinion inadmissible hearsay based on unsupported assumptions.

The developed record in this case suggests that this was a poor case to test the legal viability of a shelf space theory of antitrust harm. The contours of a tortilla product market were blurred and not clearly defined, because it appeared that many alternatives to fresh tortillas seemed to exist -- including tortilla shells, chips and refrigerated and frozen tortillas. Entry appeared to be easy with expansion by fringe firms possible and even likely. Prices, for whatever reason, appeared to be falling over time, an inherently bad fact in almost all antitrust cases. Even the role of slotting fees in the industry was ambiguous, given the conflicting testimony of plaintiffs' experts and sworn statements provided by defendant's retailer witnesses.

Finally, antitrust injury and plaintiffs' damages were weak and not tied to defendant's conduct or to a specific antitrust violation.

While the plaintiffs in the case were unsuccessful, retailers and manufacturers must still continue to seek counsel regarding slotting arrangements as the government and private parties will continue to challenge slotting allowances that foreclose rivals' ability to compete.

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DIVISION'S WHITE COLLAR CRIME CRACKDOWN IN ROAD CONSTRUCTION AND SCRAP METAL INDUSTRIES

The Antitrust Division's crackdown on bid-rigging conspiracies in the road construction industry in Wisconsin and allocation and bid-rigging conspiracies in the scrap metal industry in Cleveland has led to the arrest and indictment of several executives.

Road Construction Investigation

On January 13, four Wisconsin road construction executives were arrested on charges of bid-rigging and wire fraud for participating in a conspiracy involving road construction projects, including public road, highway, bridge, street, and airport construction projects worth more than \$100 million to the State of Wisconsin.

According to the charges, James J. Maples, President of Vinton Construction Company; Michael J. Maples, Vice President of Vinton; Ernest J. Streu, President of Streu Construction Company; and John Streu, Secretary of Streu Construction Company, rigged bids submitted to

the Wisconsin Department of Transportation from 1997 to the present. The charges allege that through telephone calls and in-person meetings, Maples and Streu shared bid information, discussed potential competitors and agreed to rig bids in an attempt to allocate projects among themselves. The Division also alleges that the four conspirators submitted rigged bids in electronic format through interstate wire communications from the Eastern District of Wisconsin to Florida. The majority of these projects were federally funded.

The arrests were the latest result of a joint investigation conducted by the Antitrust Division, the U.S. Attorney for the Eastern District of Wisconsin, the Federal Bureau of Investigation, the U.S. Department of Transportation and the Office of the Inspector General.

More Scrap Metal Companies Indicted In Cleveland

On January 15, a federal grand jury indicted M. Weingold and Company ("M. Weingold"), its owner, Jack Weingold, an employee of M. Weingold, Loren Margolis; and Harry Rock and Associates ("Rock") for conspiring to allocate scrap metal suppliers and rig bids for the purchase of scrap metal in Northeast Ohio. In addition, Rock was indicted for committing wire fraud in a bid-rigging attempt with a competitor.

According to the charges, all four defendants were charged with participating in two separate conspiracies to allocate suppliers and rig bids from December 1993 through November 1999. In addition, Rock was charged with wire fraud in connection with a scheme to defraud a supplier of scrap metal by attempting to rig a bid with one of Rock's competitors in January 2000. The charges allege that the two conspiracies were

carried out through meetings and discussions among the conspirators, during which they agreed to allocate scrap metal suppliers among themselves and not compete against each other, denying the companies and individuals from whom they purchased scrap metal a competitive price. During their alleged collusive discussions and meetings, the conspirators agreed to rig bids to scrap metal suppliers, including agreeing on which designated co-conspirator would purchase scrap metal from particular suppliers and the prices to be submitted to them, refraining from submitting bids to scrap metal suppliers, and submitting complimentary, non-competitive and rigged bids or price quotations to scrap metal suppliers.

