March Antitrust Update for In-House Counsel

by Bingham McCutchen LLP
March 15, 2013
Discussion Agenda

• Mergers and Acquisitions
  Thane Scott, Partner, Boston

• Non-Merger Civil Enforcement
  Hill Wellford, Partner, Washington D.C.

• Cartel Enforcement
  Kristen Palumbo, Partner, San Francisco

• Private Litigation
  Stacey Anne Mahoney, Partner, New York

• International Developments
  Davina Garrod, Partner, London
“Merger mania” continues in February-March

**American Airlines/USAirways** (February 13, 2013)

- If approved, four airlines will have combined market share approaching 70% of domestic market
- Positively received by shareholders, mixed views from consumer advocates

**Office Max/Office Depot** (February 20, 2013)

**Staples/Office Depot v. 2.0?**

- Times have changed since FTC’s successful Staples challenge in 1997
- May address central question affecting all retailers – competitive effects of internet sales
Deals Currently Under Review

• Beer break: *Anheuser-Busch InBev/Grupo Modelo*
  - Joint motion for stay filed February 20, 2013

• *Oltrin Solutions, LLC*
  - FTC challenges non-compete agreement stemming from completed assets acquisition
  - Will be discussed later in presentation

• *T-Mobile/MetroPCS*
  - Cleared by DOJ March 13, 2013, five months post-signing
  - DOJ press release says, unlike *AT&T/T-Mobile*, investigation showed that:
    - MetroPCS does not compete at national level
    - MetroPCS local markets all served by four national carriers

• *St. Luke’s Health System, Idaho* (March 12, 2013)
  - FTC and Idaho Attorney General announces challenge to hospital acquisition of physician practice group
  - Claim is that acquisition creates a dominant (60%) single provider of adult primary care physician services
  - FTC action follows private lawsuit in which preliminary injunction blocking merger has already been denied
Supreme Court Issues Merger Ruling!

_FTC v. Phoebe Putney Health System, Inc._ (February 19, 2013)

• First high court merger case in three decades
• First high court state action case in two decades
• Unanimous Supreme Court reverses 11th Circuit

Facts:

• Merger to monopoly of the only two hospitals in rural county in Georgia
• Transaction was overseen by regional hospital authority, which acted as nominal purchaser of target hospital, which it then sold to Phoebe Putney through sales and lease agreements

Ruling:

• Question: What type of state oversight/involvement is sufficient to shelter private actors under state antitrust immunity?
• Answer: state must “clearly articulate” and “affirmatively express” policy envisioning exercise of delegated authority in specific, competition-suppressing way
• Pendulum has swung back to favoring antitrust enforcement over federalism concepts
• Compare to _Credit Suisse_, in which Court provided generous elbow room to _federal_ regulators regulating complex financial markets
• Impacts will be felt in businesses in which competition is affected by state and municipal regulators
Non-Merger Civil Enforcement

Hill Wellford
Unilateral conduct

Government enforcement

• EC fines Microsoft € 561 million ($751 million)
  • Microsoft failed to offer browser choices in its Windows OS, as required by 2009 commitment
  • First-ever EC Article 9 compliance proceeding
  • Fine represents 1% of Microsoft’s relevant sales; could have been up to 10%

• Germany investigates Amazon’s “price parity” rule
  • “Could violate the general ban on cartels,” says Bundeskartellamt
  • Growing international agency hostility to MFNs?
Unilateral conduct

The smartphone patent wars

• Speech by DOJ DAAG Renata Hesse
  • Suggests Section 2 liability for breach of FRAND should not be limited to deception as in *Broadcom*

• Paper by economists Kuhn, Morton & Shelanski
  • Propose changes to SSO IPR policies

• In re Innovatio (N.D. Ill. Feb. 4, 2013)
  • Upholds NPE’s *Noerr-Pennington* defense to tort and unfair competition claims for asserting patents
  • FRAND-based breach of contract claim continues
Unilateral conduct

Private Cases

• Walgreen et al. sue Warner-Chilcott
  • Allege “product hopping” -- promoting new pharma products to respond to “genericide” of old ones
  • US FTC has made similar inquiries, industry-wide
  • *Noerr-Pennington* or policy defenses?
  • Could this liability theory spread beyond pharma?

