

Clearance: The Back Story and Looking Forward

Justin O'Neill Kay

In antitrust circles, “clearance” is a loaded word. It has become synonymous with disagreement, not just between the Federal Trade Commission and the Antitrust Division over which agency conducts an investigation but also within the antitrust bar over whether the clearance process needs to be reformed. Opinions in recent years have ranged from those strongly favoring reform¹ to those that are skeptical and dismissive of the need or benefit.² The debate has even become the butt of jokes.³

William J. Baer, whom President Obama nominated on February 6, 2012, to the position of Assistant Attorney General for the Antitrust Division, historically falls squarely into the category of advocates for reforming and refining the clearance process.⁴ And while the reform momentum has steadily diminished since then-Senator Ernest “Fritz” Hollings (D-SC) forced the agencies to abandon their 2002 agreement (the terms of which Mr. Baer helped formulate as one of four prac-

¹ *Interview with William E. Kovacic, Chairman, Federal Trade Commission*, ANTITRUST SOURCE, Aug. 2008, at 12 (“[T]he clearance process by which the agencies avoid duplication of effort with respect to the specific matters is quite worthy of a rethink.”), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Aug08_KovacicIntrvw8_6f.pdf; *Interview with Antitrust Modernization Commission Chair Deborah A. Garza*, ANTITRUST SOURCE, Apr. 2007, at 2 (“The [Antitrust Modernization Commission] Commissioners would like to see action on our recommendation regarding a global clearance agreement between the Justice Department and FTC”), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr07_GarzaIntrvw4_30f.pdf.

² *Interview with Richard A. Feinstein, Director, FTC Bureau of Competition*, ANTITRUST SOURCE, Apr. 2010, at 7 (“[T]he notion that [clearance is] a problem of major proportions or that consideration of deals is frequently delayed by clearance disputes doesn’t comport with my experience.”), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_FeinsteinIntrvw4_14f.pdf; *Interview with William Blumenthal, General Counsel, Federal Trade Commission*, ANTITRUST SOURCE, Dec. 2007, at 9 (“[I] think people need to step back and ask themselves how severe the problem is and whether efforts to fix the problem potentially might make things worse.”), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec07_Blumenthal12_17.pdf; *Interview with FTC Commissioner Pamela Jones Harbour*, ANTITRUST SOURCE, Mar. 2006, at 10 (“As for the need for certainty in interagency clearance, call me a skeptic, but I do not believe that any tweaks to the clearance agreement will ever solve all of the clearance issues.”), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Mar06_HarbourIntrvw3_22f.pdf.

³ *Roundtable Conference with Enforcement Officials: American Bar Association Section of Antitrust Law Spring Meeting, Washington, DC*, ANTITRUST SOURCE, Apr. 2009, at 9 (Statement of Scott D. Hammond, Acting Assistant Attorney General, Antitrust Division: “I have actually come up with a solution to this clearance dispute problem . . . Going forward, the Antitrust Division will start looking at all Section 2 conduct criminally, and we will also review all mergers through our criminal enforcement program. [Laughter.]”), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr09_EnforcerRT4_29f.pdf.

⁴ *See, e.g.*, William J. Baer, *The Dollars and Sense of Antitrust Enforcement*, Prepared Remarks of William J. Baer, Director, Bureau of Competition, Federal Trade Commission, Prepared Remarks Before the Antitrust Section of the N.Y. State Bar Ass’n 13 (Jan. 25, 1996) (“One goal has been to expedite the process of determining which of the two agencies will investigate a particular merger transaction. . . . Our reforms have produced results.”); William J. Baer, Director, Bureau of Competition, Federal Trade Commission, Prepared Remarks Before the American Bar Ass’n Antitrust Section Spring Meeting 1998 at 24 (Apr. 2, 1998) (“Ongoing concerns on our radar screen include clearance delays . . .”), available at <http://www.ftc.gov/speeches/other/baeraba98.htm>; *Dep’t of Justice & Fed. Trade Comm’n Merger Workshop* 141 (Feb. 19, 2004) (Statement of William Baer, Arnold & Porter) (“The whole problem with clearance remains an issue.”), available at <http://www.ftc.gov/bc/mergerenforce/040219ftctrans.pdf>; William J. Baer, Prepared Remarks on U.S. Merger Enforcement Policy Before the Antitrust Modernization Commission, 13 (Nov. 17, 2005) (“The existing clearance process unduly delays antitrust clearance, and confers little if any benefit on the parties, consumers, or the enforcers. . . . [The 2002 FTC-DOJ accord], or some variant of it, should be adopted promptly.”), available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Baer_Statement.pdf.