This is the fifth case resulting from an ongoing investigation of the scrap metal industry being conducted by the Antitrust Division's Cleveland Field Office. Previously, Howard Bahm, the former president of Rock, pled guilty to having engaged in four separate antitrust conspiracies. Bahm is awaiting sentencing and facing the possibility of 37 months in jail, in addition to a fine of \$1 million. Two other Cleveland-area

scrap metal companies, Bay Metal ("Bay Metal") of Richfield, Ohio and Bluestar Metal Recycling Co. ("Bluestar") of Elyria, Ohio, previously pled guilty to conspiring to allocate scrap metal suppliers and rig bids in the purchase of scrap metal in Northeast Ohio. Bay Metal paid a fine of \$850,000 and Bluestar paid fines and restitution totaling \$675,000. In another related case, *United States v. Atlas Iron Processors Inc.* et.al., four individuals and two companies were convicted at trial in Miami, Florida for conspiring to allocate suppliers and fix prices. Atlas Iron Processors, Inc. is a Cleveland area company. Its three top officials and owners were each sentenced to one year in jail and ordered to pay fines and restitution.

The Antitrust Division's ongoing investigation of the scrap metal industry is being conducted out of its Cleveland Field Office with the assistance of the Federal Bureau of Investigation's Cleveland Office.

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RECENT ACTIVITIES

DOJ ANTITRUST HIGHLIGHTS

- Reportedly, the Antitrust Division is closer to making a decision to challenge Oracle's acquisition of Peoplesoft. Speculation exists that Oracle has substantially complied with its second request for additional information and that Antitrust Division lawyers, who deposed Oracle Chief Executive Larry Ellison on the week of January 23rd, are continuing to gather evidence to be used in a possible suit in a federal court in San Francisco to challenge the deal. A final decision, however, will not be made before the end of February. That being said, sources claim that the DOJ staff members are leaning against recommending approval of the deal. Even if the staff recommends a challenge to the deal, Oracle's lawyers will have a final chance to dispute their arguments in front of R. Hewitt Pate, the Assistant Attorney General in charge of the Antitrust Division.

RECENT ACTIVITIES

DOJ Antitrust Highlights (Continued)

- On January 22, NYCE Corporation filed suit against Concord EFS, Inc., et al., in the Superior Court of New Jersey (Bergen County) seeking an injunction to stop Concord from enforcing a mandatory routing rule ("MRR"), which diverts the processing of transactions from NYCE to Concord's STAR network. The lawsuit comes after First Data agreed with the Antitrust Division that it would divest NYCE in order to complete its acquisition of Concord's STAR network. The lawsuit is noteworthy because NYCE is seeking to protect its business while it is in the process of being sold to a third party as part of First Data's agreement with the Antitrust Division. The lawsuit is also interesting because the complaint states that NYCE demanded that Concord immediately revoke their MRR on March 31, 2003, or two days before First Data announced that it was acquiring Concord. Evidently, NYCE took no further action because the MRR would not have been problematic if the NYCE/STAR EFT networks had been combined. Now, with a settlement agreement in place that requires the divestiture of NYCE, NYCE is taking steps to protect its business.
- On January 16, the Antitrust Division announced that it had filed its appellate brief in the *Dentsply* case, an exclusive dealing case that the Division lost after trial. The issues presented by the Antitrust Division for appellate review are (1) whether, as a matter of law, a dominant firm's exclusive dealing cannot violate Section 2 of the Sherman Act, if it is found not to violate Section 3 of the Clayton Act; (2) whether a monopolist that prevents rivals from distributing through established dealers can be found not to have maintained its monopoly in violation of Section 2 of the Sherman Act, even though it acted with predatory intent, had no legitimate business justification, and engaged in conduct making no economic sense but for its tendency to exclude; and (3) whether a firm that maintained a 75%-80% market share for a decade, established a price umbrella, successfully made repeated aggressive price increases without regard to the prices of its rivals, and was able to exclude rivals from a major channel of distribution, can be found not to possess monopoly power within the meaning of Section 2 of the Sherman Act on the basis that rivals were not entirely excluded from the market and some rival products were priced higher than some of its products.
- On January 15, the Antitrust Division issued a Microsoft Consent Decree Compliance Advisory concerning changes to the "Shop for Music Online" feature in Windows XP, which invokes Microsoft's Internet Explorer even when the user has chosen a different default web browser, such as Netscape, Opera, or Mozilla. The Antitrust Division concluded that the invocation of Internet Explorer by the "Shop for Music Online" feature violated Section III.H of the Final Judgment. Section III.H of the Final Judgment requires Microsoft to allow end users and original equipment manufacturers to set a default for Windows to launch a non-Microsoft middleware product, such as a web browser, in place of Microsoft's corresponding middleware product. Microsoft has agreed to remove the override of the user's default browser contained in "Shop for Music Online". The removal of the override resolves the Antitrust Division's concerns about this potential consent decree violation. The Compliance Advisory also announced that Paula Blizzard and Patricia Brink will serve as Special Counsel for the Microsoft Decree Enforcement.

