ABA Antitrust Section
Corporate Counseling Committee

Antitrust Update November 2011
Sponsored by

Presenters
Tom Demitrack        Paula Render
Sébastien Evrard     Fiona Schaffer
David Wales
Developments at DOJ
DOJ Merger Review FY2011

• 1,450 HSR Filings
  • Initiated Investigation in 2% of HSR Filings
  • Notable Judicial Proceedings:
    » AT&T/T-Mobile
    » H&R Block/TaxACT
  • Additional Notable (Settled) Challenges
    » George’s Incorporated/Tyson Foods (monopsony harm)
    » Stericycle/Healthcare Waste Solutions (barriers to entry)
    » Sara Lee’s (price discrimination)
    » Alberto-Culver/Unilever (use of data and UPP)

• Non-Reportable Transactions Challenged
  • Blue Cross Blue Shield of Montana

Source: Sharis A. Pozen, Acting Assistant Attorney General, Antitrust Division, “Developments at the Antitrust Division & The 2010 Horizontal Merger Guidelines – One Year Later.” (Nov. 17, 2011)
Blue Cross Blue Shield of Montana

- **Non-reportable transaction**
  - Blue Cross paid five of six Montana hospitals that own competing insurer New West Health Services $26 million in exchange for those hospitals agreeing collectively to stop purchasing health insurance from New West for their own employees and to purchase it exclusively from Blue Cross for six years

- **Would reduce and perhaps eliminate New West’s ability to compete by signaling that New West was likely to exit the market**

- **Consent Decree terms:**
  - Agreement allowed to proceed only if:
    - New West’s commercial health-insurance business is divested
    - Defendant hospitals contract with the buyer of the divested insurance business
    - Other injunctive terms
First Niagara Bank N.A. and HSBC Bank USA N.A.

- HSBC sought to sell 195 branches in New York and Connecticut to First Niagara for approximately $1 billion
  - Required to divest 26 branch offices in the Buffalo, N.Y., area with approximately $1.6 billion in deposits and commercial loans
- DOJ alleged adverse effect on competition in the Buffalo area for retail banking or small business banking services
- DOJ advised the OCC that it will not challenge the merger provided that the parties divest the branch offices specified in the agreement and associated loans and deposits
### H&R Block and the Revised Merger Guidelines

<table>
<thead>
<tr>
<th>Revised Guidelines</th>
<th>H&amp;R Block</th>
</tr>
</thead>
</table>
| Market definition less important | • “Merger analysis begins with defining the relevant product market”  
• “Defining the relevant market is critical in an antitrust case because the legality of the proposed merger in question almost always depends upon the market power of the parties involved” |
| Less focus on concentration levels/HHI analysis | • “Market concentration, or the lack thereof, is often measured by the Herfindahl- Hirschmann Index (‘HHI’)”  
• “These HHI levels are high enough to create a presumption of anticompetitive effects. Accordingly, the government has established a prima facie case of anticompetitive effects.” |
| Greater emphasis on economic analysis | • “When determining the relevant product market, courts often pay close attention to the defendants’ ordinary course of business documents.” |

- “the division has defined relevant markets in all its public cases since the 2010 Guidelines were released…In fact, product definition and substitutability…was a central focus of Court’s decision in H&R Block” -- Sharis Pozen, Acting Assistant AG
Criminal Enforcement FY 2011

- 90 Criminal Cases Filed
  - Highest number in last 20 years!
  - 27 corporations charged
  - 82 individuals charged
  - Involving real estate, optical disk drives, auto parts, air cargo, financial services industries (e.g. municipal bonds)
- Agreed to $520 million in criminal fines (~ FY2010 level)
- 21 jail terms imposed (10,544 days of jail time)
Developments at FTC
Personnel Changes

• Kovacic’s term ended; Ohlhausen to replace him
• Leibowitz re-nominated for another term
• Commissioners
  – Leibowitz (D) (Chairman)
  – Ramirez (D)
  – Brill (D)
  – Rosch (R)
  – Ohlhausen (R) (awaiting confirmation)
PNO Guidance on Item 4(d) in HSR Form

• New HSR rules require submission of additional documents under Item 4(d)
• Includes confidential information memoranda, competition assessments by third parties and synergy analyses
• In response to criticism, FTC issued new guidance in November
• Confirms overlap with those searched for 4(c) documents and narrows/clarifies scope
OSF/Rockford Hospital Merger Challenge