tioners tapped by the agencies to recommend reforms),⁵ Mr. Baer's presumed confirmation may invite a renewed effort to fix the clearance process.

History of the Clearance Process

The Antitrust Division and the FTC have discussed the allocation of their shared enforcement responsibilities since the formation of the FTC in 1914.⁶ The first informal agreement was reached in 1938, but a formal clearance agreement was not executed until June 30, 1948.⁷ The timing of that first formal agreement is not coincidental: it was likely the result of the Supreme Court's ruling earlier that year in *FTC v. Cement Institute*,⁸ a case stemming from simultaneous FTC and Division investigations of the same entity for the same conduct. The Court held in that case that the FTC and the Division "can chase the same respondent if [they] wish to do so, Section 5 of the Federal Trade Commission Act being broader than Section 1 of the Sherman Act."⁹

Since 1948, the agencies have formally modified that agreement four times (in 1962–1963, 1993, 1995, and 2002).¹⁰ The modifications prior to 2002 were not widely publicized, while the modifications in 2002 received substantial publicity and were ultimately abandoned as a result of political pressure.¹¹

The 1948 and 1962–1963 Clearance Agreements

The 1948 agreement was reached following a conference between the Assistant Chief Trial Counsel and Assistant Chief Examiner for the FTC and the Assistant Attorney General and the Chiefs of the Litigation and Complaint Sections of the Division for the Department of Justice.¹² The agreement provided for exchange of "cards" between the office of the Assistant Chief Examiner for the FTC and the office of the Chief of the Complaint Sections of the Division "regarding pending anti-monopoly investigations and of each new investigation at the time it is directed."¹³ The cards (completed in duplicate with one copy retained and the second copy dispatched to the other agency) were to include a file number, title, date, description of the product and parties involved, and statement of the charges.¹⁴ Upon receipt, a liaison officer at the recipient agency would circulate the card internally (e.g., to the Section Chiefs in the Division) and review the recip-

The Antitrust Division and the FTC have discussed the allocation of their shared enforcement responsibilities since the formation of the FTC in 1914.

⁵ Timothy J. Muris, *Comments on the FTC-DOJ Clearance Process Before the Antitrust Modernization Commission* 7–8 (Nov. 3, 2005) [hereinafter Muris Comments], available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Muris_Statement.pdf.

⁶ *Id.* at 3 n.2.

⁷ U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL VII-4 (4th ed. July 2009) [hereinafter ANTITRUST DIV. MANUAL], available at <http://www.usdoj.gov/atr/public/divisionmanual/index.html>.

⁸ 333 U.S. 683 (1948).

⁹ Miles W. Kirkpatrick, *Enforcement Policies and Procedures—The Past As Prologue*, 42 ANTITRUST L.J. 1, 32 (1972) [hereinafter Kirkpatrick Comments].

¹⁰ Muris Comments, *supra* note 5, at 3 n.2; Deborah Platt Majoras, *Recognizing the Significance of Prosecutorial Discretion in a Multi-Layered Antitrust Enforcement World*, 11 GEO. MASON L. REV. 121, 132 (2002).

¹¹ Majoras, *supra* note 10, at 132. Cf. Muris Comments, *supra* note 5, at 17 ("[T]here is a myth that the 2002 Clearance Agreement failed because of opposition from 'Congress.' The opposition came from only one member, albeit an important one, Senator Ernest Hollings (D-SC).").

