

Book Review: A Casebook for Our Time

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Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy

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Reviewed by A. Douglas Melamed

You can tell from the table of contents. This is a modern, sophisticated, and somewhat inside-the-Beltway casebook. Its most important contribution, among many, is that it organizes the materials conceptually, rather than formalistically, and thereby helps student and practitioner alike analyze antitrust issues the way they should be analyzed and the way they are in fact analyzed by the enforcement agencies and, increasingly, the courts. The extensive, thoughtful commentary and the copious citations to the current literature should make this an unusually useful casebook for the practitioner.

Organization

The book is organized into four parts. Part I provides an introduction and overview. Parts II and III cover the substantive issues of antitrust law. And Part IV focuses on contemporary and institutional issues.

Part I, entitled “An Introduction to the Study of Antitrust Law,” consists of a single chapter that is intended to illuminate basic principles of competition policy and what the authors call “three themes” of the casebook: How antitrust is “evolving from the analysis of discrete categories of behavior toward reliance on a set of core concepts, which economic theory has greatly influenced;” the “still unfolding trend toward globalization of antitrust law;” and the wide range of “skills demanded of the antitrust lawyer.” (*Casebook*, pp. 2–3.) While this Part could be criticized for being too long, especially if thought of as an introduction, and for giving short shrift to vertical or exclusionary issues, it effectively makes accessible to the student the economic principles and policy issues that form the foundation of contemporary antitrust analysis.

The organization of Parts II and III constitute, to this reader at least, the most valuable contribution of the book. Part II, entitled “Conduct Having Collusive Anticompetitive Effects,” deals with problems of collusion—antitrust problems that arise when competitors agree to diminish their rivalry—and Part III, entitled “Conduct Having Exclusionary Effects,” deals with problems of exclusion—antitrust problems that arise when conduct of one firm or group of firms threatens to weaken their rivals or exclude them from the market. Gavil, Kovacic, and Baker are not the first to see this distinction, but their casebook embodies the most comprehensive and up-to-date implementation of it.¹

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¹ Judges Posner and Easterbrook made the same distinction in their casebook 20 years ago, and commentators and enforcements officials have articulated the distinction as well.

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The distinction between these two types of antitrust harm is fundamental to sound antitrust analysis. By organizing the casebook around that distinction, the authors have deliberately chosen to focus on the substantive and economic issue the distinction suggests—how might the conduct in question injure competition—rather than on the more formalistic issues suggested by books that are organized around legal categories, such as issues of agreement under Section 1 of the Sherman Act or mergers under Section 7 of Clayton Act, both of which encompass collusive and exclusionary problems. Organizing the materials around the distinction between collusion and exclusion enables the authors and the readers more clearly to understand the substantive issues. The authors' analysis of collusive and exclusionary group boycotts, for example, is both insightful in its own right and illustrative of the benefits of the book's structure. The same could be said of their treatment of distribution restrictions.

The structure of the book does have the effect of diverting attention from the more formalistic notions and shorthands that figure prominently in some of the cases, especially in the lower courts. These include, for example, the largely unsuccessful efforts of the courts to define a "group boycott" and the quantitative foreclosure tests used by some courts to determine the lawfulness of exclusive dealing arrangements. But these matters are for the most part discussed in the authors' extensive analytical text; and they are in any event matters that contemporary practitioners get to only at the end of their analysis, when assessing litigation risks or making arguments to courts. The authors have wisely chosen not to make them a major focus of the book.

The organization within Parts II and III is faithful to the authors' desire to avoid formal categories and to focus, instead, on economically based concepts. Part II thus proceeds, with understandable interruptions for such issues as how to distinguish concerted and unilateral action, from naked restraints like price fixing, to more complex competitor collaborations and joint venture issues, to vertical or distributor relationships with collusive or intrabrand effects, to horizontal mergers. The sequence is logical and effective.

Part III starts with dominant or single firm conduct and then covers concerted conduct having exclusionary effects, including both vertical agreements and vertical mergers. It thus sweeps into one part issues arising under Sections 1 and 2 of the Sherman Act, the Clayton Act, and the Robinson-Patman Act. The structure works, in part because, by beginning with single-firm exclusion, the book creates an understanding of the economics of exclusion that disciplines and provides a unified focus for the more disparate forms of concerted exclusionary conduct.

Part IV, entitled "Constructing the Modern Antitrust Case," consists of three chapters. Chapter 8, the first chapter in Part IV, reflects the authors' most questionable organizational decision. That chapter purports to apply the concepts discussed in Parts II and III in a more structured manner that reflects the way issues are likely to arise in a contemporary antitrust case or investigation. It focuses in depth on issues of antitrust injury, proving anticompetitive effects, the role of intent, entry, and efficiency.

These are, to be sure, issues that cut across the collusion/exclusion categories of Parts II and III. But the chapter appears repetitious of much that precedes it. And the discussion here of some issues, efficiencies in particular, obscures the different ways in which efficiencies affect the analysis in collusion and exclusion cases. The authors' decision to address these issues in a separate, later chapter might prove to be successful in the classroom; but it is likely that many teachers will choose to integrate the materials from this chapter into the earlier discussions of the issues in Parts II and III.

That is unlikely to be the case with the remainder of Part IV. Chapter 9 deals with the institutional

context of antitrust enforcement—issues of federalism, international jurisdiction, public and private enforcement, petitioning and state action limits on antitrust, and remedies. Chapter 10 deals with currently hot issues involving “innovation, intellectual property and the ‘new economy.’” (*Casebook*, p.1062.) The issues addressed in these chapters are sufficiently different from the broad themes developed in Parts II and III that the authors have prudently put them in a different and later part of the book.

Analysis

The book is distinctive in another important way as well, beyond its organization of the topics. It is rich in text, analysis, and explanation by the authors. Given the economic sophistication of the book, it is surprisingly light on supply and demand curves (this is not a criticism); but it uses, often and well, other forms of diagrams, flow charts, and tables to analyze cases and show the relationships between various concepts. Several of the notes compare U.S. and European approaches to competition law.

Although the leading cases of past and present are included, they are typically used after discussion and analysis to illustrate issues and problems. Other casebooks, by contrast, begin the various topics with cases, followed by questions and occasional commentary.

The difference is important. This is not a casebook for teaching students how to read cases, nor is it likely to appeal to those who want their students to learn antitrust inductively, by inferring principles from the cases. And it is not a casebook that just spells out the answers for the students. Instead, this book explicitly discusses the economic underpinnings of antitrust analysis, identifies key issues and then, with cases and problems, invites the reader to grapple with those issues at a more sophisticated level than is expected in a more traditional casebook.

The authors’ commentary is, for the most part, clear, sound, and imaginative. The authors draw upon their broad knowledge of the field, including the economic and legal literature and the analyses promulgated by the enforcement agencies. They are keenly aware of the current, unresolved issues affecting antitrust law and enforcement. The discussions of collusive and exclusionary effects, group boycotts, quick-look rule of reason, the economics of collusion, competitive effects of horizontal mergers, durable goods monopoly, raising rivals’ costs, exclusionary conduct, inferring market power, the economics of antitrust penalties, and antitrust principles in the “new economy” are especially illuminating.

Of course, having chosen to include so much of their analysis in the book, the authors provoke the reader to think about what he would say or how he would analyze the same issues. The authors’ discussion is not perfect, or at least it is not exactly what this reader would do, if, after having been armed with the authors’ rich analysis, he could add or amend to his liking. The things that might have been done differently, or even better, include the following, among others.

In Part I, the authors define “anticompetitive conduct” as conduct “likely to lead to the creation, maintenance, or enhancement of market power, or that involves the actual exercise of market power.” (*Casebook*, p.40.) That definition would encompass, for example, developing a new and better product, which is unambiguously desirable, and charging a supracompetitive price, which U.S. antitrust laws have long and wisely not regarded as illegal. “Anticompetitive conduct” is better defined with respect to the attributes of conduct that would cause it to be condemned under the antitrust laws if it had the effect of creating additional market power. One possible attribute of that type is that it does not create any efficiency, or at least not enough to be profitable for the potential defendant without the payoff of monopoly power. Also, the discussion of agreement in Part I and elsewhere does not clearly identify the question whether agreement is a legal conclu-

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sion applied to certain facts or, instead, a shared state of mind whose existence is sometimes inferred from circumstantial evidence.

The authors' effort in Part II to describe all variations of the rule of reason as being either "unstructured" in the *Chicago Board of Trade*² tradition or involving "ancillary restraints" in the *Addyston Pipe*³ tradition seems overstated. Neither identifies rigorously what the rule of reason is intended to ascertain (in collusion cases, whether the restraint on balance increases or decreases output), and together they leave the impression that there is no way, other than the unstructured way, to determine the lawfulness of a restraint that both enhances efficiency and restricts rivalry.

Also in Part II, the book would have been aided by inclusion of at least one joint venture case. And the authors missed an opportunity in the discussion of *Topco*⁴ to address the question whether an agreement can ever violate the antitrust laws by restricting competition that would not exist but for the agreement. The agencies treat this issue differently in the Intellectual Property and Competitor Collaboration Guidelines.

In Part III, the book should have given more attention to Justice Scalia's provocative dissent in *Kodak*.⁵ It should have inquired whether the errors in *Alcoa*⁶ were the result of an obsolete view of antitrust law or policy, on the one hand, or just mistaken economic analysis, on the other hand. The discussion of predation should have been more explicit about the limits of economic analysis and the policy judgments that are an ineluctable part of any predation rule that seeks both to reconcile competing dynamic and static concerns and to be administrable as a practical matter; and it should probably have included mention of the pending *American Airlines* case,⁷ which represents an effort to reconcile the insights of modern economics with the policy judgments embodied in cost-based predation rules.

Also in Part III, the authors should have mentioned the *Microsoft*⁸ case in their discussion of product design as exclusionary conduct. Their discussion of "monopoly broth" would have been richer if they had distinguished the idea of considering together various instances of lawful but aggressive conduct from the idea of aggregating various instances of anticompetitive conduct no one of which itself had a sufficient impact on competition to be unlawful. And the authors should have been clearer that vertical mergers are anticompetitive only if there is market power at both levels.

The development of analytical principles culminates with a discussion of the *Microsoft* case at the end of Chapter 8, in Part IV. It is the right place to end; but the authors do not end in what, to this reader, is quite the right the way. They note, with a typically thoughtful and illuminating diagram, the four-step analysis embraced by the court of appeals. The last step, which the court did not reach in the case, calls for weighing the anticompetitive harm of the conduct in question against its procompetitive justifications. The authors missed an opportunity to note that the court did not say how the weighing is to be done; the authors also did not discuss the solution to that

² *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918).

³ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

⁴ *Topco Assocs., Inc. v. United States*, 405 U.S. 596 (1972).

⁵ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

⁶ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

⁷ *United States v. AMR Corporation*, No. 01-3202 (10th Cir.).

⁸ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

problem proposed by the United States in that case and whether the court simply did not reach that question or, instead, chose deliberately not to embrace the government's proposal.⁹

In the end, though, these are small points. Some are probably oversights by the authors; others may reflect no more than differences in judgment between the authors and this reader. Perhaps more important, they are in any event testament to the depth of the book and its ability to stimulate thought and raise questions at the frontiers of contemporary antitrust analysis.

Conclusion

Casebooks are like recipes: You cannot really be sure just by reading.¹⁰ But you have to start by reading. And, judging from the reading, this is a wonderful casebook that can teach a great deal to both student and practitioner. ●

⁹ See *generally* Brief for the United States and the Federal Trade Commission as Amici Curiae in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, at 8–15 & n.2 (S. Ct. No. 02-682, Dec. 2002).

¹⁰ This problem is particularly acute at the moment because the teachers' manual has not yet been published.