• Part 3 and PI complaints filed on Nov. 18
• Hospital and primary care physician services included in complaint
• Alleges merger to duopoly in hospital services; combined 37% share in physician services
• DOJ blocked Rockford/Swedish American hospital merger in same market (1989)
Pool Corp. Conduct Decree

- FTC alleged monopolization of pool product distribution via refusal to deal
- Pool Corp. threatened to stop dealing with product suppliers who sold to new entrants
- Decree prohibits discrimination/retaliation against suppliers who sell to competitors
- Rosch dissent argues no effects or causation evidence
What Else to Keep an Eye On at FTC

- Challenging “pay-for-delay” patent settlements continues to be high priority
  - Legislation and new cases
- New standalone Section 5 FTC Act cases
  - E.g., standard setting
- Ongoing Google investigation
- Outcome of Express Scripts/Medco merger review
- ALJ decision in ProMedica/St. Lukes
Ex-U.S. Developments
Outline

• The November headline in the EU: Eurozone crisis: nothing to do with antitrust?

• Otherwise, business as usual:
  – Article 101,
  – Article 102,
  – Mergers, and
  – Work program for 2012.
Article 101

• Policy:
  – Compliance brochure
  – Consultation on technology licensing block exemption (+ report)
• New cases:
  – Inspections in the sector of bearings for automotive and industrial use
  – Formal investigation in e-book sector
• Closed cases:
  – International airline passenger probe
• Will European Court of Justice become more interventionist in cartel cases (following Arkema case-law on parental liability in September)?
  – Plastic industrial bag cartel: lack of evidence on (i) single and continuous infringement, and (ii) knowledge of geographic scope of cartel (+ five-year limitation period).
  – Methacrylates cartel: lack of evidence on (i) entire infringement period, and (ii) knowledge of product scope of cartel.
Article 102

- Commitments imposed on S&P:
  - Abolish the licensing fees for US ISINs;
  - Distribution of US ISIN record (i) separately from other added value information, (ii) on a daily basis, (iii) for USD 15,000 per year (+inflation), (iv) for all direct users, ISPs and service bureaus.

- Focus on IP right:
  - Apple/Samsung RFIs: No formal complaint but investigation in “enforcement of standards-essential patents in mobile telephony” (litigation abuse?);
  - Complaints against Qualcomm, Google, etc.
Mergers

• Publication of Best Practice for NCA/Commission cooperation in merger control:
  – Follows publication of best practices with US authorities in merger review in October 2010.

• Importance of first to file:

<table>
<thead>
<tr>
<th></th>
<th>Western Digital/Viviti</th>
<th>Seagate/Samsung</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deal announcement</td>
<td>7 March 2011</td>
<td>19 April 2011</td>
</tr>
<tr>
<td>Filing of Form CO</td>
<td>20 April 2011</td>
<td>19 April 2011</td>
</tr>
<tr>
<td>Clearance</td>
<td>23 November 2011 (with remedies)</td>
<td>26 October 2011 (without remedies)</td>
</tr>
</tbody>
</table>

• Other cases closed or pending:
  – Phase II investigations pending in (i) ED&F Man/Südzucker, (ii) Johnson & Johnson/Synthes and (iii) Deutsche Börse/NY stock exchange.
Work program for 2012

- Rules for Services of General Economic Interest to be adopted in December;

- Consolidation of state aid rules, including new rules & guidelines (e.g., re. rescue and restructuring);

- Commission initiative designed to remove the major obstacles for damages actions before national courts:
  - European legislation to protect its leniency programs (following Pfeiderer judgment) and ensure an effective right to damages;
  - Collective redress – follow-up on consultation.
Civil Litigation
• Affirmed rejection of Rose Acre’s claim for insurance coverage for price-fixing litigation under policy’s advertising coverage
• Antitrust liability is a major risk; unlikely to be covered implicitly
NBA v. National Basketball Players Ass’n