• Sunbeam v. Nielsen (11th Cir Mar. 4, 2013)
  • No antitrust injury for “inferior” video rating service
  • Requires proof of “willing and able” competitor, “waiting in the wings”; court finds that none exists
Joint conduct

Government enforcement

- DOJ settles with MacMillian in the Ebooks case
  - All five publishers have now settled
  - Apple remains in the DOJ case; has settled in the EC

- FTC issues a no-challenge opinion to Oklahoma Norman Physician Hospital Organization (PHO)
  - Cites benefits of clinically integrated network

- FTC v. Actavis – Supreme Court argument on Mar. 25
Cartel Enforcement

Kristen Palumbo
DOJ expands auto parts cartel investigation to new products and maybe new companies

- Deputy Assistant AG Scott Hammond announced expansion of Antitrust Division’s three-year investigation into price fixing and bid rigging in auto parts industry.
- Thus far, investigation has focused on wire harnesses, instrument panel clusters and fuel senders. Nine corporate and 12 individual guilty pleas; $809 million in fines and 1-2 year sentences.
- Hammond says that while the probe is ongoing, “it already appears to be the biggest criminal antitrust investigation that we’ve ever encountered.”
Royal Bank of Scotland entered deferred prosecution agreement for role in manipulating LIBOR benchmark interest rates

- Admitted to wire fraud and participating in price-fixing conspiracy with other banks to rig Japanese Yen LIBOR
- Agreed to $100 million penalty and continued cooperation; brings total RBS fines and penalties in U.S. and U.K. to $612 million
- Barclays and UBS already settled; more than a dozen firms still under investigation

Two Japanese freight forwarders agreed to plead guilty to price-fixing

- Fined total of $18.9 million for roles in conspiracy to fix fuel surcharges and security fees for air cargo shipments from Japan to U.S.
- Part of ongoing worldwide investigation of freight forwarders
- In U.S., 16 companies have either pleaded guilty or agreed to plead guilty and have agreed to $120 million in fines
Three California real estate investors agreed to plead guilty in ongoing investigation of big rigging at public foreclosure auctions

- Investors agreed not to bid against one another and instead designate winner to obtain selected properties
- Investigation has yielded 29 guilty pleas to date

**Former CEO of U.S. tomato processor sentenced for racketeering and participation in conspiracy to fix tomato product prices in U.S.**

- Among the longest prison terms for crimes involving antitrust laws
- Cartel investigation has led to 10 other guilty pleas

**AU Optronics files brief in appeal of March 2012 price-fixing conviction**

- Argues conviction improperly based on entirely foreign conduct:
  - Under Ninth Circuit precedent, rule of reason (not per se) standard should have been applied
  - Under other standards, including those in FTAIA, Sherman Act should not have been allowed to reach foreign conduct
Fined fuel cartels a total of $61 million for price-fixing at gas stations
• Six local cartels in different cities involving 28 gas stations, 3 trade associations and 31 individuals

Fined Air France and KLM $7 million for conspiring to fix prices of air freight fuel surcharges
• Eight executives previously charged for role in alleged cartel
• Remaining companies to appear before CADE this month

Began legal action against alleged bid rigging cartel in IT market
• Seven IT companies and 10 executives charged with rigging bids in government auctions for outsourced IT services
• Alleges allocated bids and exchanged sensitive commercial information about price, clients and tender conditions
Cartel Enforcement – Europe

Germany’s Federal Cartel Office raided steel makers looking for evidence of cartel agreements in market for steel products used in auto sector.