Copperweld: The Basics and Beyond

ABA Section of Antitrust Law “Brown Bag” Program

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Editor’s Note: In 1984, the United States Supreme Court handed down its decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), curtailing application of Sherman Act liability under Section 1 to “intra-enterprise” conspiracies and creating what is considered a mainstay in contemporary antitrust thought. Almost twenty years later, the Corporate Counseling Committee of the ABA Section of Antitrust Law revisited the case in a program addressing *Copperweld*’s historical past, uncertain progeny, and possible future application. In this edited version of that August 28, 2002 Brown Bag program, moderator Brian Henry and panelists Geraldine Alexis, Stephen Calkins, and Mark Whitener provide practical advice and perspectives on *Copperweld* issues.

It is apparent from the discussion that, while the Court’s decision in *Copperweld* established clear guidance for a parent and a wholly-owned subsidiary, the rule as it relates to structures falling short of that is less clear. This issue is becoming increasingly relevant as firms seek more predictability and courts are faced with increasingly intricate corporate concerns. As Judge Boudin observed in *Fraser v. Major League Soccer, L.L.C.*, “the Supreme Court has never decided how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself.”

—MICHAEL R. BARNETT

BRIAN HENRY: We have a distinguished panel for this Corporate Counseling Committee Brown Bag program on *Copperweld: The Basics and Beyond*. Professor Steve Calkins will begin by providing us with a firm grounding on *Copperweld* issues. This will form the basis for the rest of the discussion. Mark Whitener will then cover the issue of how *Copperweld* applies in the context of less than 100 percent ownership. He’ll talk about where the courts and the agencies are on that issue. Gerry Alexis will conclude with a discussion of some recently proposed, though now off the table, California legislation that raised *Copperweld* issues. She will also address EC *Copperweld*-type issues.

STEPHEN CALKINS: Let me first confess that I am hopelessly torn in terms of my biases. As a law professor I revel in uncertainty, confusion, and issues that mystify students. On the other hand, I do a little bit of advising as Of Counsel to Covington & Burling, and while wearing that hat I have the practitioner's love of certainty. The tension between my two interests was driven home in a *Copperweld* context a while back when a client bought another firm. Assume (the actual facts were somewhat different) that before the acquisition both firms had been living contented lives, one with a 100 percent-owned subsidiary that was selling only in the U.S., the other one with a 75 percent-owned subsidiary that was selling only in Mexico. The apparently simple question that arose after the acquisition: could the firm continue to have the U.S. operation stay in the U.S. and the Mexican operation stay in Mexico? Or would that amount to per se illegal horizontal market division? As a legal advisor, I longed for certainty—but as a law professor I was grateful for a nice exam question.

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—STEPHEN CALKINS

It really used to be that black-letter law provided that agreements among separate corporations, even when they were commonly owned or when one was a wholly-owned subsidiary of the other, could be analyzed under Sherman Act Section 1. According to the Antitrust Section's 1975 *Antitrust Law Developments* book, the Supreme Court had indicated that "the intra-enterprise conspiracy doctrine will be applied to strike down concerted action between a parent and subsidiary, or between otherwise related corporations when the challenged conduct has the purpose or effect of unreasonably restraining trade."

That was the law when *Copperweld* came along in 1984. The defendants' situation was most sympathetic. A parent and wholly-owned subsidiary had entered into an agreement that was clearly procompetitive and raised no genuine antitrust concerns. The court of appeals obviously appreciated this but felt bound by precedent to find an agreement. President Ronald Reagan's new Justice Department supported a grant of certiorari in an amicus brief that argued very powerfully that the courts were getting this fundamentally wrong. There is a basic difference between Section 1 and Section 2, the brief asserted, and it is important to limit the reach of Section 1. According to the brief, "the difficulty with the intra-enterprise conspiracy doctrine is that it evaluates conduct within a single competitive unit by the stringent standard for conspiracy cases simply on the basis of an enterprise's choice of corporate form." Later, the Court granted certiorari, the FTC joined the Justice Department on a subsequent amicus brief supporting reversal, and the Court did so. Although today we think of *Copperweld* as a no-brainer, in fact, three Justices dissented and Justice White (who could well have joined the dissent) was recused. What today seems obviously correct was not so obvious back then.

What did the Court do? The court followed very closely the lead of the Solicitor General, and ruled in rather stirring language that "the Sherman Act contains a 'basic distinction between concerted and independent action.' The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization."¹ The Court then took this basic insight and applied it to relations between a parent corporation and a wholly-owned subsidiary. The Court ruled that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate conscious-

¹ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 452 U.S. 752, 761 (1984)).

nesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver.”² *Copperweld* had changed the law.

Copperweld presented the easy case: a parent can direct its wholly-owned subsidiary without concern for whether it is engaged in something the antitrust laws might consider a contract, combination, or conspiracy. On the other hand, it left open a whole host of fact patterns, many of which we’ll discuss today—sister corporations; ownership interests of less than 100 percent; control in part or full through something other than stock ownership; common control; officers, agents, and employees; joint ventures. *Copperweld* issues have been raised in merger cases when firms start to link up their operations shortly before merging (but after an agreement in principle calls for them to merge). The Supreme Court has not revisited the subject and given meaningful guidance on the long list of difficult issues that arise so regularly in everyday life.

Outside of antitrust, *Copperweld* has been considered in a wide variety of non-antitrust contexts, such as RICO, civil conspiracy, or contract or conspiracy tortiously to interfere with a contract. Although these courts cite *Copperweld*, they generally distinguish it, concluding that *Copperweld* is an antitrust decision based on antitrust concerns.³ Apparently recalling the original Solicitor General-inspired concern about too quickly condemning agreements under Section 1, courts have been reluctant to apply *Copperweld* outside of antitrust.

Where does that leave us, today? With considerable uncertainty, which my colleagues will address. As an introduction, let me mention one particularly insightful opinion: *Fraser v. Major League Soccer*.⁴ The case featured a challenge to the basic structure of Major League Soccer, LLC (MLS). Without going into details, MLS differs from the NFL and other sports leagues because a single entity (MLS) owns the various teams in the league. On the other hand, most of those teams have what is known as an “operator/investor,” who invests in MLS but operates an individual team, receiving revenues significantly based on how the team fares. The operators/investors control a majority of seats on MLS’s board of directors. The litigation had to resolve whether this was a single entity (MLS) or rather multiple entities (the operators/investors) who were capable of conspiring under Section 1. The district court found that an LLC was equivalent to a corporation, so MLS should be regarded as a single entity under *Copperweld*.⁵

The court of appeals was more hesitant to reach this conclusion. Judge Boudin’s opinion openly agonizes about the proper application of *Copperweld* in this kind ambiguous situation. Rather than a simple single firm, the court of appeals saw “a diversity of entrepreneurial interests that goes well beyond the ordinary company.”⁶ The court was reluctant to invoke *Copperweld* to immunize such a joining together of multiple business actors with differing views and perspectives. More fundamentally, the court observed that antitrust must choose between two ways of addressing fact patterns such as those presented in this case. *Copperweld* can be made to carry more water through intricate, detailed identification of situations deserving immunity, or, instead, *Copperweld* can be applied in a more relaxed fashion and courts can develop the rule of reason

² *Id.* at 771.

³ *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001) (RICO) (*Copperweld* “doctrine turns on specific antitrust objectives”); *Scandinavian Satellite Sys., AS v. Prime TV Limited*, 291 F.3d 839 (D.C. Cir. 2002) (*Copperweld* addressed a “limited issue” and did not establish that ownership creates a non-antitrust identity of interests between two corporations).

⁴ *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002) (Boudin, J.).

⁵ *Fraser v. Major League Soccer*, 97 F. Supp. 2d 130 (D. Mass. 2000).

⁶ 284 F.3d at 57.

into a practical, predictable means of separating the lawful from the illegal. In the end, the court did not have to choose a path because it found alternative grounds to affirm. My sense, however, is that the court preferred to rely more on thoughtful development and application of the rule of reason and less on aggressive use of *Copperweld*.

Back in 1984 when *Copperweld* was decided, the Solicitor General pointed to the spectre of near-certain illegality that followed from finding a Section 1 conspiracy. Today, much of what was then viewed as almost automatically illegal is considered lawful under the rule of reason. This suggests that Judge Boudin's approach (as I read it) makes sense: today, there is less need to rely on expansive applications of *Copperweld* to permit procompetitive activity to continue, and there's more freedom to let the rule of reason distinguish the lawful from the unlawful. On the other hand, of course, any departure from bright-line rules makes counseling more difficult. Thus I'm very pleased to turn the ball over to my colleague Mark Whitener to talk about practice realities.⁷

MARK WHITENER: Let me start by confessing that my bias is entirely that of the practitioner looking for as much certainty as I can get, largely unfettered by academic impulse. That is to say, I think there are a range of cases that should be easy and obvious and that, unfortunately are not, for reasons that I'll describe. And then I think there is another category of cases involving *Copperweld* issues that are going to have to be looked at on the facts of the particular case. I think that's inevitable in some of the situations Steve described. I will also say that, in looking for as much certainty as we're reasonably entitled to, I'm not sure the way forward is to throw everything into a rule of reason analysis.

All of us who counsel in the antitrust area know that once you get to a rule of reason analysis, you introduce a range of issues that are inherently somewhat uncertain. But with that said, one way to deal with *Copperweld* issues is to cover both of your bases. That is, do the best you can to get your arrangement within the protection of *Copperweld*. But also cover your flank by being sure that if there is any uncertainty as to whether you're dealing with a single enterprise for Sherman Act purposes—and there sometimes will be uncertainty—you also have a reasonable case that the conduct should be viewed as lawful, even if it's viewed as outside the protection of *Copperweld*.

So let's pick up where Steve left off, with the *Copperweld* decision itself. As he said, the decision addresses the specific case of a parent and a wholly-owned subsidiary. The Court expressly left open what to do in situations where the facts are different, including the case of a parent and a subsidiary that is not wholly-owned.

I want to divide the *Copperweld* world into two categories. The first category is the case where there is clear control from a corporate and securities point of view. I'll take the easy case, or what should be the easy case, where there is majority ownership by the parent of the voting shares of a corporate subsidiary which, unfortunately, the Supreme Court left open in *Copperweld*. What you have in the intervening years is a range of lower court decisions. And, if you look this up in a hornbook, you will find that the weight of opinion is that where the parent controlled a majority of voting stock in a subsidiary, those two entities could not be found to have conspired under the Sherman Act. But there are exceptions. For the most part, these are district court cases, so the outcome in a given case may depend on which district you're in or which precedent a court would follow in deciding whether a parent and a controlled, but not wholly-owned, subsidiary could be found to have conspired.

⁷ For further background, see Stephen Calkins, *Copperweld in the Courts: The Road to Caribe*, 63 ANTITRUST L.J. 345 (1995).

Here are some examples of the cases following *Copperweld* that have gone both ways on this issue: In the *Novatel* case, a 1986 Northern District of Georgia decision, the court decided that greater than 50 percent voting control equals *Copperweld* protection.⁸ There was a District of Oregon case, *Aspen Title* in 1987, which went the other way despite 60 or 75 percent ownership by the parent of the subsidiary.⁹ There are other decisions, going predominantly, but not uniformly, toward conferring *Copperweld* protection in the majority ownership situation. As recently as this year, in the Southern District of New York, there was the *Geneva Pharmaceuticals* case¹⁰ where *Copperweld* protection was not found in a sister corporation situation. There was a common parent—an individual who controlled their majority of the shares of two subsidiaries—yet agreements between the commonly-controlled subsidiaries were found to be subject to Section 1.

Now *Geneva Pharmaceuticals* illustrates, I think, how the judicial treatment of the issue has at times gone awry and what the risks are in this area, because of the types of factors that the court looked at in evaluating the *Copperweld* issue. I think these factors caused the court to get confused and go off the rails. You had in the case of one subsidiary the fact that the individual parent's ownership of the shares was not publicly known, and indeed, the court found there were efforts to conceal the parent's ownership of one of the entities. In the case of the other subsidiary, the parent was found not to have been an "active" investor, even though there was unquestioned control of a majority of the equity. So the parent in one instance was concealing his ownership of the shares and in the other instance was a passive investor, at least in the court's view, despite the fact that he owned the majority of the voting stock. And then the two entities entered into an agreement that was challenged under the Sherman Act, and the court said that these are not commonly controlled entities under the rubric of *Copperweld*, pointing to several factors that should have been irrelevant.