- NBA filed suit against the players ass’n NBAPA in S.D.N.Y. on Nov. 2; antitrust case “frankly very thin”
- NBAPA decertified as union, then brought two cases (Minn. and Cal.) in response, alleging group boycott and price-fixing (Nov. 15, 16)
- NBAPA consolidated in Minn. on Nov. 21
- NBAPA dropped its suit on Nov. 29 after lockout was resolved
In re TFT-LCD (Flat Panel) Antitrust Litigation, No. 07-md-01827 (N.D. Cal. Nov. 4, 2011)

• Judge rejected motion for partial summary judgment regarding claims of conspiracy to fix production levels, where claims of price-fixing were not challenged
• Evidence must be considered as a whole; motion was an “improper attempt to carve the conspiracy into a number of mini-conspiracies”
• Even if there were defendants for whom there was no evidence of production agreements, they are liable for co-conspirators’ conduct
• Other decisions as well; Toshiba, LG, Phillips’s bids to escape various lawsuits rejected
Seventh Circuit affirmed district court decision that Illinois AG’s antitrust suit against LCD makers is not a class action and should be remanded to state court.

Parens patriae action is not a “disguised class or mass action”

Ninth Circuit made similar decision in October.
• In antitrust class action against five ready-mix concrete manufacturers, defendants settled for $18.5 million total

• Court awarded over $7 million in fees and expenses

• Judge: “This case has been to me what it was like when I stood before da Vinci’s ‘Mona Lisa’ and Michelangelo’s ‘David,’ observing the great masters’ works. I was overcome with a rare and gargantuan sense of awe that will likely last a lifetime.”

• Court also commended defense counsel, but without reference to any great masters
Rambus Inc. v. Micron Technology Inc., CGC-04-431105 (Cal. Sup. Ct.)

• Rambus Inc. sued Hynix Semiconductor and Micron Technology for $3.9 billion for conspiring to eliminate Rambus from the DRAM marketplace
• Defendants argued that design flaws, higher costs, and other factors caused Rambus’s product to fail
• Jury found Rambus failed to bear the burden of proof, after deliberating from Sept. 22 to Nov. 16
• Claim: Wal-Mart and Netflix agreed to allocate markets (on-line rentals to Netflix and DVD sales to Wal-Mart)
• A litigation class was certified, as well as a settlement class for plaintiffs’ settlement with Wal-Mart
• Summary judgment decision dismissed all claims; court held that plaintiffs had not produced any evidence of an unlawful agreement
• Supreme Court refused to hear claims by over 20 towns and cities that Defendants conspired to fix natural gas rates
• Claim was that Defs. used a 2003 report from the Nat’l Petroleum Council to raise a false alert about supply
• Defs. claimed that prices rose due to shortages from Hurricanes Katrina and Rita
• D.C. Cir. held on SJ that plaintiffs’ ability to prove parallel conduct was dubious, but even assuming parallelism, the evidence did not support a reasonable inference of conspiracy and did not create a genuine issue of fact barring SJ
Court granted Defendant’s motion to dismiss for failure to state a claim for a violation of the Robinson-Patman Act (“RPA”)

Fresh N’ Pure’s complaint focused on allegations that Defendant refused to sell to it

Court stated, however, that to state a claim under the RPA, Plaintiff must point to instances where Defendant sold to Plaintiff’s competitors at a lower price than it offered to Fresh N’ Pure

Although complaint mentioned six competitors, it did not allege that the Defendant sold products to any competitor for less than it charged to Fresh N’ Pure
Taleff et al. v. Southwest Airlines Co.,
No. 11-cv-02179 (Nov. 30, 2011)

• Direct purchaser class sued to enjoin the merger of Southwest and AirTran
• DOJ closed its investigation into the merger in April
• Court dismissed with prejudice, rejecting assertion that the public interest is “always served by the competition” of two rivals
• Moreover, damages sought were monetary
Criminal Litigation
• Taiwanese auto part maker indicted, along with its top executive and its U.S. distributor for conspiring to fix prices of aftermarket vehicle lights
• Conspirators announced pricing based on their agreements and audited compliance with the conspiracy
• Total number of defendants (individuals and companies) indicted is now eight
• Two other aftermarket light distributors have pled guilty, paying total fines of $43.2 million and with one individual sentenced to six months in prison and a $25,000 fine