¹² 5 SENATE COMM. ON GOVERNMENT AFFAIRS, STUDY ON FEDERAL REGULATION, S. DOC. NO. 95-91, at 255 (2d Sess. 1977) [hereinafter Senate Committee Report] (including a copy of the agreement as "Appendix A").

¹³ *Id.*

¹⁴ *Id.*; see also *id.* at 235 (including a copy of a blank clearance request card).

ient agency's records regarding past and present investigations involving the disclosed information.¹⁵ The liaison officer would then telephone his counterpart and disclose whether there was a pending investigation involving the parties, products, or charges for which clearance was sought.¹⁶ Provided there was none, the submitting agency would commence its investigation.¹⁷ If there was a pending investigation, however, "further liaison [was] to be effected . . ."¹⁸

The 1948 agreement was designed to "avoid the silliest kind of mistake of all—both [the Division and the FTC] investigating the same thing," and to that extent, it worked well.¹⁹ Whether shaped by that agreement or not, according to a report of the Attorney General's National Committee to Study the Antitrust Laws, by 1955 "an enforcement pattern ha[d] emerged from case-by-case action": while both agencies continued to enforce the Sherman Act and Section 7 of the Clayton Act, unless the conduct under investigation constituted part of a violation of the Sherman Act, the Division ceded to the FTC enforcement of Section 2 and Section 3 of the Clayton Act.²⁰ The report also concluded, however, that the clearance procedure could be improved: it recommended that the Division and FTC expand the exchange of cards to include "all proceedings and rulings of both agencies" (specifically noting "railroad releases, clearances under Sections 7 and 8 of the Clayton Act and comparable informal rulings"); keep each other informed about "significant subsequent developments" in cleared investigations; and coordinate agency-head to agency-head to ensure that investigations would be cleared based "not on any arbitrary allocation of jurisdiction, but on a case-by-case account of past experience, present manpower and remedies available to each agency."²¹ While it is unclear whether all of these recommendations were implemented, by 1958 the Division was publicly stating that allocation of investigations was in fact determined on "a case-by-case account of past experience, present manpower and remedies available to each agency."²²

In 1962 the agencies first formally amended the 1948 agreement. As a result of complaints from the Division that the FTC sometimes failed to respond to clearance requests for up to ten days, the Assistant Attorney General for the Division and the Chairman of the FTC agreed via exchange of letters that an investigation would be cleared if the recipient agency failed to respond within twenty-four hours of receipt of the request.²³

In March and April of 1963 the agencies again amended the 1948 Agreement when the Assistant Attorney General for the Division and the Chairman of the FTC exchanged a series of letters refining the clearance procedures as a result of several perceived shortcomings, includ-

¹⁵ *Id.* at 234.

¹⁶ *Id.* at 234 & 255.

¹⁷ *Id.* at 255.

¹⁸ *Id.*

¹⁹ *An Interview With the Honorable Donald F. Turner, Assistant Attorney General In Charge of the Antitrust Division*, 30 A.B.A. ANTITRUST SECTION 100, 112 (1966); Marcus A. Hollabaugh, Chief, Special Litigation Section, Antitrust Division, *Development of an Antitrust Case*, 4 A.B.A. ANTITRUST SECTION 14, 18 (1954) ("[N]o investigation is started without prior clearance from the F.T.C., in order that there will be no conflict between the two agencies. A workable and near fool-proof procedure has been established to make sure that no conflicts occur.").

²⁰ ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 376 (1955).

²¹ *Id.* at 376–77. The report also recommended more cooperation between the agencies in general, including sharing investigative files, consulting with each other's economists, and consolidating and sharing FBI resources. *Id.*

²² Victor R. Hansen, Assistant Attorney General in Charge of the Antitrust Division, *Functioning of the Antitrust Division—Its Relationship to the Federal Trade Commission and Current Policies of the Division*, 13 A.B.A. ANTITRUST SECTION 20, 22 (1958).

²³ Senate Committee Report, *supra* note 12, at 236.