For example, the court said that these were independent corporations, and that the only basis for *Copperweld* protection is that they have a common owner. Well, most of the lower court cases have said that, in this so-called sister company situation where both are, in fact, controlled by a common parent, agreements between sister subs are protected. Again, that is the weight of the cases, but it's clearly not the uniform view. Cases like *Geneva Pharmaceuticals* suggest that if, as far as the public was concerned and as far as customers were concerned, the common control of the entities is ambiguous—it's not known, it's not open, notorious, and overt—then some judges may say, "We're not satisfied that the *Copperweld* analysis is met here."

Judges are not the only ones who have helped create the confusion. The antitrust agencies have had something of a hand in this, at least by omission. The 1988 Department of Justice Guidelines for International Operations took a position that I think was pretty straightforward and was clearly a logical follow-on to *Copperweld*. DOJ said, in effect, that when they analyze an acquisition of greater than 50 percent of the voting stock of another company, they treat that merger as a pooling of competitive interests; they're not interested in an argument by the buyer that, "Well, we may own 51 percent of the voting stock, but we're not going to exercise control, or we may let this company go off and exercise some degree of autonomy." Similarly, DOJ said, where you have a parent and a majority-owned subsidiary, *Copperweld* protection exists for agreements between them.

⁸ *Novatel Communications, Inc. v. Cellular Tel. Supply, Inc.*, Civil Action No. C-85-2674A, 1986 U.S. Dist. LEXIS 16017 (N.D. Ga. Dec. 23, 1986).

⁹ *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1987).

¹⁰ *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236 (S.D.N.Y. 2002).

Where you have a subsidiary that you clearly control but where there are other shareholders, the way to stay out of Copperweld trouble is to make it clear to the public, to customers, to the marketplace, that the control relationship exists—make it overt.

—MARK WHITENER

We all know that the '88 Guidelines are no longer in effect. When the antitrust agencies started looking at doing Competitor Collaboration Guidelines a couple of years ago, a number of businesses and groups said, "Look, here's an opportunity to deal with a fairly simple issue. Go back and revisit the '88 Guides on *Copperweld* and adopt that position." But the agencies didn't do it. Various reasons have been offered for why that may have been, but my sense is it was an instance of the hard case overwhelming the easy case. So what are the hard cases? Clearly there are going to be situations where there's an argument that entities are coming together for a common purpose but may also be independent for some other purposes. Or there may not be a clear control relationship—such as where there are subsidiaries that have a common shareholder that's only a minority owner; or where you have, as Steve said, individual executives, employees, agents of a company coordinating their efforts with the company itself. Or there may be joint ventures, trade associations, standard setting consortia, or other groups. In those cases, what you find the courts have done, not surprisingly, is look at the facts of a particular case.

Steve mentioned the *Major League Soccer* case. Sports leagues have been primary fodder for *Copperweld* analysis. There is also the *NBA* case in the Seventh Circuit¹¹ where the court said, in essence, we're going to look at *Copperweld* on an issue-by-issue basis, so if you have a business arrangement, like a sports league, you are going to need to look at the particular conduct that's involved, and we may find that the league is a single entity for some purposes and we may find that the members thereof, or investors or teams, or independent actors for different purposes. I think that some case-by-case analysis is inevitable; it's dictated by *Copperweld*, and it's going to continue to be done in some circumstances.

There are several counseling implications from all of this. First, in the clear equity control situation, but where ownership is less than 100 percent—where the *Copperweld* analysis should provide categorical protection, but doesn't—I think the risk can be minimized if you avoid situations like those that have led some courts to go off the rails. Where you have a subsidiary that you clearly control but where there are other shareholders, the way to stay out of *Copperweld* trouble is to make it clear to the public, to customers, to the marketplace, that the control relationship exists—make it overt. And I think a secondary step—again, which arguably shouldn't be necessary—is to ensure that when the affiliated entities are out there in the marketplace, their conduct doesn't create the impression in the minds of customers that they are acting independently and competitively vis-à-vis the parent. That's usually going to make good business sense anyway. It's not usually going to be the case that a corporate parent will want to have its controlled subsidiaries out there competing with each other, approaching the same customers with the same or similar products.

Ordinarily, as a matter of good business organization, that will be the way to do it, but there may be exceptions. There may be times when commonly controlled entities are in related fields, and there are business reasons for them to be doing similar things without tight control in every instance by the parent. But if you allow that to happen and create expectations in the marketplace that these are independent competitive entities, and then take steps behind the scenes to coordinate the entities' competitive actions, there is the possibility of a customer being upset, surprised, and raising a complaint, and a court may be receptive to the argument that there is an antitrust issue despite the fact that common corporate control of the entities ought to be dispositive.

¹¹ Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593 (7th Cir. 1996).

So, in the range of situations where control is not obvious from an ownership standpoint, you need to do the two-step analysis I described before. First, take steps where possible to make it clear to the marketplace that the enterprise is behaving as a single entity. But then as a back-stop, since *Copperweld* protection may not be clear before the fact, it's important that you also run the antitrust analysis assuming that an agreement could be alleged, and make sure that if it were examined under the rule of reason, there would be a legitimate rationale for it.

GERALDINE ALEXIS: To further complicate things, Senator Dunn of the legislature of the State of California, last February [2002], decided that the *Copperweld* doctrine was not something that should be applied in California. Senator Dunn proposed legislation—SB 1814—that would amend California's counterpart to Section 1 of the Sherman Act, the Cartwright Act. He would amend Section 1 to say "liability under this chapter is not precluded solely because the combination described in subdivision (a) is between two or more persons who are related to one another by common ownership." And even if it was a wholly-owned subsidiary—which *Copperweld* addresses—it would be possible for sister corporations or parent and a sub to conspire and violate the Cartwright Act.

I might add that the Cartwright Act also has criminal penalties, as well as a civil right of action. This bill did pass the Senate—it was a stealth bill in the sense that the business groups in California didn't really become aware that it was moving forward until fairly late in the game. It was sometime around June that this became known. And I was retained, just for full disclosure, by a client to look at this and deal with the staff at the AG's office—they were the ones who were pushing it—to try to persuade them that this didn't make a lot of sense. This was my first lobbying effort. I discovered that arguing that things don't make a lot of sense, and trying to be very rational weren't necessarily the way to go, but I did learn a lot about the process as well as what the thinking was behind this legislation.

The purpose of the amendment to the Cartwright Act was really driven by the concern out here that the energy companies were not being nailed. As you may recall, last year, California went through an electricity crisis of major proportions, and there was a lot of political pressure to bring the energy companies to the courtroom and prosecute them for raising prices to an unreasonable level. The antitrust office within the AG's office, as I understand it, conducted a pretty thorough investigation and wasn't able to find evidence of collusion, at least at that point in time, between unrelated companies. So they decided that this legislation—which I suspect they had in their drawer for many years and probably have tried many times before to get through the legislature—would solve the problem. They would try to amend the Cartwright Act, claim that the bill was clarifying existing law thereby making it retroactive (even, they told me, on the criminal side), and prosecute the energy companies for collusion among corporate subsidiaries in trading energy.

The trading, I think, was basically trading back and forth—sham trading was the allegation—so as to make the prices look higher than they actually were. In my discussions with the California AG's office as well as the Senate staff, it was clear that they hadn't really thought this through. When I questioned them as to whether immunity would ever apply, they took the position, "Well we're not saying that you could never get immunity. What we're saying is that the parent and the sub or the related corporation have to prove that they act with an economic unity of interest as in the pre-*Copperweld* days." They thought that was a reasonable way to proceed, and they were relying a lot on one case out of the California Appellate Court which, curiously, supported *Copperweld*, so I don't quite understand why they were relying on it. But in talking to them I pointed out that if, for instance, the energy subsidiaries were acting under the direction of the parent,

which they probably were, then wouldn't they then have an economic unity of interest? And they said they hadn't thought about that. Well, I said, "Under your own standard for *Copperweld* immunity, or whatever type of intra-enterprise immunity you would permit, they would qualify."

I also pointed out to them that the problem is that, as you prove economic unity of interest—that is, more and more direction from the top—are you also possibly digging yourself into a hole? Because if you don't qualify for *Copperweld*-type immunity—if the court finds you not eligible for it—and this again is if the California bill had passed, then are you really providing evidence of a hub-and-spoke conspiracy where the parent is basically telling its subs what to do? Before you know it, you could have proven the case against yourself at least on the substantive Section 1 claim, in this case the Cartwright Act.

The bill passed the Senate, but by the time it got over to the California Assembly there were a number of business associations that had come together and started to lobby. The Motion Picture Association (which is very powerful in California), a high-tech company association from Silicon Valley, and the California Chamber of Commerce, all descended on the Assembly and argued that this was a totally unacceptable amendment. I think it was that political pressure, as opposed to the reasoning that I was trying to bring to the table, that had the major impact, and the *Copperweld* part of the amendment was withdrawn.

There was also something behind the *Copperweld* amendment that I think Mark was alluding to and what the staff in the AG's office seemed to be concerned about—fraud—that is, basically having a company engaged in transactions that appear to be between unrelated entities and that therefore give the appearance that there is a real transaction, when there really isn't an arms-length transaction. I had pointed out to the AG staff that there is a fraud statute that they might have some success under, but there was no point in using this meat cleaver to affect other companies that have legitimate reasons to have subsidiaries. For regulatory and other reasons, companies often have to have separate subsidiaries in different states.

The other thing I was asked to touch upon, and I'm certainly not an expert on this, is what foreign jurisdictions recognize a *Copperweld*-type doctrine. The only jurisdiction I'm aware of, and this is through secondary sources, is the EU. Article 85 of the Treaty of Rome makes it clear that for an agreement to violate the treaty, it has to be among two or more undertakings. While there isn't a very solid body of law dealing with intra-enterprise activities, there are a few cases in the EU in which it appears that they've adopted an economic entity of interest test. They look to see just how much autonomy the subsidiary and its parent or sister corporations have to determine whether their activity is eligible for immunity. I think they've been clear as to what the purpose is of recognizing that kind of immunity: not to force companies to bring corporate units in as divisions just to avoid a problem, for instance, in having licenses between various subsidiaries within your company. So they recognize that the formation of subsidiaries, etc., can serve economy efficiency purposes which shouldn't be defeated by some formalistic approach to the law.

CALKINS: Well, Gerry, I can't let your claim that California is the strangest state go unchallenged. Massachusetts regularly rivals California, and it does so here. In *West Boylston Cinema Corp. v. Paramount Pictures Corp.*,¹² the Massachusetts Superior Court addressed a movie clearance agreement between a corporation and the "controlling shareholder" of that corporation's parent corporation, and applied *Copperweld* to conclude that the arrangement could not be a "conspir-

¹² *West Boylston Cinema Corp. v. Paramount Pictures Corp.*, 2000 Mass. Super. LEXIS 628 (Sept. 18, 2000).

acy . . . in restraint of trade” under state antitrust law. This did not end the matter for the court, however, which went on to ask “whether the clearance between [the two firms] actually restrained trade,” apparently as a “contract . . . in restraint of trade.” Although the court eventually found the restraint to be reasonable, this should not disqualify the Massachusetts candidacy. The case also serves as a reminder of the potential and actual importance of state law.