• DOJ alleged that Sea Star and co-conspirators agreed to allocate customers and fix prices for freight transportation
• Sea Star pled guilty and agreed to pay $14.2 million fine
• Frank Peake, Sea Star’s former president, was indicted
• Previously, another shipping company and five former executives pled guilty in the ongoing investigation
• Another conviction in the DOJ’s ongoing investigation of a price-fixing conspiracy to raise fuel surcharges on cargo shipments after Hurricanes Katrina and Rita

• So far, 41 defendants have been indicted for participation (21 individuals and 20 airlines)

• DOJ has collected over $1.8 billion in fines and four executives have been sentenced to serve time

• Guilty plea follows trial at which jury was deadlocked and fail to reach a verdict
FCPA Actions

• Bill introduced on Nov. 30 in the US House of Reps. to allow private entities to sue for damages for violations of the FCPA
• Nov. 10: Pfizer reported settling FCPA claims with DOJ and SEC
• Nov. 3: SEC announced investigation of Brazilian aircraft mfr. Embrauer SA for FCPA violations
Tom Demitrack has litigated numerous antitrust cases, including price-fixing, vertical restraints, monopolization, and Robinson-Patman cases, as well as intellectual property cases raising antitrust issues. He has substantial experience, in particular, in distribution cases raising price discrimination and similar issues and in class action practice. Tom is the coordinator of the antitrust practice in Jones Day's Cleveland Office.

In recent years, he has represented clients such as Ascension Health, Bayer, Eastman, Experian, Macy's, Madison Square Garden, and R.J. Reynolds.
Paula Render is an antitrust litigator, defending clients against claims of price-fixing, market allocation, refusals to deal, price discrimination, tying, and other antitrust claims. She also litigates merger challenges brought by the enforcement agencies. Her clients are in industries as diverse as pharmaceutical benefit management, specialty chemicals, financial services, manufacturing technology, and consumer products.

Paula has argued in the Third, Fifth, Seventh, Eighth, and Tenth Circuits as well as numerous federal and state trial courts and has tried cases in federal courts and before arbitration panels. Prior to her legal career, Paula worked in product management for AT&T in New Jersey and Milan, Italy.
Fiona Schaeffer has extensive experience in antitrust counseling, litigation, and transactional matters for clients in a broad range of industries, with particular depth of experience in the health care, financial services, and media sectors. She advises corporate and private equity clients on antitrust aspects of mergers and acquisitions, joint ventures, and other commercial transactions.

She frequently serves as global coordinating antitrust counsel for transactions requiring antitrust review in the U.S., EU, and other jurisdictions worldwide. She also represents clients in government investigations, arbitrations, and litigations, including multidistrict treble damages class actions and private antitrust suits in federal and state courts.

Fiona practiced for a number of years in Europe, representing clients in cross-border transactions and EU litigation. She has appeared before the European courts in Luxembourg and worked on complex antitrust proceedings in the UK High Court.
Alexandre Verheyden's practice focuses on competition/antitrust law, representing major corporations before the European Commission, European courts, and national authorities. Alexandre also has significant experience in transatlantic mergers.

Alexandre's experience involves abuse of dominant position/monopoly offense, cartel, merger, and state aid cases. He represented DoubleClick in its merger with Google and BT in its various mergers since 1995 (including MCI, AT&T, Infonet, and Radianz). He obtained a favorable judgment in a €500 million damage claim for abuse of dominant position against Belgacom Mobile and the largest fine ever imposed on a dominant enterprise by the Competition Council. He represented Dole in the banana cartel case and Bouygues Telecom in several state aid cases against the French government. He also represents Toyota in all its competition law-related European distribution matters.
Dave Wales has extensive antitrust experience in both the private and public sectors. He represents foreign and domestic clients in a wide range of industries on all aspects of antitrust, including mergers and acquisitions, criminal grand jury investigations, dominant firm conduct, distribution arrangements, licensing, and competitor collaborations.

Dave has the unique experience of serving as a senior official in both U.S. antitrust agencies. He spent three years at the Federal Trade Commission and, from 2008 to 2009, oversaw all of the agency's antitrust enforcement as acting director of the Bureau of Competition. From 2001 to 2003, Dave was counsel to the assistant attorney general in the Department of Justice's Antitrust Division, where he was part of the team overseeing all antitrust matters before the agency, including the Microsoft case, the DIRECTV/Echostar merger, and Northrop Grumman's acquisition of TRW.