These clearance procedures (the 1948 agreement as amended by the 1962–1963 letter agreements) remained relatively unchanged over the next several decades, worked well in practice, and generated little controversy.

ing the failure to exchange full and accurate information about the scope of the proposed investigations.²⁴ The result of this exchange was a mutual commitment to “fully advise” each other of the purpose and scope of a proposed investigation (including providing “all information” in response to questions about that scope), and an agreement that a broad-scale study of an economic field by one agency did not prohibit the other from later using that information or investigating specific items within that field.²⁵ In addition, the agencies agreed that in the event that the liaison officers could not resolve a dispute, the issue would be escalated within each agency, ultimately, if necessary, to the FTC Chairman and the Assistant Attorney General.²⁶

The agencies did not, however, agree on the Division’s proposal to more formally allocate enforcement responsibility.²⁷ Specifically, the FTC rejected the Division’s proposal to assign to the Division “all matters involving per se violations of the Sherman Act, matters primarily concerned with Sherman Act violations, and matters within the scope of Section 3 of the Robinson-Patman Act”²⁸ and leave to the FTC “[m]atters involving primarily violations of Section 5 of the FTC Act, matters with a primary thrust of unfair competitive practices, or unfair or deceptive practices affecting consumers, and matters involving discriminatory pricing or other practices within the scope of the Robinson-Patman Act (except Section 3 thereof).”²⁹

These clearance procedures (the 1948 agreement as amended by the 1962–1963 letter agreements) remained relatively unchanged over the next several decades, worked well in practice, and generated little controversy.³⁰ Success, however, was still measured in terms of simply avoiding duplication of effort—neither the agencies nor the bar appeared to be focused on the speed with which clearance decisions were made, likely because delays were not a problem.³¹ Indeed, the 1977 Study on Federal Regulation by The Senate Committee on Governmental Affairs, although recommending some revisions to the clearance process,³² concluded that “[g]enerally,

²⁴ *Id.*; see also *id.* at 256–60 (including copies of the correspondence between Hon. Lee Loevinger, Assistant Attorney General for the Antitrust Division, and Paul Rand Dixon, FTC Chairman).

²⁵ *Id.* at 236.

²⁶ *Id.*

²⁷ *Id.* at 237.

²⁸ *Id.* at 259.

²⁹ *Id.* at 257.

³⁰ See Muris Comments, *supra* note 5, at 3 (“Clearance problems had not been serious when I was at the FTC in the 1980s; in my time as head of the Bureau of Competition, I encountered perhaps a handful of disputes each year.”); Kirkpatrick Comments, *supra* note 9, at 32 (“At the moment [the liaison meetings] are more or less continuous, such that any matter that comes in that involves the opening of an investigation is cleared through that committee to one agency or the other on quite reasonable, frequently de facto, bases.”); Comments of Commissioner Philip Elman, *Analysis of the Merger Movement—Antitrust Aspects: Panel Discussion*, 39 ANTITRUST L.J. 148, 161 (1969–1970) (“[T]here has long been a pre-merger arrangement . . . and there hasn’t been any change in that arrangement which, by and large, works out pretty well.”).

³¹ Kirkpatrick Comments, *supra* note 9, at 32 (“It is a clearance procedure, so that there isn’t any overlapping or duplication; we want to be sure that we don’t chase the same hapless respondent on the same set of facts. That has happened in my recollection really only once—in [*FTC v. Cement Institute*, 333 U.S. 683 (1948)].”).

³² The Report recommended that (i) representatives of the FTC and the Division meet at least weekly to ensure that matters not resolved in 10 days “are not forgotten or neglected,” and (ii) the FTC and the Division be required to report to the appropriate Congressional committees the existence of and reasons for any clearance disputes exceeding 60 days. Senate Committee Report, *supra* note 12, at 241. The Report further noted that by the time of its issuance, the FTC and the Division had already agreed to meet on a weekly basis, and agreed “to allow a more completed exchange of information when a clearance has been denied.” *Id.*

the liaison arrangement appears to have worked well in accomplishing its principal purpose: avoiding outright duplication of effort.”³³