Let me put in a good word on behalf of the antitrust system in two respects. First, an awful lot really is clear. Wholly-owned sister corporations are exempt. And 100 percent ownership is exempt. Although I’m not sure I’d join Mark in drawing the line at 50 percent, because as the percentage ownership increases and if nothing unusual is going on, you are very likely to be safe. The courts are really quite good at briskly finding agreements among officers and employees and agents to be exempt, with a few exceptions such as where there is some kind of independent personal stake. There is a wide area where the lower courts are very predictably finding that *Copperweld* immunizes agreements.¹³

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Although many, many cases are easy, creative defendants are understandably attempting to rely on *Copperweld* and *Copperweld*-based thinking to push the envelope. In a few cases, which are worth noting less for counseling than as background, aggressive invocation of *Copperweld* has succeeded or come close. A mere 20 percent ownership may be enough, if accompanied by “significant and substantial influence,” according to *Fresh Made, Inc. v. Lifeway Foods*.¹⁴ Defendants have relied on *Copperweld* to defend franchisor-franchisee situations and licensor-licensee situations.¹⁵ There are cases relying on *Copperweld* to conclude that a trade association did not act by agreement.¹⁶ One case even seems to say that a covenant not to compete is exempt, under *Copperweld*-type of thinking.¹⁷ In an important recent Fourth Circuit decision, a gift with strings attached was found not subject to Sherman Act scrutiny because *Copperweld* had made “concerted action” a term of art that requires a joining together of power to achieve an outcome otherwise not possible.¹⁸

—STEPHEN CALKINS

A good example of aggressive reliance on *Copperweld* is provided by a pending dispute that I’ll present as a hypothetical. Imagine two major hotels in a moderate-sized city both of which are national brands. Although the hotels appear completely independent, in fact one of them is wholly owned and operated by the Jones Corp. and the other is operated by Jones Corp. pursuant to a recently-entered long-term management contract. The two hotels assert that they may agree on anything they wish, including prices, because Jones Corp.’s ownership of one hotel and management of another means that there can be no Section 1 agreement between them. In other words, an agreement merely on prices would be illegal per se, but a contract that temporarily eliminates all competition is immune. *Copperweld* thus offers ample opportunity for creative lawyering.

As with much of antitrust, clients wanting to push the envelope will encounter uncertainty, which should not prevent us from understanding that much is already resolved and well understood. There is a broad area where advice-giving is quite easy.

¹³ See, e.g., *Livingston Downs Racing Ass’n v. Jefferson Downs Corp.*, 2003-1 Trade Cas. (CCH) ¶ 73,946 (M.D. La. 2002).

¹⁴ *Fresh Made, Inc. v. Lifeway Foods, Inc.*, 2002-2 Trade Cas. (CCH) ¶ 73,779 (E.D. Pa. 2002) (dictum).

¹⁵ *Search International, Inc. v. Snelling & Snelling, Inc.*, 168 F. Supp. 2d 621 (N.D. Tex. 2001); *St. Martin v. KFC Corp.*, 935 F. Supp. 898 (W.D. Ky. 1996) (franchise contract was unilaterally imposed so not subject to Section 1).

¹⁶ *Trugman-Nash, Inc. v. New Zealand Dairy Board*, 942 F. Supp. 905 (S.D.N.Y. 1996).

¹⁷ *Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc.*, 946 F. Supp. 495 (E.D. Ky. 1996).

¹⁸ *Virginia Vermiculite Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002).

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—GERALDINE ALEXIS

ALEXIS: Well, Steve, I can't leave without another word on this. Keep in mind, though, the California AG's office takes the position, whether or not they will ever go into a court and really try to rely on it, that California law—the Cartwright Act—does not recognize *Copperweld* and that they were just clarifying with this amendment. At least over in the AG's office, they believe that there is no *Copperweld* doctrine in California. There may be some states that are still out there, namely California, where there is a little bit of risk on that point. I don't know how you deal with that in counseling, other than just rely on the good sense of the California courts at least to rein them in.

WHITENER: First, I agree with Steve that there are a lot of situations here that are not too hard. It is not an issue that preoccupies me on a daily basis, and my client is a fairly broad-based company. Second, to go back to the question Gerry posed a little earlier—are you essentially prejudicing yourself if you do take the position that affiliated entities are commonly controlled, so that you are setting yourself up to fail if somebody disagrees?

I think you need to essentially make an election in your business planning as to whether you are going to defend coordination on a *Copperweld* basis or not. Now when I said you need to have a hip pocket argument in reserve in cases where *Copperweld* protection is unclear, what I meant in terms of the substantive analysis is that if there were found to be coordination that is subject to Section 1 analysis, you would also have arguments that it should be viewed as legitimate under the rule of reason. But I don't think typically you are going to be able to play both sides of the fence on whether you are coordinating the activities of the affiliates in the first place. If you are, then you either must have a good *Copperweld* argument or the arrangement has to be defensible under the rule of reason. You can't coordinate and then later say, "Well, there was no coordination, there was no agreement."

The other thing I just want to mention is that there can be real business situations in which commonly controlled entities are not always entirely coordinated and seamless. For example, a lot of companies have multiple operations, and suppose that one of those operations deals with a customer who is also a competitor of a different business within the controlled entity. Those customers might in some situations want, as a contractual matter and as a commercial matter, to be assured that certain confidential information they provide to their supplier isn't also going to go to an affiliated entity of the supplier that competes with the customer. They may want an information firewall. Often those are done for business reasons to give the customer the protection it wants. Sometimes firewalls are imposed by antitrust decrees to remedy vertical merger issues. That is not at all inconsistent with *Copperweld* protection for agreements among the commonly controlled businesses. I am just pointing out that, when I say the way to avoid problems in majority ownership situations is to make certain the relationships are overt and that it is clear that everybody is commonly controlled, there may be times when those commonly-controlled entities are not run in an entirely seamless, "single-enterprise" manner. There may be legitimate reasons to respect the separateness of those entities for commercial reasons, such as assuring a customer that information that goes to one entity will not go to the other. Commonly coordinating the affiliates is usually the sensible business thing to do, but it doesn't always mean that you are going to do it entirely or perfectly or in every respect.

HENRY: Let me mention a comment that came in this morning via e-mail during the Brown Bag discussion. Mark, you reference *Copperweld* protection several times and the importance of holding the company as a single entity, but the flip side of that is if you are behaving as a single entity, then for Section 2 purposes, the assessment of market power will combine and consolidate

all of your various holdings. Assuming that you have two wholly-owned subsidiaries that may be competing with each other in the marketplace, offering the same or similar product, will their market shares be combined for Section 2 purposes? It is not really “immunity from the antitrust laws”; you have to consider the Section 2 implications, also.

WHITENER: That is clearly right. When we all talk about *Copperweld* “protection” or “immunity,” we are simply dealing with whether there is an agreement. By the way, there are court decisions that have said that if you meet the criteria of *Copperweld*, it could apply to not only a Section 1 agreement but also to an agreement to monopolize under Section 2. But it is, strictly speaking, only a question of whether there is an agreement.

ALEXIS: I thought I would comment on the use of *Copperweld* in other areas. I think as Steve said, especially in the vertical areas where you have an agent, *Copperweld* seems to be creeping in. I think that makes a lot more sense than the dichotomy in the resale price maintenance area of asking, is somebody really an agent or somebody a retailer for purposes of dictating the retail price? The analysis as to whether there is an economic interest—a unity of interest—seems to me to be a more thorough analysis than trying to just establish that dichotomy, though admittedly on the issue of whether someone is an agent, some of those questions come up.

The other area where *Copperweld* creeps in is under Section 8 of the Clayton Act on interlocking directorates. There you have to worry about whether you have an interlocking director to lead the potential charge when you own less than 100 percent of a company and you are hovering just around 50 percent.

The courts have said that they are going to use the same analysis under *Copperweld*, that is, is there sufficient evidence of control? They obviously go further than *Copperweld* because *Copperweld* only applies to a wholly-owned subsidiary situation, but they will look at situations where the ownership is less than 100 percent and follow some of the district court cases that have developed *Copperweld* in minority ownership situations under Section 1 of the Sherman Act.

HENRY: We really appreciate the participation of everyone on the panel. It’s been very interesting and insightful. ●

Lessons from Real Life

True Stories that Illustrate the Art and Science of Cost-Effective Counseling

Editor's Note: *Thomas Leary has been a Commissioner of the Federal Trade Commission since November 1999. Before entering government, Commissioner Leary held a variety of highly distinguished positions in the private sector. From 1983 to 1999, he practiced as an antitrust and trade regulation partner at Hogan & Hartson, and before that he served as Assistant General Counsel of General Motors, with overall responsibility for antitrust, consumer protection, and commercial law matters. He was a partner at White & Case before going to General Motors. Commissioner Leary is a graduate of Princeton University and Harvard Law School. This article is a later written version of remarks Commissioner Leary delivered on October 25, 2002, at the ABA Section of Antitrust Law Antitrust Masters Course in Sea Island, Georgia.*



Thomas B. Leary

The lessons recounted here are drawn from my own personal experience. I think they illustrate some of the things I learned as an antitrust counselor and litigator for over forty years.

In their role as counselors, lawyers in private practice bear the primary responsibility for enforcement of the antitrust laws in this country. They deal with the issues day-to-day and get in at the beginning of the movie. As such, lawyers deal with a lot of serious issues before they ripen into serious problems. Those of us who work in government only see a small sample toward the middle or the end. Without the efforts of the private bar, the system would fail.

In looking back at my own years in private practice, certain lessons stand out that I would particularly like to pass along.

■ **Thomas B. Leary** is a Commissioner, Federal Trade Commission. As always, the views expressed here do not necessarily represent the views of any other Commissioner—a caveat particularly appropriate here because they are primarily based on the author's experiences in the private sector.

Lesson 1: Imagine the View from the Other Side.

The first lesson goes back to my days in the Navy, before I even went to law school. Shortly after I was commissioned as an Ensign in 1952, I found myself at the Naval Intelligence School in Washington. I learned a lot of fascinating things there, but one experience, in particular, has stuck in my mind ever since. Over the years I have come to appreciate its close connection to things I have done as a lawyer.

One of the instructors told us that “the role of a good intelligence officer is to act as the enemy’s representative on the commander’s staff.” The *enemy’s* representative! Believe me, you sit bolt upright when you hear something like that in wartime. What he meant, of course, was that it was our job to learn as much as we could, from a variety of sources, about the capabilities and the strategies of the enemy—to try to think like the enemy thinks—to help the commander anticipate what will happen in battle.

It seems to me that a similar thought process is also essential for an antitrust counselor. When you look at a proposed business plan, you need to imagine how a government lawyer, or perhaps a prospective plaintiffs' lawyer, is apt to react—based on precedents, guidelines, speeches, or other sources of information. These people are not necessarily the “enemy” but they clearly have a different perspective, and they may be adversaries someday. A good lawyer needs to scope out their likely reactions and communicate them to the client without fear.

That “without fear” part is important because some clients may not understand what a lawyer's job is all about. You may hear things like: “Whose side are you on?” or “I thought you were part of the team.” You will need to explain the difference between an advocate in a public setting and a counselor who gives privileged advice in private. This may not be easy at first, but you do the client a disservice in the long run if you tailor your message to avoid some potential unpleasantness up front.¹

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an advocate in a public

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Lesson 2: The Rules Are Not Obvious.

Fast forward a few years. I was a young antitrust associate at White & Case around 1960 when news of the multiple conspiracy indictments in the so-called “Electrical Cases” splashed on front pages across the country. The impact was roughly comparable to the accounting scandals in the news recently. I got an agitated telephone call from one of my brothers, who was working for a major company in a marketing capacity. He referred to all the news articles about competitor price discussions and asked in astonishment: “Is that kind of thing really illegal?”

The lesson, of course, is that the commands of the antitrust laws are not intuitively obvious, even to relatively well informed people in the business community. In terms you may remember from law school, antitrust offenses are generally *malum prohibitum* not *malum in se*. Business people may be generally aware today that hard-core price fixing in smoky rooms is wrong—because of extensive publicity over an extended period of time—but the more subtle offenses are still not obvious. Varieties of market division are a particularly good example; a lot of people still think it is somehow unethical to actively solicit business from a competitor's good customers. We in the legal profession cannot be too sanctimonious about all this because in the pre-*Goldfarb*² days we acted on the same beliefs.