RECENT ACTIVITIES

FTC ANTITRUST HIGHLIGHTS

- On January 30, 2004 the Commission approved a petition from Aventis S.A. to reopen and modify a final consent order regarding the 1999 combination of Hoechst AG and Rhone-Poulenc S.A. which resulted in the newly-named successor company, Aventis. Aventis was required to reduce to five percent its holding in Rhodia, a French-based chemical company. Through Rhone-Poulenc, Aventis held a 65 percent share of Rhodia. The Commission voted 4-0-1 to reopen and modify the order (Chairman Muris not participating) and extended the period for divestiture by 12 months, until April 22, 2005.
- In a January 16, Federal Register notice, the FTC announced an adjustment to the thresholds in Section 8 of the Clayton Act which regulates anticompetitive interlocking directorates. The two thresholds define when it is unlawful for an individual to serve as an officer or director of two or more competing corporations. The two threshold figures, which are effective immediately, trigger the Section 8 prohibition if each of the two companies has capital, surplus, and undivided profits in excess of \$20.09 million (formally \$10 million) and the competitive sales of each corporation exceed \$2.009 million (formerly \$1 million). The 1990 amendment to Section 8 requires the FTC to adjust the interlocking directorate thresholds based on the changes in the Gross Domestic Product which these newly enacted thresholds reflect.
- On January 12, the FTC reopened and modified an existing consent order at the request of Wright Medical Technology, Inc. The consent order relates to Wright's 1994 cash tender offer for a competitor, Orthomet, Inc. The order required Wright for a period of 10 years to obtain prior FTC approval before acquiring more than one percent of any company involved in the production and sale of orthopedic finger implants. Wright's petition to reopen and modify related to the elimination of the prior approval provision. The Commission voted 5-0 to set aside the prior approval provision citing a June 1995 Commission announcement that the Hart-Scott-Rodina Act, which effectively identifies proposed acquisitions that are likely to have anticompetitive effects, is an appropriate check on problematic acquisitions. Prior approval provisions therefore are not routinely necessary and may not be in the public interest.
- On January 13, by a vote of 3-1-1, the FTC closed its investigation into Genzyme Corporation's 2001 acquisition of Novazyme Pharmaceuticals, Inc. At the time of acquisition, Novazyme was engaged primarily in conducting early pre-clinical studies relating to enzyme-replacement treatment ("ERT") for Pompe disease. Genzyme was also engaged in pre-clinical animal testing of ERTs. The Commission's investigation focused on the transaction's potential impact on the pace and scope of research into the development of a treatment for Pompe disease. Pompe disease is a rare and often fatal disease affecting infants and children, for which there is currently no effective treatment. Because of the relatively limited number of Pompe patients, therapies for Pompe disease fall under the Orphan Drug Act ("ODA"). The first Pompe therapy to gain FDA approval will obtain seven years of market exclusivity under the ODA. A second therapy may break that exclusivity only by establishing superiority over the first therapy. Three Commissioners filed separate statements presenting their views. Chairman Muris issued a statement on behalf of the majority to close the investigation; Commissioner Thompson dissented; and newly-appointed Commissioner Pamela Jones Harbour expressed her views on the policy issues involved in competition and innovation cases without voting on the merits of the investigation. (For additional information on this matter, see February 2004 issue of the *Antitrust Review* at page 5.)