The 1993 and 1995 Clearance Agreements

By the early 1990s, the clearance process was no longer functioning as it had in previous decades. Clearance disputes increased several fold, from an average of 10 per year between 1982 and 1989 to an average of 83 per year between 1990 and 2001.³⁴ As a result, the agencies and the bar were no longer measuring the success of the clearance procedures solely by the lack of duplicative investigations. Rather, they were increasingly focused on whether clearance decisions were made “quickly.”³⁵ The reason the clearance decisions were not being made quickly was likely a combination of increases in the number and complexity of mergers³⁶ along with technological changes and deregulation resulting in mergers of previously disparate industries which “blurred the traditional boundaries between different products and, consequently, [] eroded the basis on which the two agencies had distributed antitrust matters between them.”³⁷

Regardless of the underlying causes, the agencies made their first moves to reduce delays in December 1993 when they entered into an agreement to “improve and expedite the operation of [the 1948 agreement’s] current successor”³⁸ and in March 1995 when they announced additional revisions to further expedite the process.³⁹ The combination of the 1993 and 1995 agreements establish the clearance procedures that are now in effect.⁴⁰

Under the 1993 clearance procedures, the process commenced with the filing of a “claim” by the liaison office of the agency requesting exclusive investigative authority.⁴¹ Unless a counterclaim was filed within seven days for HSR reportable mergers (with shorter deadlines for cash tender offers and bankruptcy filings) or ten days for non-HSR reportable mergers, the matter was cleared to the agency filing the claim.⁴²

³³ *Id.* at 237.

³⁴ Muris Comments, *supra* note 5, at 6.

³⁵ *Merger Enforcement at the Antitrust Division*, 58 ANTITRUST L.J. 329, 347 (1989) (“[T]he Division and the FTC] agree early on, or certainly try to, which of us will investigate a particular merger, if it is to be investigated at all. We try to do that, as I said, quickly. Before it is done, it is very hard to talk with anybody. . . . We try to do it quickly.”) (Statement of John W. Clark, Deputy Director of Operations, Antitrust Division).

³⁶ *Roundtable Conference with Antitrust Enforcement Officials*, 67 ANTITRUST L.J. 453, 481 (1999) (“1999 is not like 1976 by a long shot, in terms of the numbers of mergers, the size of mergers. . . . [T]here are three times as many mergers filed today as just five or six years ago” (Comments of FTC Chairman Robert Pitofsky); Antitrust Modernization Commission Hearings on Harmonizing FTC and DOJ Injunction Procedures 2 (Oct. 24, 2005) (Testimony of Michael N. Sohn, Arnold & Porter, LLP) [hereinafter Sohn Testimony], [available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Sohn_Statement.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Sohn_Statement.pdf)).

³⁷ Muris Comments, *supra* note 5, at 8; Sohn Testimony, *supra* note 36, at 2; Antitrust Modernization Commission Hearings on the FTC-DOJ Clearance Process 1–2 (Nov. 3, 2005) (Statement by John M. Nannes), [available at http://govinfo.library.unt.edu/amc/commission_hearings/federal_enforcement.htm](http://govinfo.library.unt.edu/amc/commission_hearings/federal_enforcement.htm).

³⁸ *60 Minutes with the Honorable Janet D. Steiger, Chairman, Federal Trade Commission*, 63 ANTITRUST L.J. 277, 293 (1994).

³⁹ *Roundtable Discussion with Enforcement Officials*, 63 ANTITRUST L.J. 951, 956 (1995) (Remarks of Anne K. Bingaman, Assistant Attorney General, Antitrust Division) [hereinafter Bingaman Remarks].

⁴⁰ ANTITRUST DIVISION MANUAL, *supra* note 7, at VII-4.

⁴¹ *Clearance Procedures Between Division and FTC*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1643, at 746 (1993).