When you structure and present compliance programs, you need to recognize that there will be some psychological resistance, along with widespread ignorance. These issues also have a bearing on the way violators should be treated after the fact. People who violate antitrust norms are not all rogue elephants (though some surely are). A policy of indiscriminate harshness will be perceived as unfair and, equally important, will shut down the channels of self-reporting that you need to rely on.

Lesson 3: The Dangers of Casual Contacts.

Shortly after the *Electrical Cases* broke, White & Case was one of a number of firms hired to defend General Electric in the myriad private-damage actions. Our particular focus was on turbine-generators and, as a very junior member of the team, I had to learn a lot about these big

¹ Another aspect of the “unpleasantness” issue will be discussed in Lesson 8. This issue may actually be a more difficult one for “outside” counsel than “inside” counsel today, given the breakdown in longstanding client/law-firm relationships and the prevalence of so-called “beauty contests.”

² *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), of course, was the case that made it clear lawyers were subject to the antitrust laws.

machines—including the way they were custom designed and bid and the competitor discussions of the bids that created the antitrust problem.

It became obvious that a lot of these discussions had occurred at otherwise legitimate trade association meetings, not as part of the formal business agenda but in the uproarious and liquid receptions that followed. I particularly remember a defense lawyers' strategy discussion when someone raised the question of whether we could defend on the ground that Mr. X was unauthorized to speak for the General Electric Company and I, with youthful irreverence, suggested: "Given the circumstances of his communications, we should argue that Mr. X was unauthorized even to speak for himself."

The lesson, of course, is that antitrust offenses can be committed casually, in non-business settings, after hours. Compliance with the antitrust laws is not something that can be reduced to the review of agendas or the preparation of a checklist. You have to rely on peoples' good instincts in settings where they may not be particularly wary or attentive. This is why it is important to go beyond a list of "dos" and "don'ts" and try to explain, on a deeper level, what the antitrust laws are all about.

Lesson 4: It Can Happen Anywhere.

I once was outside antitrust counsel for a good client, which had a number of executives who seemed to delight in skating as close as possible to the edge. It made for a lively, if nerve-racking, practice. One of these executives was fixated on the idea that he should have lunch with his opposite number in a competitive company, who had been newly appointed from outside the industry. There was no obvious business reason: "I just want to find out what kind of guy he is." (Maybe, he had once been to the Naval Intelligence School.) I said, of course, that it was a bad idea, absent a legitimate business purpose—particularly since the client was the market leader in a tight oligopoly. We went around in circles for weeks. Then, he came up with the notion that I should attend the lunch, as well, along with a designated lawyer from the other company. In a weak moment, I agreed.

The four of us had a fine lunch in a neutral city, talking about the usual things you would expect of four men who do not really know one another very well. (Sports, and sports.) I heard nothing that was remotely problematic and, when I returned to my office, I prepared a memo for future reference and mailed a hefty bill, which included the travel time. A happy outcome? Not quite.

About three years later, visiting on another subject, my client said out of the blue: "By the way, did I ever tell you what happened after that lunch as we were picking up our coats to leave the restaurant? When you two lawyers weren't watching, the other guy nudged me and whispered 'You lead.'"

Once I recovered my bearings, the obvious question was: "What did you say?" He replied: "Oh, don't worry; I didn't say anything. I just nodded, like I'd heard." You can imagine the lecture that followed, to the effect that he was very lucky that there had been no unusual price movements that had attracted anyone's attention; that, if there had been, this five-second exchange could supply evidence of a price-fixing conspiracy; that he ought to know better, etc., etc.

The point of this story is not just to confess my own lapse of judgment. The point is to illustrate once more that the antitrust laws can be violated in the most unlikely settings (almost under the nose of two chaperones) and with a moment's thoughtlessness or recklessness. The perp left the company shortly thereafter and, to this day, I do not know whether he was a naive innocent or an active collaborator. It really doesn't matter because the antitrust laws do not distinguish between the two.

Lesson 5: Words Can Kill.

Between my tours in the law firms of White & Case and Hogan & Hartson, I was responsible for antitrust compliance at General Motors Corporation. This was in the 1970s, when the company was popularly, if erroneously, believed to have “market power,” and was everyone’s favorite antitrust target. I always liked to work for clients like this, partly for the same reasons that move me to cheer for the New York Yankees,³ but mostly because they tend to take antitrust matters very seriously. General Motors certainly did; every business plan of any consequence was vetted with the antitrust lawyers.

At some point in the 1970s, the threat of Japanese import competition first became very serious, and management was challenged to come up with innovative strategies. I was once called upon to review a particular proposal at the headquarters of one of our divisions. To fire up the troops, the conference room was festooned with posters dating from World War II, like “Remember Pearl Harbor!” and other more incendiary slogans.

The proposed strategy might indeed have had a serious impact on some imports, but it was genuinely innovative and therefore carried very slight antitrust risk (though it was later abandoned purely for business reasons). After I delivered a reassuring antitrust opinion, however, I added that all of the posters had to come down and people were not to voice any such sentiments, even alone in their closet at home. As you can imagine, this advice was greeted with stares of stupefaction.

I went on to explain that these childish slogans were not likely to be seriously cited as evidence of predatory intent but that they were evidence of a mindset that was dangerous for any company vulnerable to antitrust attack. The operative slogan should be what the company can do *for* customers not what the company can do *to* competitors. If people view the world through this prism, they are much less likely to get into trouble. An emphasis on words is not just a semantic exercise.

The story also illustrates the value of shock-therapy. I do not think the listeners will forget the time they were told to pull their posters down, and the reason why. At another meeting with another client,⁴ a questioner identified himself as the “manager of sales for the Seattle market.” He initially bristled when I said there was no such thing as a “Seattle market,” because he assumed I was belittling his job. He calmed down when I went on to explain why it is dangerous to use the word “market” as a noun. The reason is that the word (like the word “agreement”) has specific legal overtones that the speaker might not fully understand or intend. Examples that may seem overblown are memorable and help to make a larger point.

Lesson 6: Be Realistic.

In the Li'l Abner comic strip, a character named “Marryin’ Sam” would offer a barebones wedding for one dollar, with added embellishments at added cost. As I recall it, the five-dollar wedding would conclude as he was fired from a cannon, or some such rousing finale.

I used to talk about Marryin’ Sam’s sliding scale of weddings whenever I was asked to design a compliance program for a client. The reason goes beyond the usual caveat that it is a good idea to agree on costs up front. When you launch a compliance program, you want to be sure that the client will follow through on the steps that have been included. Like it or not, you may be deemed

³ Red Smith, the great sports columnist, once wrote that rooting for the New York Yankees was like rooting for United States Steel. I remember thinking that’s exactly right—I root for U.S. Steel, too. In fact, I still root for great enterprises and also for lawyers who help their employees understand and comply with the law.

⁴ This is just an example, and does not count against the quota of stories.

to have established a standard of care, and the company may suffer if management later decides that the whole thing has become too burdensome.

Let me give you a specific example. When we printed an antitrust compliance booklet at General Motors, we had to decide which employees would be given a copy. If the distribution was too restricted, those who needed to know might not get one; if it was too broad, it might not be taken as seriously. We wanted people to believe that they had been particularly selected for the advice, and went through our organizational charts in detail to identify the job descriptions of people who might possibly get the company in antitrust trouble. We identified 40,000 of them! Big company.

If we had gone further and said, for example, that everyone in this category had to receive a specified number of lectures—or even sign annual affidavits—we knew that we would be launching a program that would not be continued across the board. There is never going to be a 100 percent fail-safe antitrust compliance program (see Lesson 4), and it is better to have a realistic program that management will support and honor than a more comprehensive one that will gradually be abandoned.

In fact, this is true of law compliance generally. Your antitrust education program has to compete with education on safety, environment, SEC, EEOC, foreign payments, and the myriad other regulations that govern corporate behavior. Counselors need to practice triage analysis with sensitivity and common sense or management people will be spending all their working hours listening to lawyer lectures.

Counselors need to practice triage analysis with sensitivity and common sense or management people will be spending all their working hours listening to lawyer lectures.

Lesson 7: What Is the Client Really Trying to Do?

One of the advantages of an ongoing counseling relationship—either inside or outside—is that you get to see business proposals at an early stage, before implementing steps have been taken. I remember when the president of a regular client made a speech in which he noted that the antitrust authorities were now apparently much more tolerant of joint ventures⁵ and that people should think about them. Very shortly thereafter, I was asked to review an avalanche of joint venture proposals.

It soon became obvious that people were proposing joint ventures because the company president had mentioned joint ventures, but neither they nor he had given sufficient thought to whether a joint venture structure was really necessary to accomplish the business objective. In most cases, it turned out that some kind of long-term supply or customer relationship would be just as effective—or nearly as effective—and involve considerably less antitrust risk.

In my experience, clients will frequently opt for the “less restrictive alternative,” once the risks are explained. When clients say they appreciate lawyers who are helpful rather than obstructionist, do not assume they are asking for dishonest advice. Your experience as antitrust counselors will have made you familiar with a variety of business arrangements—innovative ways of getting from here to there. Your clients may not have the same familiarity with different legal forms or appreciation of different legal risks, and they genuinely appreciate counsel who can solve problems in a way that will avoid legal complications.

⁵ Presumably, this was about 1984, the year that the first version of the National Cooperative Research Act was passed and the GM-Toyota joint venture was approved by the FTC.

Lesson 8: Make Clients Take Responsibility.

Once, on an otherwise fine day, the president of General Motors called me over to his office. The top executive offices were large, richly appointed, and altogether intimidating. The president did not come out from behind his desk to greet me in his usual friendly fashion. In fact, the reception was downright chilly.

The conversation started something like this: "I understand that you have advised that General Motors cannot do . . . [something he had proposed]. Is that correct?" I answered to this effect: "No, that is not quite right. What I have advised is that if the company did this, the chances of litigation were very high, the chances of winning were very low, and the amounts at stake were very large. The proposal is not illegal on its face, however, and you can do it if you want. The choice is yours."

It was amazing how the atmosphere changed! Like a balloon deflating, he settled down, smiled, and said: "Maybe you'd better explain to me what is at stake here."

Absent a per se or criminal offense, it is not counsel's job to decide whether a company will take antitrust risk; that is what line managers are paid to do. The lawyer's job is to explain the risks in the most objective way possible. If the lawyer attempts to shade the advice, in order to avoid momentary unpleasantness (or win a "beauty contest"), the client is not well served. (See Lesson 1.)

In fact, I would go further and suggest that realistic appreciation of the proper roles of counsel and client should actually reduce client conflicts. Anytime you find yourself arguing with a reluctant client, stop and think. The argument likely results from a blurring of roles; someone has moved over to the wrong side of the desk. The client may be second-guessing unwelcome legal advice, which is really silly. (You might not want to follow your doctor's recommendations, but would you argue about the diagnosis?) Alternatively, a risk-averse lawyer may be usurping a management function. (That is why the GM president was mad when he got a garbled version of my advice.)

When I was in private practice, I found that a useful analogy to use with clients is a televised weather report. Like everyone else, I listen to weather reports because the announcers know a great deal more about the subject than I do. At the same time, however, I realize that weather patterns are complex, predictions are inherently uncertain, and there is always the possibility that the predictions will be wrong. Even more important, I understand that it is up to me, not the announcers, to decide whether I should wear my raincoat.

So it is with legal advice. Clients pay antitrust lawyers for advice because they understand the lawyers know a lot more about antitrust law than they do. They also expect predictions, even expressed in percentages like weather forecasts. I was willing to do that but always emphasized that even the most careful and informed predictions may be wrong and that, in the end, it is up to the client to decide what action to take.