RECENT ACTIVITIES

FTC Antitrust Highlights (Continued)

- The FTC approved a January 12 letter from the Secretary of the FTC to the Commodity Futures Trading Commission ("CFTC") supporting the application of U.S. Futures Exchange, L.L.C. ("USFE") for contract market designation. USFE is a foreign-owned firm seeking to establish a new competing United States-registered commodity futures exchange. According to the FTC's letter, economic studies and theory indicate that consumers would likely benefit from having additional competition in the market for futures trading. The FTC found that two recent studies noted that securities-based options listed on multiple exchanges, rather than a single exchange, have significantly lowered bid-ask spreads. The FTC noted that this evidence of exchange-based pro-competitive effects parallels evidence of similar pro-competitive effects of multiple exchanges in equity markets. The FTC letter also criticized public restraints, such as regulatory barriers, that impede competition, limit new entrants, stifle innovation and raise prices.
- On January 6, the FTC published a notice describing the types of agreements that brand-name pharmaceutical and generic drug manufacturers must file with the FTC and the DOJ, pursuant to Section 1112 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Generally, agreements between brand-name and generic pharmaceutical companies regarding the manufacture, marketing, and sale of generic versions of brand-name drug products are required to be filed with the FTC and DOJ. In addition, certain agreements between generic drug manufacturers, each of which have filed certain types of new drug applications with the U.S. Food and Drug Administration for the same brand-name drug product, must also be filed with the FTC and DOJ. These filing requirements cover agreements executed on or after January 7, 2004. The filing requirements are based on, and are the result of, the FTC's recommendations in its July 2002 study, "Generic Drug Entry Prior to Patent Expiration," that the FTC be notified about the execution of these types of agreements, between both brand-name and generic manufacturers. The Commission's 2002 recommendations were premised on the fact that brand-name and generic agreements and agreements between two generic manufacturers have the potential anticompetitive effect of delaying generic drug entry. Brand-name drug manufacturers and generic drug applicants must file their agreements with the FTC and DOJ within 10 business days of execution of the agreement.
- On January 2, the FTC announced that it approved an "interim consent order" in the matter concerning Chicago Bridge and Iron Company's ("CB&I") acquisition of certain assets of Pitt-Des Moines, Inc. ("PDM"). The interim order, subject to public comment, stipulates the CB&I cannot alter in any way the assets acquired from PDM, except in the ordinary course of business or through ordinary wear and tear. If CB&I wishes to dispose of any assets at its Provo, Utah facility, it must give the FTC 60-days advance notice. Though this "interim consent order" is somewhat unusual and suggests the Commission may have feared certain assets would be sold or diminished in value, it does move this matter closer to completion. The assets in question include real and personal property, inventories, rights under contract, and intellectual property, among others.

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

RECENT ACTIVITIES

FTC CONSUMER PROTECTION HIGHLIGHTS

- On February 4, the FTC announced the approval of joint final rules with the Board of Governors of the Federal Reserve System that set effective dates for provisions of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"). FACTA drastically revises the Fair Credit Reporting Act ("FCRA") by making permanent the existing FCRA preemption and adding provisions to combat identity theft and to enhance accuracy and consumer access to credit information. FACTA requires the FTC, among other things, to engage in further rulemaking and other proceedings with the Federal Reserve Board and other financial regulators.
- The FTC settled claims on February 4 against The Fountain of Youth Group, LLC, and its principal, Edita Kaye, for alleged false and unsubstantiated weight-loss and health claims relating to their "Skinny Pill" dietary supplement products. The proposed settlement, which requires approval of the U.S. District Court for the Middle District of Florida, prohibits the defendants from making any weight-loss or health benefit claims for the "Skinny Pill" and similar products, unless the defendants have competent and reliable substantiation for these claims. The proposed settlement also contains a judgment of \$6 million, which has been suspended due to the defendants' inability to pay.
- On February 2, the FTC announced that nearly 20,000 consumers who had received compensation checks stemming from the agency's settlement of illegal subprime lending charges against home mortgage lender First Alliance Mortgage Company and its chief executive officer would be receiving second redress checks. This is because the initial consumer redress pool has been augmented over the course of legal proceedings to include approximately \$20 million, in addition to the initial pool of \$45 million. The settlement was reached in March 2002 as part of a joint effort by the FTC, state agencies, the AARP, and private plaintiffs. First Alliance, headquartered in Irvine, California, formerly offered home loans, usually secured by first mortgages, in 18 states and the District of Columbia.
- The sixth annual National Consumer Protection Week ("NCPW") occurred from February 1 through 7 of this year, with focus on financial literacy. NCPW is jointly sponsored by the FTC in conjunction with the Federal Citizen Information Center, the Federal Communications Commission, the U.S. Postal Service, the U.S. Postal Inspection Service, the National Association of Consumer Agency Administrators, the National Consumers League, the AARP, the Better Business Bureau, the Consumer Federation of America, and the National Association of Attorneys General. The purpose of this year's NCPW was to help citizens learn more about their options in the marketplace, and to better manage their finances.
- As of January 29, telemarketers are required to transmit caller identification ("ID") information in order to comply with the revised FTC Telemarketing Sales Rule ("TSR".) Telemarketers are required to transmit their telephone number and name (where possible), to consumers' caller ID services. A telemarketer may comply with this requirement by transmitting either its own identifying information, or that of the seller (or charitable organization).