German and Belgian antitrust authorities fined flour mills for conspiracy to fix flour prices, coordinate capacity and allocate customers.

- Part of long-running investigation of flour mills throughout EU
- Limited fines given heavy penalties already imposed by other countries

Spain’s CNC fined (a) polyurethane foam makers for fixing prices and setting production quotas for foam since at least 1992; and (b) stationary companies for 15-year conspiracy to fix prices of notebooks and other stationary products.

France’s Competition Authority fined pork slaughterhouses for colluding to limit purchases of pigs in order to lower prices paid to farmers.

Norway’s Competition Authority levied largest-ever fine of €18.5 million against construction company for bid rigging and collusion on road building contracts.

- Most involved fines of less than €10 million and leniency applicants with full immunity or reduced fines. Some involved fines against trade associations.
Private Litigation

Stacey Anne Mahoney
Supreme Court Litigation

- **American Express Co. v. Italian Colors Restaurant (12-133)**
  - Whether arbitration agreement with a class action waiver prevents “effective vindication” of federal antitrust claims?
    - Argument on 2/27/13 addressed whether the test depended on practical outcomes, cost benefit analysis, a comparison of arbitration to litigation, or something else
    - Interesting inquiry re: whether the imposition of the arbitration clause was indicative of Amex’s market power and whether that issue was properly before the Court

- **AU Optronics Corp. v. South Carolina (12-911)**
  - Petition for writ of *certiorari* briefing was complete 3/5/13
  - Conference scheduled for 3/22/13
Circuit Court Litigation

• **Mayor and City Council of Baltimore v. Citigroup Inc.** (2d Cir. 10-cv-722 and 10-cv-867)
  - Dismissed auction-rate securities (ARS) investors’ class claims against banks holding that banks’ decisions to leave ARS market was not a group boycott

• **Blessing v. Sirius XM Radio Inc.** (2d Cir. 11-3696-CV)
  - Rejected objectors’ argument that nonmonetary 5-month price freeze merger settlement was inconsistent with CAFA, overvalued or insufficient given plaintiffs’ case weakness

• **Gatt Communications Inc. v. PMC Associates LLC** (2d Cir. 11-1111-CV)
  - Dismissed bid rigging claims, holding that federal and NY bid rigging requires injury to consumers, not just plaintiff
• **AT&T Mobility LLC v. AU Optronics Corp.** (9th Cir. 11-16188)
  - Indirect purchasers who purchased products outside of California may bring price-fixing Cartwright Act claims if defendants’ conduct was sufficiently connected to California
  - Remanded to determine defendants’ California conduct

• **Sunbeam Television Corp. v. Nielsen Media Research Inc.** (11th Cir. 11-10901)
  - Affirmed summary judgment holding that plaintiff television operator did not have standing to sue because plaintiff failed to identify any potential entrant rating company
  - Rejected establishing different burdens of proof for plaintiff competitors vs. customers as “efficient enforcers”
District Court Litigation

- *In re: Libor-Based Financial Instruments Antitrust Litigation* (SDNY 1:11-md-02262) (at least 5 new LIBOR-related cases have been filed since 2/12/13)
  - 3/15/13 hearing conducted in which J. Buchwald addressed statutes of limitation issues and whether LIBOR is a “price” subject to price-fixing claims
- *Louisiana Wholesale Drug Co. Inc. v. Shire LLC* (SDNY 1:12-cv-03711)
  - J. Marrero granted motion to dismiss class action alleging price inflation resulting from stifling generic competition
  - To hold otherwise would discourage pharmaceutical companies from entering patent licensing settlements that facilitate bringing generics to market faster
District Court Litigation (cont.)