This lesson also has a bearing on who is responsible for corporate law compliance generally. During the 1970s, it was fashionable for lawyers to anoint themselves as the "conscience of the corporation" or some such high-sounding title. This is a dangerous idea. If managers believe that compliance is primarily the lawyers' business, they will treat "approval" of lawyers as just another hurdle to be cleared. They will inevitably be tempted to slant the facts in order to get the needed clearance and they will get bad advice. If they are held accountable for compliance themselves, their own survival instincts will encourage candor and lead to better business decisions. ●

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Antitrust Liability for Category Management and Other New Merchandising Techniques: Have You Updated Your Counseling?

Ted Banks

The Supreme Court's refusal to disturb the billion dollar judgment that Conwood Company obtained at the expense of United States Tobacco Co.¹ drew a great deal of breathless attention. Of course, the size of the verdict (more than \$1 billion after trebling) would result in a case of "sticker shock" for most people, even antitrust lawyers. But some of the press reports characterized the case as a condemnation of all category management efforts, and there was extensive discussion (among those antitrust lawyers) of the fact that the huge damage award was recovered by a profitable and growing plaintiff. Plus, there was speculation about whether the Federal Trade Commission, which had been investigating category management and related practices, such as slotting payments, might now take a more active role in regulating the area.

As we think about what to tell our clients about all of this, we're tempted to ask if there has been a fundamental shift in antitrust focus requiring us to change our antitrust compliance programs. Previously, the main focus was on collusion: "Don't talk to that competitor!" Yes, we also tried to train our clients about not engaging in predatory or discriminatory practices, but the big issue was price fixing. When we talked about things like exclusive dealing, we thought we could calibrate the risk based on market share. And, we had the idea that just having a bad intent didn't mean much in antitrust law if the purported victim really wasn't hurt.

Does *Conwood* mean that any time you can show a smattering of "bad" conduct by a market leader that is trying to displace competitors, and you have a theory on how you were damaged by that market leader, you have a winning case? Is a nonmonopolist now at risk any time it tries to raise prices, since, in *Conwood*'s definition, the ability of a firm to raise prices (even at the cost of sales volumes) was offered as proof of monopoly power? Is there anything particularly risky about paying or requesting slotting allowances or using category management tools?

The short answer is no. While it is too soon to be certain, *Conwood* does not appear to represent any seismic shift in antitrust law. *Conwood* does not set out new legal standards to enable one to determine when there has been unreasonable exclusion, since the defendant admitted that it had market power. It probably belongs in the *Utah Pie*² line of cases where a jury becomes incensed when hearing about acts they consider unfair, and renders a verdict designed to

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¹ *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), cert. denied, 123 S. Ct. 876 (2003).

² *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967).

punish a wrongdoer, which the reviewing court does not overturn, due to the sufficiency of the evidence to sustain the verdict. But the case does suggest that a prudent antitrust counselor will guide clients that have market power, or that may find themselves characterized as having market power due to a lock-in theory,³ away from practices that seem to generate the most risk under this developing area of law. A few suggestions along these lines follow.

Counseling Point #1: Don't Lie . . .

It is really not a radical suggestion to advise clients not to lie, but this usually didn't appear in "top 10" lists of antitrust "do's and don'ts." While prior cases did not automatically turn every business tort into an antitrust violation,⁴ it is hard to overestimate the impact of an untruth on a jury (or judge) that is already predisposed not to like the "big guy."⁵ As the market power of the buyer or seller increases, the risks of antitrust violation for utilizing false information or deceptive tactics increases. Thus, for your clients that are sellers with actual or potential market power, it is important that you review the sales plans they plan to use. If the plans contain a category management component (where the customer will be given suggestions by a supplier as to what products it should carry), then the plans should clearly rely on demonstrably accurate information, should not disparage competitors, and should not contain financial incentives or clever "hints" that would push employees to bend the rules in order to make that extra sale.

You should also review the training program (and make sure there *is* a training program) for the sales staff responsible for implementing the sales plan. The importance of following the company sales plan (after it has received its legal review, of course), and an understanding of what might happen (to the employee and to the company) if they don't, should be made clear. If challenged about a sales program that succeeded (i.e., one that resulted in an increase of sales at the expense of competitors), a company should be able to demonstrate that its program was legal and that it thoroughly trained its sales staff on how to properly implement the program. The displacement of any competing products, rearrangement of shelves, or removal of display racks (things that got U.S. Tobacco into trouble in the *Conwood* case), must be the decision of the retailer, based on demonstrably accurate factual information provided to the retailer. Other parts of the sales program, such as display allowances, should be implemented according to a nondiscriminatory promotion program, as outlined below.

For purchasers, buying decisions that result in the elimination of a supplier should be based on sound business reasons. If a special price or payment was the basis of the decision, it should not have been an induced discriminatory price. In other words, the buyer can tell a seller that its originally quoted price "is not in the ball park,"⁶ but it can't fib about the competitive offers.

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³ See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992); *ID Security Sys. Canada Inc. v. Checkpoint Sys., Inc.*, No. 99-577, 2002 U.S. Dist. LEXIS 14400 (E.D. Pa. May 28, 2002) (entry of \$80 million judgment for sale of anti-theft tags and equipment that rivals could not supply).

⁴ "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

⁵ *Caribbean Broad. Sys., Ltd. v. Cable & Wireless Plc*, 148 F.3d 1080 (D.C. Cir. 1998) (false information about radio coverage and sham objections to a government licensing agency as basis for Sherman Act § 2 jurisdiction); *Digital Equip. Corp. v. Sys. Indus., Inc.*, 1990-1 Trade Cas. (CCH) ¶ 68,901 (D. Mass. 1990) (false information about products).

⁶ *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979).

Counseling Point #1(a): . . . and Don't Abdicate Responsibility

It also seems to be a management mistake to abdicate responsibility for a category in a store.⁷ Lack of management attention provides an opportunity for suppliers—or aggressive sales representatives acting with or without corporate encouragement—to engage in mischief. The goal is to be able to demonstrate that isolated instances of unauthorized conduct are just that, and that the company policy and strategy was clearly contrary.

Counseling Point #2: Don't Overpromise

Sometimes, new “cool” merchandising tools, such as category management, can be misunderstood and oversold. Category management frequently involves a retailer using a manufacturer (usually the category leader) to make proposals for managing a product category in a store.⁸ The manufacturer is expected to be able to tell the retailer which products to carry for most profit and how to shelve them, using a schematic of the shelf known as a “plan-o-gram” (which has been around for a long time). Historically, a manufacturer would suggest to a retailer a shelf layout designed to get more of its products into a store. In many stores, the leading supplier in a category would be designated the “category captain” and be given the responsibility for presenting a plan-o-gram, but other manufacturers in the category would be providing their input to the retailer as well. The retailer would make the final decision on the shelf-set, based on both what the manufacturers told it and the retailer’s knowledge of local purchasing preferences.⁹

Retailers attempt to extract the most value from every inch of shelf space, both by carrying the most profitable products, but also (in many cases) by charging manufacturers or wholesalers for the privilege of being on the shelf (a “slotting allowance”). The result is that obtaining space on the shelf or in the plan-o-gram is an important accomplishment—it may be very difficult (and expensive) to get back into a store after being removed from the shelf or losing your display rack.¹⁰

The new wrinkle in this process is the use of sophisticated tools to analyze information derived from checkout scanners to give a better picture of consumer demand.¹¹ Because of the apparent complexity in using all of the category data to prepare a plan-o-gram, a certain mystique seems to have become attached to the process. Category management tools may be touted as a highly valuable asset of a company,¹² and may lead people to believe that they are the key to bulletproof

⁷ Even if a department in a store has been “rented” to a supplier, such as a cosmetics counter in a department store, the retailer still has an obligation to oversee the activities to make sure that the lessee of the space is not engaging in improper activities with regard to competitors or customers.

⁸ A customer can certainly perform its own category management activities, or hire an independent consultant to assist it. A survey by McKinsey of retailers in the consumer packaged goods industry revealed that the most successful retailers (large and small) were those that used all available data, not just what was supplied by manufacturers, to actively understand and manage every category in the store. See GMA Forum at 18 (First Quarter 2003).

⁹ A plan-o-gram supplied to a retailer by a manufacturer is just a suggestion. It does not create a binding agreement to carry certain products. *Added Extras, Inc. v. Party City Corp.*, 193 Misc. 2d 403, 749 N.Y.S.2d 647 (Sup. Ct. N.Y. Co. 2002).

¹⁰ “Mass market retailers periodically determine how much retail shelf space will be devoted to particular products. This periodic re-allotment of shelf space is referred to as the ‘plan-o-gram reset.’ . . . [The plaintiff] contends that loss of plan-o-gram space compromises sales, and that once lost, plan-o-gram space is difficult to regain.” *Western Pub. Co. v. Publ’ns Int’l, Ltd.*, No. 94 C 6803, 1995 U.S. Dist. LEXIS 5917 at *12–13 (N.D. Ill. May 2, 1995).

¹¹ The data from the scanners can show how well the products sold at differing prices, how the products responded to advertising, displays, or price reductions, and which other products experienced a sales decline when a product was promoted.

¹² *Crossmark, Inc. v. DeGeorge*, 655 N.W.2d 647 (Wis. Ct. App. 2002) (unpub.) (action for indemnification for theft of trade secrets, including category management templates).

financial management.¹³

Category management is just a way to respond better to what consumers want; rather than guessing, actual sales data inform the choices. But the press reports on *Conwood* were confusing. Some focused on the use of false category management data; others just talked about how category management was now the basis for lawsuits.¹⁴ Reading the text of the *Conwood* opinion, one observes that while the court did not actually say that category management was illegal, it criticized certain common practices (such suggesting that retailers carry fewer brands and promotion of the category captain's brands).

The FTC looked at various category management practices, but declined to issue regulations on how, for example, slotting allowances should be paid.

Realistically, as a result of all of this, should manufacturers stop making suggestions to retailers? No, of course not, but what a manufacturer says about its products and those of its competitors, and the results a retailer is expected to achieve if the suggestions are followed, should be made in good faith. Although category management is, at its foundation, just one more aspect of salesmanship, like all other sales tools, it should not be abused. A customer, as well as a competitor, can bring an action against a supplier based on abuse of a category management system. Theories, such as promissory estoppel, unfair competition, negligent misrepresentation, and breach of fiduciary duty might surface. Even though a manufacturer would not normally have a fiduciary relationship with its customer—even an exclusive dealer or distributor,¹⁵—it is possible that a fiduciary relationship could be alleged based on a contractual relationship with elaborate representations.¹⁶ So, the message remains the same: use care in how the program is designed, and care in how it is executed.

Counseling Point #3: Have a Good Reason for What You Do . . .

Aggressive competition is to be encouraged, but you should always be able to explain, in terms that will sound reasonable to an average consumer, why a certain practice is being implemented.

¹³ In *Bennett Restructuring Fund, L.P. v. Hamburg*, No. (X02)CV010167682S, 2003 Conn. Super LEXIS 61 (Waterbury Dist., Jan. 2, 2003) (unpub.), the plaintiff alleged that the 10-K was misleading since it contained glowing description of a category management system, which allegedly gave a material advantage over the competition by allowing the company to work with retailers and know which products were doing well or poorly and quickly adjust marketing strategies. The plaintiffs claimed that they reasonably relied on these misrepresentations regarding the effectiveness of the category management system when they invested in the company's notes. The existence and effective functioning of those systems made them believe in the accuracy of the financial data in the 10-K, for the data were impliedly based on the category management data. A motion to strike the fraud and negligent misrepresentation counts in the complaint was denied.

¹⁴ "Retail category management programs look vulnerable to antitrust suits now that the U.S. Supreme Court has declined to review a record \$1.05 billion antitrust verdict . . ." Ira Teinowitz, *Antitrust: UST Decision Could Bring More Lawsuits*, ADVER. AGE, Jan. 20, 2003, at 3.