⁴² *Id.*

For HSR reportable mergers, if a counterclaim was filed, the agencies agreed to seek to resolve the claims within ten calendar days of receipt of the filings,⁴³ but if only fifteen days remained in the waiting period and the matter was not resolved, then the dispute was escalated to the first of two levels where a representative of each agency served as a reviewer.⁴⁴ If the matter was not resolved by the two first level reviewers within two days, the dispute was then escalated to the two second level reviewers, where the dispute was to be immediately resolved.⁴⁵ At any time during a clearance dispute, the agency that lost or conceded the prior clearance dispute could invoke the “merger possession arrow” and obtain clearance for the matter then in dispute.⁴⁶

The principal ground for resolving clearance disputes under the 1993 clearance procedures was “expertise in the product involved in the investigation to be conducted gained through a substantial antitrust investigation of the product within the last five years.”⁴⁷ The agencies defined “product involved” to include not only the product, but also (in descending order of importance) substitutes, inputs, outputs, or products used in conjunction with the product.⁴⁸ Where each agency’s expertise with the product involved was relatively equal, priority was to be given where an agency had ongoing contacts with a party as a result of an ongoing investigation or where an agency had in the last three years conducted an investigation involving a party and that investigation had presented “failing firm” issues.⁴⁹

The agencies defined “substantial investigation” to mean an investigation where documents were produced and reviewed in response to a subpoena or other compulsory process or where there was ongoing familiarity with a product as a result of outstanding civil decrees or consent orders (or the potential for the investigation to interfere with outstanding civil decrees or consent orders).⁵⁰ Investigations where second requests were not issued and criminal prosecution was not under consideration were generally not to be considered substantial investigations absent extraordinary circumstances.⁵¹ Where each agency’s expertise with a substantial investigation was relatively equal, priority was given (in descending order) to litigated cases, filed cases (including settled cases), announced challenges (including fix-it-first situations in response to potential challenges), merger investigations, civil conduct investigations, and criminal investigations.⁵²

On March 23, 1995, the agencies jointly announced eight HSR “Premerger Program Improvements.”⁵³ The improvements were intended to expedite the pre-merger review process and were the product of a comprehensive review of the clearance process, including consultations with the bar, business groups, and members of Congress.⁵⁴ Included among the improvements were the

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* The process for resolving non-HSR reportable merger clearance dispute was identical, but with longer deadlines.

⁴⁷ *Id.* The period would be extended to ten years where neither agency had significant experience within the past five years.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ ANTITRUST DIVISION MANUAL, *supra* note 7, at VII-4.

⁵⁴ A copy of the Premerger Program Improvements is available at 2 STEPHEN M. AXINN ET AL., ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT app. at E-6 (3d ed. 2010).

following commitments related directly to clearance procedures: (1) clearance would be determined within six business days for “the vast majority” of HSR matters, and within nine business days for “all” HSR matters, and procedures would be implemented to ensure compliance with these deadlines;⁵⁵ (2) the agencies would coordinate to enable parties to request preclearance meetings with and submit preclearance documents to both agencies in order to assist the clearance process and potentially expedite the review;⁵⁶ and (3) if the matter was not cleared by the ninth business day, the Chairman of the FTC and head of the Antitrust Division would “get on the phone and decide which agency will review the merger.”⁵⁷

Efforts to Reform the Clearance Process 2001–2002

Notwithstanding the efforts to expedite the clearance process evidenced by the 1993 and 1995 announcements, clearance disputes continued unabated, and indeed worsened.

Notwithstanding the efforts to expedite the clearance process evidenced by the 1993 and 1995 announcements, clearance disputes continued unabated, and indeed worsened. A more substantial effort to reform the clearance process therefore began in the late 1990s, ending unsuccessfully in 2002 due to the opposition of Senator Hollings, then ranking member on both the Senate Commerce Committee and the Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary.⁵⁸

By the early 2000s, clearance disputes took an average of approximately three weeks to resolve.⁵⁹ Even in cases where clearance ultimately was not formally contested, the agencies were sometimes spending weeks deciding whether to contest allocation.⁶⁰ This increase was attributed to several factors: the blurring of lines of traditional responsibility associated with the convergence of industries, duplication of experience, and the inefficient allocation of areas of primary responsibility.⁶¹ Ultimately, the clearance tail began to wag the investigation dog—decisions on whether to contest clearance, and indeed whether to investigate at all, were sometimes driven by whether experience (or lack thereof) garnered by an investigation would be used as ammunition in later clearance disputes.