RECENT ACTIVITIES

FTC Consumer Protection Highlights *(Continued)*

- On January 28, the FTC announced a proposal to require an identifying mark or notice to alert consumers that a spam e-mail message contains sexually oriented material. Such identifying information will help consumers filter their e-mail messages of such spam messages. The establishment of such a requirement by the FTC would help the agency accomplish one of its responsibilities under the federal CAN-SPAM Act, signed into law on December 16, 2003. A Federal Register Notice should be published soon to seek public comment on the proposal. The CAN-SPAM Act mandates that the FTC prescribe the mark or notice within 120 days after passage of the Act. The comment period ends on February 17.

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INTERNATIONAL ANTITRUST HIGHLIGHTS

- On January 22, it was announced that the Chinese government was circulating a draft law that would be China's first comprehensive set of rules governing monopolistic activities. China's Ministry of Commerce circulated a draft anti-monopoly law to foreign law firms and Chinese academics for comment and analysis. The law, which has been discussed over the last decade, appears to be coming one step closer to a reality. It is expected to be submitted to the State Council and then the National People's Congress for enactment at some point this year. Despite China's expanding market economy and its World Trade Organization accession, the Chinese government still has not passed a complete set of regulations governing companies that engage in monopolistic activities. Even though the draft law could be passed in the near future, many believe it could still be subject to several revisions, and a lengthy lag between passage and actual implementation.
- Despite initial anticompetitive concerns, the European Commission ("EC") cleared General Electric Co.'s ("GE") proposed acquisition of Amersham, a diagnostic pharmaceuticals and biosciences company based in the United Kingdom, on January 21. The EC focused its staff's investigation on whether GE would be able to foreclose its competitors by bundling its products with Amersham's. In the end, the EC determined that such a strategy was unlikely to succeed and that European hospitals would continue enjoying competition from various suppliers. Although the EC acknowledged the potential for GE to tie its products with Amersham's, it concluded that the proposed acquisition would not lead to horizontal overlaps. The EC cooperated with the antitrust authorities of the United States and Canada in this matter.
- On January 12, European regulators announced that it would seek more information relating to Oracle's acquisition of PeopleSoft. The EC halted the in-depth probe into Oracle's \$7.3 billion proposed takeover of PeopleSoft to get more information from the companies. It had planned to complete its investigation by March 30. The agency

RECENT ACTIVITIES

International Antitrust Highlights *(Continued)*

typically suspends deadlines to get more information on products or geographical markets. The EC's concerns surrounding the deal include how it would affect the corporate business applications software market and the relational database market.