• **Cablevision Systems Corp. v. Viacom International Inc.** (SDNY 13-cv-01278)
  - Complaint was filed 2/26/13 alleging illegal tying and block booking requiring plaintiff to license and distribute an unwanted suite of networks in order to get distribution rights for defendant’s “commercially critical networks”

• **In re: Vitamin-C Antitrust Litigation** (EDNY 1:06-md-01738)
  - 2/25/13 price fixing jury trial began in which defendants argue that they fixed prices as compelled by the Chinese government
  - 3/5/13 retired Chinese government official who oversaw Vitamin C export regulation testified on behalf of defendants to support state action defense
Other Litigation

• *In the matter of certain wireless devices with 3G and/or 4G capabilities, including components thereof* (ITC 337-TA-868)
  
  • 2/21/13 hearing in which Nokia Corp. and Huawei Technologies Co. Ltd. argue that InterDigital Inc.’s complaint to the ITC that they are infringing on standard essential wireless patents is an improper effort to force them to accept an anticompetitive worldwide license with “unreasonably high royalties”
International Developments

Davina Garrod
EC blocks third attempt by Ryanair to acquire Aer Lingus (27 February 2013)

- EC’s route-by-route assessment found vigorous competition between the parties; deal would create a monopoly on 28 routes, and dominance on another 18 routes
- Irish markets characterised by insurmountable entry barriers
- Ryanair offered several sets of remedies, including divestment to Flybe of 43 overlapping routes, and cession of London airport slots to IAG/BA for 3 years
- EC considered the proposals to be insufficient, in particular because Flybe was not a suitable purchaser; nor would IAG/BA be able to constrain Ryanair post-merger
- Ryanair confirmed it would appeal against the decision
Competition Law and On-Line Trading

• Choice of contractual model: agency versus distribution
• Restrictions imposed on or by platforms and comparison sites, including parity pricing/MFNs/RPM
• Control over on-line distributors
• Key cases:
  • “E-Books”: Commitments to the EC from Apple and the Four Publishers
  • UK OFT investigation into Online Travel Agents ("OTAs") and Intercontinental Hotels
  • German FCO investigation into HRS’s alleged abuses in hotel distribution online
  • European Competition network (ECN) interest
UK Developments

Referral of Britvic/A.G. Barr PLC to the Competition Commission (CC) (13 February 2013)

- 3-2 merger in the UK market for carbonated soft drinks (CSDs)
- OFT’s market study shows that A.G. Barr’s IRN-Bru//Orangina are close substitutes for Britvic’s brands (also exclusive bottler for Pepsi, 7UP, Gatorade)
- Britvic v. Coca-Cola duopoly on-premises, with strong buyer power (supermarkets) in take-home market
- CC has until 30 July to clear (with or without conditions) or block
- Increasing trend of CC unconditional clearances – approx. 40% of CC referrals unconditionally cleared (2008-2012)

Reform of the UK competition regime

- OFT and CC to be merged into the Competition and Markets Authority (CMA) – target for implementation: April 2014
- CMA to have the power to investigate practices across markets, with sector regulators retaining their concurrent competition powers
- ‘Dishonesty’ element to be removed from the criminal cartel offence to make it easier to prosecute
- Merger notification regime to remain voluntary
- Streamlining time limits for the “mergers” and “markets” regimes
German Developments

FCO blocks proposed acquisition of Tele Columbus (TC) by Kabel Deutschland (KDG) (22 February 2013)

- KDG is the largest and TC the third largest cable network operator in Germany
- KDG had offered to dispose of TC’s networks in Berlin, Dresden and Cottbus
- FCO required double the divestments (approx. 60% of TC’s networks in Eastern Germany)
- Risk of strengthening the duopoly between KDG and Unitymedia KabelBW in Germany

Investigation by the FCO against Asics – Ongoing

- Asics took action against online traders who were pricing below Asics’s preferred pricing
- Asics rolled out a selective distribution system in Europe and it halted deliveries of its products to eBay and Amazon
- Investigation launched following complaints from affected websites
- Complaints received in relation to similar steps taken by Nike and Adidas and so the investigation may be extended
Brazilian Developments