In 1999 and 2000, FTC Chairman Robert Pitofsky and Assistant Attorney General Joel Klein engaged in “intense negotiations” in an effort to “overhaul the clearance process and to adopt a comprehensive allocation of specific industries between the two agencies.”⁶² When Charles James and Timothy Muris assumed office in the summer of 2001 as Assistant Attorney General and FTC Chairman, respectively, the efforts to reform the clearance process continued.⁶³

⁵⁵ *Id.* at E-9.

⁵⁶ *Id.* at E-10.

⁵⁷ Bingaman Remarks, *supra* note 39, at 956.

⁵⁸ Muris Comments, *supra* note 5, at 17.

⁵⁹ Fed. Trade Comm’n, *Clearance Delays*, <http://www.ftc.gov/opa/2002/02/clearance/cleardelaystats.htm> (noting that from October 1999 to February 2002, there were 136 contested clearances requiring an average of 17.8 business days to resolve, and 164 uncontested clearances requiring an average of 12.8 business days to resolve) [hereinafter *Clearance Delays*].

⁶⁰ Muris Comments, *supra* note 5, at 2–3.

⁶¹ Press Release, Fed. Trade Comm’n, FTC Releases Antitrust Clearance Process Documents (Feb. 27, 2002), available at <http://www.ftc.gov/opa/2002/02/clearance.shtm>.

⁶² Muris Comments, *supra* note 5, at 4; Antitrust Modernization Commission Public Hearing 77 (Nov. 3, 2005) (Remarks of Timothy J. Muris), available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/051103_Federal_Enforc_Transcript_reform.pdf (“[The allocation of industries] was the part that Joel Klein and Bob Pitofsky spent a lot of time on—an enormous exchange of memos . . .”).

⁶³ Press Release, Fed. Trade Comm’n, Timothy J. Muris Becomes FTC Chairman (June 5, 2001), available at <http://www.ftc.gov/opa/2001/06/muris.shtm>; Press Release, Dep’t of Justice, Attorney General Statement on the Confirmation of Charles James (June 15, 2001), available at http://www.justice.gov/atr/public/press_releases/2001/8397.htm.

Clearance disputes between the agencies by this time had become severe enough that one lasted for over a year and required the intervention of a mediator to resolve the dispute.⁶⁴

At the same time that the agencies were addressing problems with the clearance process, the Division was also reforming its merger review process. Revisions to the DOJ's merger review process and efforts to reform the clearance process were intertwined:

Days lost in debating clearance rob the agencies of time to narrow the scope of second requests to issues of genuine competitive concern. In addition, these delays sometimes can trigger the issuance of a second request simply to permit an investigation that would have occurred, but for the clearance dispute, in the initial thirty-day waiting period. In other cases, to reduce the probability of a second request, the filing is withdrawn and then re-filed.⁶⁵

On August 7, 2001, the Division announced a new merger investigation program designed to “more quickly identify critical legal and economic issues regarding transactions, facilitate more efficient and more focused investigative discovery and provide for an orderly process for the evaluation of evidence.”⁶⁶ This new “Merger Review Process Initiative” encouraged enforcement staff to be “as aggressive as possible during the initial fifteen- or thirty-day waiting period in attempting to dispense with transactions that are not candidates for further investigation, and to narrow and refine issues for transactions likely to progress to formal HSR Second Request inquiries.”⁶⁷ At the time, however, clearance battles between the FTC and the Division were taking approximately three and a half weeks to resolve, i.e., over half of the time identified in the new Merger Review Process Initiative for “aggressive” investigation.⁶⁸ As such, reforming the clearance process was a prerequisite to effective implementation of the new Merger Review Process Initiative.