- According to a statement on January 8 by Pierre Beauchamp, president of the Canadian Real Estate Association, antitrust litigation brought by real estate brokerage firm Realtysellers challenging anticompetitive behavior by the Canadian Real Estate Association, the Toronto Real Estate Board, and their respective boards of directors, has been settled. Details of the settlement were not disclosed, but the association and local board stated it was looking forward to Realtysellers continuing to offer its services as a participant in good standing of the association and local board, and in compliance with the rules of the Multiple Listing Service (MLS). The agreement with the real estate bodies was reached after changes were made to the rules for MLS. Not only will the financial details of the settlement not be disclosed but the changes to the MLS rules will also not be made public.
- After months of negotiation, it was announced on January 7 that French media conglomerate Lagardère, the world's biggest magazine publisher, had finally won approval by the European Union to buy Vivendi Universal's European publishing business. The EC exacted a high price from Lagardère and insisted it sell much of book publisher Editis to a buyer approved by the agency. The EC intervened after receiving a number of complaints about the proposed deal from other French publishers, authors, consumers, and booksellers.

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FCC ANTITRUST HIGHLIGHTS

- Public Knowledge, a Washington, D.C.-based group concerned about consumer access to digital content sued the FCC on January 30 over new rules designed to protect rampant Internet piracy of movies and television shows aired on broadcast television. In its suit, which was filed in federal court, Public Knowledge argued that the FCC rules were too broad because they restricted consumer actions unrelated to Internet-aided piracy, such as sharing news clips with family members or electronically mailing video files between computers in the home and office. The FCC adopted the rules in November to promote the transition to all-digital broadcasting. Viacom Inc., owner of the CBS network, threatened to pull HDTV content if the commission failed to adopt rules that would prevent widespread Internet retransmission.

RECENT ACTIVITIES

FCC Antitrust Highlights (Continued)

- On January 16, the U.S. District in San Francisco granted satellite TV provider EchoStar Communications Corp. a temporary restraining order against Viacom, allowing EchoStar's DISH network to continue broadcasting Viacom and CBS television channels. The order issued by a federal judge in San Francisco blocks Viacom from withdrawing rebroadcast rights for its CBS-owned stations. A preliminary injunction hearing has been scheduled for Jan. 23. In its lawsuit, EchoStar claimed that Viacom had insisted that any deal for rights to its CBS affiliates must include arrangements for Viacom-owned cable networks, such as a new offering, Nicktoons. The two sides have been negotiating since September to renew a three-year deal that expired on December 31, 2003. In the interim, Viacom has clinched similar carriage agreements with major cable providers such as Comcast and Cox and EchoStar's larger satellite rival, DirecTV, now controlled by News Corp. In its lawsuit, EchoStar said it had opposed Viacom's demands that it carry the new Nicktoons channel and extend contracts for three other cable networks - country music channel CMT, TVLand and Spike TV - from 2005 to 2008. Viacom dismissed EchoStar's claims as baseless and called the lawsuit an attempt to "strong-arm" the broadcaster in contract negotiations. In an action filed in federal court in San Francisco, Viacom countered that EchoStar's antitrust claims were without merit; even if the distributor had met the right standard for an injunction, it should have sought relief before the FCC, and not the court; and that it was EchoStar that initiated bundling discussions. EchoStar argued that it would suffer an "irreparable loss" if 1.6 million of its subscribers in cities like San Francisco lost access to popular CBS programming because of the contract dispute.
- On January 8, the FCC cleared Comcast Corp. of accusations that it violated agency rules by offering promotions designed to stop customers from defecting to a competing cable company. In a complaint filed two years ago, WideOpenWest Holdings LLC ("WOW") alleged that Comcast's customer-retention and win-back promotions violated FCC rules because the MSO had failed to inform all subscribers of the various discount offers on the table. WOW, which competes with Comcast in 42 Detroit-area communities, suggested that Comcast's practices were an illegal attempt to use its market power to drive WOW out of business. However, the five FCC members concluded in a unanimous ruling that Comcast's limited-term discounts did not meet the agency standard of "systemic abuse" of the agency's cable-consumer-protection rules.
- TiVo Inc. sued EchoStar Communications Corp. on January 5 for allegedly violating its "multi-media time warping system" patent. This patent, which it received in May 2001 from the U.S. Patent and Trademark Office, allows viewers to record one program while playing back another and to watch a program while it is recording. EchoStar markets a digital video recorder similar to TiVo's DVR called the "DISH Player-DVR". TiVo is seeking monetary awards and an injunction against future sales of DVRs by EchoStar. The suit was filed in a federal district court in Texas.

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