Resale Price Maintenance Presumed Illegal

- Decision of the CADE in the case of SKF do Brazil Ltda of 6 February 2013
- RPM condemned and presumed illegal; company using RPM fined 1% of its Brazilian revenue
- Presumption of illegality rebuttable if company found not to have significant market power (market share less than 20%) or market efficiencies outweigh negative effects of RPM and benefit consumers:
  1) company using RPM has no significant market power (market share <20%); or
  2) market efficiencies outweigh negative effects of RPM and benefiting consumers
- Onus on the company using RPM to prove it is not illegal
- Additional risk if using a Unilateral Price Policy (UPP) in Brazil

Recent Merger Control Developments under New Law

- Fewer cases were notified in 2013 when compared with 2012 (e.g., 2013 - Jan: 26, Feb:18; 2012 – Jan 41, Feb:53)
- Average time for CADE to decide has been reduced (now CADE decides in approx. 20 days)
Speakers
Thane Scott concentrates his practice on matters involving antitrust and trade regulation. Throughout the past 30 years, he has counseled industry leaders and litigated prominent cases that define modern antitrust law. He actively litigates in both state and federal courts and has served as lead or liaison counsel in numerous multidistrict, complex and class action cases.

Thane regularly defends business and consumer class actions involving antitrust and business tort claims, including class certification issues, and he has successfully concluded well over 100 government investigations of mergers and other coordinated conduct involving national and international companies. He also handles disputes involving multi-tiered distribution systems and supply chain management, particularly in technology-intensive industries.
Hill Wellford advises clients in antitrust matters, especially U.S. Department of Justice, Federal Trade Commission and foreign government enforcement at the intersection of technology, patents and competition. His practice is international, with active matters in the Americas, Asia and Europe.

Prior to joining Bingham, Hill was chief of staff at the Antitrust Division of the U.S. Department of Justice in Washington, D.C., where he oversaw the full range of criminal, merger, civil conduct and international work by the Antitrust Division’s 400-plus lawyers and economists.

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Kristen Palumbo concentrates her practice on antitrust litigation and counseling. She defends U.S. and foreign-based clients in private antitrust litigation, including class actions, in federal and state courts throughout the United States. She also advises clients in connection with antitrust investigations by the U.S. Department of Justice.

She has represented clients in a wide range of industries, including energy, consumer electronics, automotive electronics, accounting, freight forwarding, medical products, biometric authorization and payment solutions, microprocessors, printers and related supplies, and enterprise software and support services.

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Stacey Anne Mahoney focuses her practice on antitrust litigation and counseling. In her litigation practice, she defends private antitrust litigants in federal and state courts, including in class actions, throughout the United States involving claims for restraints of trade, illegal monopolization, exclusive dealing, merger transactions that may substantially lessen competition, false advertising, unfair competition laws and related business torts.

Stacey’s counseling practice focuses on distribution and pricing issues, antitrust investigations and competitor collaborations. Additionally, she develops and updates compliance programs and materials, regularly conducts on-site training for clients, and has conducted clients’ internal investigations.
Davina Garrod

Davina Garrod advises multinationals, corporates, hedge funds and other asset managers, investment banks, and other financial institutions on mergers, acquisitions and joint ventures; technology transfer/IP licensing; cartels; investigations by government agencies and regulators, including those related to the Foreign Corrupt Practices Act (FCPA) and UK Bribery Act; and State aid/restructuring. Davina also litigates before the European and UK courts. She provides strategic and regulatory advice in connection with, inter alia, financial services, energy, technology and environmental issues.

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Bingham McCutchen is widely recognized for our work in antitrust, competition and trade regulation law. Our group is highly ranked by Chambers Global 2011, Best Lawyers and Chambers USA, and has been described as “a superb team of tremendous attorneys who offer advice of the absolute highest quality.”

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