¹⁵ See, e.g., *Crim Truck & Tractor v. Navistar Int'l*, 823 S.W.2d 591, 594 (Tex. 1992); *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 481 (Tex. App. 1989) (writ denied).

¹⁶ "A fiduciary relationship may arise from a variety of relationships where the parties are 'under a duty to act for or give advice for the benefit of another upon matters within the scope of their relation'." *ARA Auto. Group v. Cent. Garage, Inc.*, 124 F.3d 720, 723 (5th Cir. 1997) (quoting *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980)). One can imagine an overzealous sales representative promising to keep a "special deal" confidential, and working to put the interests of the retailer first (even ahead of the manufacturer's interests, or those of other customers), which are attributes of a fiduciary relationship. *Lee v. Wal-Mart Stores, Inc.*, 943 F.2d 554, 558–59 (5th Cir. 1991). If a retailer completely abandons management of a category, then it may be possible for a court to that the traditional reason for not imposing a higher standard of behavior on the manufacturer (such as is customarily imposed on insurers) no longer exists. "The nature of the supplier-distributor relationship does not require special protection, nor does the supplier have the same exclusive control over the distributor's business that the insurer has over the insured's claim." *Adolph Coors Co. v. Rodriguez*, 780 S.W. 2d 477, 481 (Tex. App. 1989). Even without a fiduciary relationship, misrepresentations by a supplier may be the basis for an action in breach of contract, although most courts dealing with a commercial action between buyer and seller will not allow a separate tort action for breach of the covenant of good faith and fair dealing. *Cambee's Furniture, Inc. v. Doughboy Recreational, Inc.*, 825 F.2d 167, 174–75 (8th Cir. 1987) (every contract has a covenant of good faith, but it does not form the basis of a separate action, only an aid to contract interpretation).

A good business justification will go a long way toward making the legal reasonableness case, as well.¹⁷ Being able to explain how an excluded plaintiff had alternative methods of getting to the market would also be helpful.¹⁸ But you need to be able to justify your program. Merely asserting that the plaintiff did not prove its case is almost always going to fail when the bad story is not refuted. The good news is that there are good reasons: Manufacturers want to be category captains because it gives them a greater chance to sell their products. Retailers like having the assistance of leading manufacturers because they get the benefit of the expertise of companies that have resources available for sophisticated data analysis, and they are able to get the manufacturers to pick up certain costs involved in analyzing a category that the retailer otherwise would need to undertake. This motivation is reasonable, and it needs to be articulated.

Counseling Point #3(a): . . . and Be Able to Prove It

A company's sales or procurement strategy should be well documented. For a manufacturer, it should be aimed at growing profitable sales—not just eliminating competitors.¹⁹ A retailer's procurement strategy should also have a profit-maximization goal; it should not look like a way to collect kickbacks.²⁰ This means that a good document-creation training program (i.e., what to say, what to keep) is essential, along with the logistical systems for retaining written and electronic documents (with a disposal suspension switch that can be flipped when litigation is imminent). The provisions of the Sarbanes-Oxley Act should provide enough incentive to make sure the document retention program is in good shape,²¹ but think about what might have happened in *Conwood* if the defense had been able to marshal all of their documents to make a compelling case that the “anecdotes” at the heart of the plaintiff's claims were not representative.

Counseling Point #4: Don't Wait for the FTC

Historically, the FTC has shown interest in exclusionary retail practices, but its efforts have not always yielded constructive results. The Commission could not prove the theory of a “shared monopoly” in the cereal aisle,²² and an investigation of alleged monopolization of the dairy case

¹⁷ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Int'l Rys. of Cent. Am. v. United Brands Co.*, 532 F.2d 231, 239–40 (2d Cir. 1976).

¹⁸ *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162–63 (9th Cir. 1997) (alternative ways to distribute to be considered in evaluating impact of exclusive dealing).

¹⁹ Attempts to boost your sales cannot always be based on increasing total demand, so the sales will need to come from competitors - and that is not prohibited. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21–22 (1st Cir. 1990).

²⁰ State commercial bribery statutes or Section 2(c) of the Robinson-Patman Act may be implicated. *Envtl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1066 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990); *FTC v. Herbert R. Gibson*, 95 F.T.C. 553 (1980), *modified*, 96 F.T.C. 126 (1980), *order enforced*, 682 F.2d 554 (5th Cir. 1982) (violation of §2(c) found based on the split of brokerage payments between employee and supplier); *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266 (5th Cir. 1979); *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965) (payments by fish-food supplier to influential government employee to obtain exclusive contract); *Edison Elec. Inst. v. Henwood*, 832 F. Supp. 413 (D.D.C. 1993).

²¹ 18 U.S.C. § 1519 (up to 20 years imprisonment for knowing destruction of documents; no requirement that the defendant acted “corruptly” as in prior obstruction statutes). A document creation/records management program will train employees not to use sloppy, casual comments that can create a risk of miscommunication, and it will also establish a protocol to retain records for the appropriate time. Juries will focus on what they see as evidence of corporate intent, so a confusing document that appears to show improper motive can also do a great deal of damage.

²² *Kellogg Co.*, 99 F.T.C. 8 (1982) (order dismissing complaint). Although shelf-space allocation was at issue in the *Cereal* case, the Commission sought to establish liability for tacit collusion under Sherman Act § 1.

was resolved after several years with an order requiring an amendment to a distribution contract.²³ In response to Congressional inquiries and a petition for action with regard to slotting allowances,²⁴ the FTC looked at various category management practices, but declined to issue regulations on how, for example, slotting allowances should be paid.²⁵ The findings outlined in the FTC Report are instructive as to why this topic is murky—and why it is difficult to counsel clients on the risk profile of various practices.

None of the practices the FTC examined (slotting allowances, pay-to-stay fees, payments to limit the shelf-space available to a rival, discriminatory payment of access fees) were considered anticompetitive by themselves. The FTC Report questioned whether these practices actually could exclude rivals, and whether the efficiencies they stimulated outweighed any anticompetitive effects. The totality of the facts surrounding the suppliers, customers, and markets would determine whether, in a given situation, a specific practice was unreasonable. The staff was not really concerned with slotting allowances when they were used to advance the fundamentally pro-competitive goal of introducing new products. In that role they also served to mitigate some of the risks undertaken by the retailer in carrying an untested item. The Commission had some questions about whether the use of category management and category captains raised a greater risk of collusion and exclusion. There was a concern if a category captain obtained proprietary information about its rivals' marketing plans that would enable it to design a promotional program that would blunt the rivals' marketing efforts.

Any lock-up program

has a certain element

of risk built in, no

matter how reasonable

or clearly disclosed,

so the client should

understand the risks

before going forward.

The Commission would be concerned if a dominant manufacturer or small group of manufacturers obtained exclusive dealing contracts with a high percentage of the desirable retailers in relevant markets, or if rivals were relegated to fringe retail outlets. This suggests that if your client (buyer or seller) uses an exclusive dealing system that results in foreclosure of an appreciable percentage (as a benchmark, more than 30 percent) of outlets in a market, you should be particularly alert to the risks of public or private enforcement,²⁶ or if a significant competitor that provided price competition is kept out of a relevant market.²⁷

Any practice that encourages communications between competing suppliers could facilitate collusion. For this reason, the FTC proffered that retailers make their own category management decisions, limit competitor communications, and limit the information about competitors given to the category captain. This is another good reason to make sure the client understands the importance of limiting communication among competing suppliers—the FTC may not have wanted to take action in the past, so why give them a reason now? Information about competitive activities are a key to effective competition, but the client must understand that direct contact with com-

²³ The Pillsbury Co., 97 F.T.C. 354 (1981) (consent order eliminating exclusive dealing provisions in distribution contract for refrigerated dough products).

²⁴ The FTC announced on June 21, 2002, that it would not issue guidelines on the payment of slotting allowances, denying a petition, filed on April 14, 2000, by the Independent Bakers Association, the Tortilla Industry Association, and the National Association of Chewing Gum Manufacturers. Acknowledging the complexity of the situation, the FTC said it would research the matter further.

²⁵ Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry (Feb. 20, 2001), available at <http://www.ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf>.

²⁶ Justice O'Connor's concurring opinion in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 44–47 (1984), is instructive because it analyzed the arrangement in question as exclusive dealing, and determined that the 30 percent share was not exclusionary because there were other options available.

²⁷ *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394–95 (7th Cir. 1984) (exclusive dealing agreement may be unreasonable when significant price competitor kept out of market and prices likely to rise above competitive level).

petitors to get that information is prohibited, and documents should not be created that make it look as if such communications took place when they did not.

The Commission did express an interest in how monopsony power and slotting allowances should be considered when evaluating mergers in the retail grocery industry, and, at the same time, they also recognized that slotting allowances are a manifestation of competition. In their challenge to the Heinz-Beech Nut baby food merger,²⁸ they noted that one way in which the merger would reduce competition would be in the reduction of competition to get on the shelf—which was reflected in the payment of slotting allowances.

Counseling Point #5: The No Harm-No Foul Rule May Be Gone

One of the most confusing parts of the *Conwood* case (at least for antitrust lawyers) was the way in which the plaintiff was able to point to a period of time where market output increased 45 percent, new brands were sold, and the market leader's share declined, yet the plaintiff was still able to collect damages for competitive injury. The plaintiff's case was supported by expert economic testimony that its business would have grown faster but for the defendant's violations.²⁹ The court looked at evidence that for every 10 percent increase in UST facings, retail prices went up by seven cents. It was concerned that there was no recent new market entry, although the substantial profits in the category should have encouraged such entry.

There is probably not much to talk about with the client here, since the goal of a compliance program is to avoid a violation in the first place, not to hope that you get off by showing no damages. However, the defendant's admission that it held monopoly power and criticism of the testimony of company officers by the defendant's CEO may have set the stage for the award of damages.³⁰ Although judges in some cases have rejected economic testimony that was not reliable,³¹ and the normal rule is that consistency of market share should not raise an inference of anticompetitive behavior, the *Conwood* court accepted the plaintiff's theory and the jury ruled accordingly.

Counseling Point #6: Be Ready for Piling On

A compelling point to make when you are counseling clients on the consequences of illegal exclusionary acts is that they could get hit multiple times. U.S. Tobacco has been hit with suits filed by Swedish Match (a snuff competitor),³² as well as by direct customers of U.S. Tobacco,³³ alleging that they, too, were injured by the practices outlined in the *Conwood* decision.

Counseling Point #7: Be Ready for the Flank Attack

Even if you are not the initial target of exclusion litigation, someone else may be thinking about

²⁸ *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

²⁹ *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768, 791–95 (6th Cir. 2002).

³⁰ Even if you have a 78 percent share, if there are new entrants, or other persuasive economic evidence (e.g., low barriers to entry and low/no profits), you have the basis for arguing that you do not have the power to restrict competition.

³¹ *Bailey v. Allgas, Inc.*, 284 F.3d 1237 (11th Cir. 2002); *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028 (8th Cir. 2000); *SMS Syst. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11 (1st Cir. 1999).

³² Suit filed July 7, 2002 (W.D. Ky.). "Swedish Match has expanded in the US, but we do not know how much greater this growth would have been without UST's illegal actions, which were designed to impede competition," said Bo Aulin, General Counsel. *Swedish Match Brings Competition Lawsuit Against UST in US*, SWEDISH MATCH INSIDE, No. 4 (2002), available at <http://www.swedishmatch.com/eng/ir/magazine/2002-mag/mag4-competition.asp>.

³³ *In re Smokeless Tobacco Antitrust Litig.*, No. 1:00 CV01454 (PLF) (D.D.C. filed Jan. 8, 2001).

coming after you,³⁴ particularly if there are similarities to the practices employed in *Conwood*. The case of the future might combine allegations of everything you read about in the newspaper: abuse of category management, discriminatory slotting allowances (or induced slotting allowances), lock-ins via unreasonable contracts, financial fraud (phony orders, phony deductions, phony accounting, and abuse of product returns), and destruction of documents.

So, as you consider what your practices are, think about who might be motivated to challenge your successes in court. Have competitors experienced dramatic business setbacks? Has your (or their) stock price declined precipitously? Relating the litigation horror stories of what another company has gone through might be a helpful technique in counseling a client reluctant to give up a sales (or procurement) practice of borderline legality.

Counseling Point #8: Is the Customer Locked In?

Another factor that may have a significant impact on how a judge or jury looks at the reasonableness of an exclusionary program is whether the customer is locked in to the manufacturer's products—for the main purchase or aftermarket activities.³⁵ If the lock-in is an important part of the program (as in a franchise), the counseling should emphasize the reasonable reasons for the lock-in, the customer or consumer benefits, and the clarity of the up-front explanation to the customer (including costs) before the purchase commitment is made.³⁶ And any lock-up program has a certain element of risk built in,³⁷ no matter how reasonable or clearly disclosed, so the client should understand the risks before going forward.

Counseling point #9: Don't Conspire

In all of the concern about new theories of liability, let's not forget the old basic rule: no horizontal collusion. The client should be told to stay away from agreements with other suppliers in the same category. The role of the category captain should be to present a proposal to the customer, and to implement the customer's decision. If the customer wishes to use another manufacturer as a "validator" of the category captain's recommendations, then all conversations should be with the retailer, and none between the competing manufacturers. If the retailer insists that the category captain communicate with competitors, the client should understand that its role is only to pass on information to the retailer, and not to reach any agreements with the competitor about what will be done with its (or other competitors') products. This does, of course, present a compliance and training challenge, since the sales representatives will normally have numerous encounters with their competitive counterparts at the store. But even if there is no way to avoid the conversations, the training program can emphasize the importance of never having the parties agree on eliminating a competitor or otherwise allocating business. The decision about what products to carry should always go to the retailer. Retailers can assist the process by not delegating the decision

³⁴ See, e.g., *Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc.*, No. 1:02cv2214 (D.D.C. filed Nov. 8, 2002) (complaint alleging that Ocean Spray, the market leader, engaged in various exclusionary practices).

³⁵ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

³⁶ Courts may take different approaches to determine whether an illegal tying agreement is present. Compare *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997), with *Collins v. Int'l Dairy Queen, Inc.*, 939 F. Supp. 875 (M.D. Ga. 1996).

³⁷ Aspects of a lock-in arrangement that might be viewed as deceptive will materially increase the risk of illegality. According to Judge Easterbrook, absent deception, the lock-in will be much harder to prove. *Digital Equip. Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir. 1996).

making to suppliers. An excluded supplier may well bring an action against everyone—manufacturer and retailer.

Counseling Point #10: Don't Discriminate

Economists may debate the merits of the Robinson-Patman Act, and it may be difficult to win a case on price discrimination alone, but when a discrimination scenario is added to an exclusion story, the picture starts to look scary, particularly if the programs completely exclude competing suppliers or dramatically seem to favor larger purchasers.³⁸ Promotional payments for display of products (including slotting allowances) if nondiscriminatory, should be legal.³⁹ Promotional payments or services are generally allocated in proportion to a buyer's purchases, although exact mathematical precision is not required, and a seller's costs in connection with providing services can be taken into account.⁴⁰ Smaller retailers may allege that they were never told about available allowances (including slotting allowances),⁴¹ so your client's promotional program should include a method to communicate with both direct and indirect customers.⁴² Because smaller customers may never be able to utilize certain promotions or services, alternatives should be made available that they can utilize, although they need not be identical.⁴³

Training on this issue should emphasize the fundamentals of price discrimination and the importance of documenting a meeting competition defense. Even though the FTC Report expressed concern over getting competitive marketing information from a common customer, if the customer will share the information with you to help you support a meeting competition defense, by all means get it.

Counseling Point #11: Don't Stop Competing

Conwood may have been an aberration, or it may be a harbinger of things to come. But while the client should be counseled on the proper rules and risks, the primary rule of our economy is to compete aggressively. Sometimes that will mean offering a promotional payment to secure access to the store,⁴⁴ or advising a retailer that it can increase profits by changing the product assortment. When done properly, tools like category management can promote efficiency and enhance com-

³⁸ In *Coalition for a Level Playing Field, LLC v. AutoZone, Inc.*, No. 00-CV-0953 (E.D.N.Y. Oct. 18, 2001) (unreported decision denying motion to dismiss on § 2(f) claim but granting it as to § 2(c) claim), the plaintiffs alleged a violation of Robinson-Patman § 2(f) based on a variety of practices, including induced slotting allowances, volume discounts, sham advertising, and improper promotional payments, all of which enabled the defendants to reduce their retail prices as much as 40 percent. In the complaint in the *Smokeless Tobacco Antitrust Litigation*, No. 1:00 CV01454 (PLF) (D.D.C. filed Jan. 8, 2001), the plaintiff alleges that Wal-Mart was offered millions of dollars worth of services and in-kind benefits for exclusivity in the snuff category. When it was discovered that the reduction of brands hurt overall sales, US Tobacco allegedly gave Wal-Mart more money to make up for losses in the form of rebates and promotions not offered to other retailers.

³⁹ In *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362 (M.D.N.C. 2002), the plaintiff challenged a merchandising program that provided payments in proportion to shelf space commitments. The program was allowed, since commitments were terminable in less than a year, and the defendant, notwithstanding a market share in excess of 50 percent, was found not to have foreclosed competition, due to the introduction of several new brands.

⁴⁰ See Guides For Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. 240.1 et seq.

⁴¹ Hygrade Milk & Cream Co. v. Tropicana Prods., Inc., 1996-1 Trade Cas. (CCH) ¶ 71,438, 1996 U.S. Dist. LEXIS 6598 (S.D.N.Y. 1996).

⁴² FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968).

⁴³ See 16 C.F.R. § 240.10; L.S. Amster & Co. v. McNeil Labs., Inc., 504 F. Supp. 617 (S.D.N.Y. 1980).

⁴⁴ *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001) (paying up-front fees to chain retailers for exclusive right to supply was not per se violation of the Sherman Act); *Zeller Corp. v. Federal-Mogul Corp.*, No. 97-4134, 1999 U.S. App. LEXIS 6345 (6th Cir. Apr. 2, 1999) (unpublished).

petition by providing information to trading partners that enables them to better serve consumers. Purchasers should be aggressive to get the best economic proposal—but not cross the line of providing false information or facilitating collusive practices. If the information provided is correct (or at least offered in good faith), and any payments are made in a nondiscriminatory fashion,⁴⁵ the risk can be managed. Even monopolists have no duty to pull their competitive punches.⁴⁶ ●

⁴⁵ There are two aspects of the “nondiscriminatory” concept to bear in mind. First, the promotional allowances or services offered to customers must be allocated in a nondiscriminatory fashion (in proportion to purchases). *See, e.g.*, *L.S. Amster & Co. v. McNeil Labs.*, 504 F. Supp. 617 (S.D.N.Y. 1980). Second, the program itself must provide the benefits to each customer related to actual performance. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362 (M.D.N.C. 2002).

⁴⁶ *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986).

Paper Trail: Working Papers and Recent Scholarship

This issue's Paper Trail summarizes a working paper, a forthcoming article, and (for the first time) a recently published book. The working paper, by Ahlborn, Evans, and Padilla, surveys the law and economics of tying in the United States and the EU, and argues that the time has finally come to abandon what is left of per se illegality in favor of a structured rule of reason analysis. The article, by John Lopatka and me, analyzes an often-overlooked dimension of the relationship between the antitrust laws and state regulation: the distinction between "hybrid" and "unilateral" anticompetitive state action. Finally, the book, by Bruno Zanettin, examines various current forms of cooperation between national antitrust agencies in the investigation of international antitrust offenses, and discusses the possibility of a more effective multilateral framework for cooperation.

As always, suggestions for coverage in the Paper Trail are welcome. Please email John Woodbury (jrw@crai.com) or Bill Page (page@law.ufl.edu).

—WHP

Papers and Summaries

Christian Ahlborn, David S. Evans, & A. Jorge Padilla, *The Antitrust Economics of Tying:*

***A Farewell to Per Se Illegality*, <http://www.aei.brookings.org/publications/abstract.php?pid=311>**

This paper (1) surveys and compares the current legal status of tying arrangements in the United States and the European Union, (2) reviews the Chicago School and post-Chicago economic analyses of tying, and (3) proposes a structured rule of reason inquiry for identifying anticompetitive tying. The comparative analysis of tying doctrine is lucid, particularly in its critique of some of the more retrograde formalisms of EU law. The authors show that, although the verbal formulation of EU law is similar to *Jefferson Parish*, the applications are closer to the earlier, strict per se approach in the United States. The review of economic theory usefully shows that there is really not much theoretical dispute between Chicagoans and post-Chicagoans. Chicagoans showed tying is ubiquitous, typically beneficial, and rarely anticompetitive. Post-Chicagoans like Whinston (1990) and Carlton & Waldman (2002) use game theory to demonstrate that tying can be used to deter entry in either the tying or tied product markets in limited circumstances. Because the post-Chicago theories rest on such restrictive assumptions, they also support abandonment of per se illegality.

The authors offer a series of "screens" derived from economic theory for a new rule of reason. As a first screen, they identify seven conditions for any anticompetitive effect to be present, including a near-monopoly of the tying product; imperfect competition and entry barriers in the tied product market; and the absence of power buyers. As a second screen, they would require articulation and support of a particular theory of anticompetitive harm. For example, for the Carlton & Waldman theory, they would require, among other things, proof that the a potential entrant has a higher quality product than the defendant and "would enter the primary market if it previously had entered the complementary market." Finally, they would allow proof of offsetting efficiency benefits.

—WHP

John E. Lopatka & William H. Page, State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints, YALE J. ON REGULATION (forthcoming 2003)

For a .pdf version, contact: page@law.ufl.edu

Antitrust observers are familiar with the two-part *Midcal Aluminum* test for the immunity of state regulation from federal antitrust laws: the state must clearly articulate its policy to displace competition and must “actively supervise” any private conduct pursuant to the policy. But state action need not meet these requirements if it is “unilateral” and therefore does not conflict with Section 1. Only if a state-authorized restraint is “hybrid,” combining state and private action in a way that resembles a prohibited agreement, need the restraint satisfy *Midcal*.

In this paper, John Lopatka and I examine the history and present importance of this distinction between unilateral and hybrid restraints. Although the Supreme Court’s precedents are not entirely consistent, we argue that a unilateral restraint is one in which governmental actors define the extent of consumer harm, while a hybrid restraint is one in which the government “empowers private actors to exercise discretion as to the nature or level of consumer injury in a way that closely resembles an antitrust violation.” We examine the emergence of this principle in the context of state restraints that are analogous to resale price maintenance. We then examine recent appellate decisions characterizing horizontal restraints as hybrid. In this part, we argue that antitrust law reaches “not only state authorized express collusion but state practices that significantly facilitate *tacit* collusion and serve no competitively benign purpose.”

—WHP

BOOK NOTE

Bruno Zanettin, Cooperation Between Antitrust Agencies at the International Level (Hart Publishing Co., Oxford and Portland, Oregon 2002)

Zanettin identifies actual and potential conflicts that may arise between antitrust regimes because of enforcement actions against international practices (mergers, cartels, and exclusionary practices), and then explores various levels of cooperation between agencies both to avoid conflicts and to facilitate investigations. He distinguishes “soft cooperation,” the use of bilateral agreements to coordinate investigations, from two types of “hard cooperation.” The first of these is sharing of confidential information both through judicial mechanisms and by “mutual legal assistance agreements” under the International Antitrust Enforcement Assistance Act. The second form of hard cooperation is “positive comity,” or instituting investigations at the request other countries. In the final chapter, Zanettin points out the shortcomings of bilateral cooperation and considers the possibilities for a multilateral cooperation framework, for example through the framework of the WTO.

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