In August 2001, James and Muris met with four former Division and FTC officials—Kevin Arquit, William Baer, Joe Sims, and Steven Sunshine—to discuss reforms to the clearance process.⁶⁹ These practitioners (of whom two had served under Democratic administrations, one under a Republican administration, and one under both) were given access to records and personnel at both agencies and asked to (1) consider ways in which decisions regarding allocations could be made more quickly to afford the agencies more time for substantive investigation during the initial thirty-day period, and (2) evaluate the then-current clearance process and suggest methods

⁶⁴ Muris Comments, *supra* note 5, at 5; Majoras, *supra* note 10, at 132 (“When Assistant Attorney General James and Chairman Muris took office and found a matter that had languished in the clearance process for well over a year, they realized that reforms were in order.”).

⁶⁵ Muris Comments, *supra* note 5, at 6. See also Initial Recommendations Joint Letter from Kevin Arquit, Bill Baer, Joe Sims & Steve Sunshine to Messrs. James & Muris, at 1 (Dec. 21, 2001) [hereinafter Joint Letter] (“At the end of the original 30-day stay, the only agency options (in some cases, the parties could withdraw and refile the HSR notification) are to issue a Second Request, thus extending the stay, or allow the transaction to close, thus eliminating the potential for preliminary relief. It will surprise no one that, where the agency is uncertain as to the competitive effects of a transaction, it will likely opt for issuing a Second Request. Since this imposes significant burdens on the merger parties, they will in most cases have an interest in seeing as much substantive work done by the agency during that first 30-day stay as possible. This work cannot be done before a clearance decision is made. Thus, every day lost in the clearance process is a day lost to substantive investigation, and increases the potential for additional (and perhaps unnecessary) burdens on the parties to the transaction.”), available at <http://www.ftc.gov/opa/2002/02/clearance/clearideas.htm>.

⁶⁶ Press Release, U.S. Dep’t of Justice, Assistant Attorney General Charles A. James Announces New Program for Conducting Merger Investigations 1 (Aug. 7, 2001), available at http://www.justice.gov/atr/public/press_releases/2001/8763.pdf.

⁶⁷ U.S. Dep’t of Justice, Merger Review Process Initiative 1 (Oct. 12, 2001), <http://www.justice.gov/atr/public/9300.pdf>.

⁶⁸ *Clearance Delays*, *supra* note 59.

⁶⁹ Muris Comments, *supra* note 5, at 7–8.

for improving resolution of disputes.⁷⁰ After meeting with officials at both agencies and reviewing considerable information relating to the clearance process, the group produced an initial report in the form of a letter dated December 21, 2001.⁷¹

The group found that while the then-current clearance process worked “very well in the vast majority of situations,” cases where the clearance process did not work well were “highly visible,” created “unnecessarily adversarial relationships,” caused “significant delays,” and had overall significance “out of proportion to their rarity.”⁷² Focusing on speed and correct decisions (in that order) as the two critical elements, the group suggested several modifications to the clearance process.⁷³ Among those suggestions was formal allocation of primary areas of enforcement responsibility according to a “Commodity List,” according to which fourteen products and industries were allocated exclusively to the FTC and eleven allocated exclusively to the Antitrust Division.⁷⁴

Based on these initial recommendations, the agencies planned to unveil a new clearance agreement in early January 2002.⁷⁵ Senator Hollings, however, expressed concerns about the agreement, objecting to Muris’s and James’s failure to seek input from all of the FTC Commissioners and Congress,⁷⁶ characterizing the agreement as a “change [in] the authority of the authorizing statute,”⁷⁷ and questioning the assignment to the Antitrust Division of all entertainment and media mergers (based on the concern that the Department of Justice was more susceptible to political pressure from the White House than the five FTC commissioners, two of whom must be of a different political party than the President),⁷⁸ resulting in several weeks of dialogue between him and the agencies. Two FTC Commissioners released statements expressing disappointment in Senator Hollings’ opposition to the agreement,⁷⁹ while two others released statements echoing Senator Hollings’ concerns.⁸⁰

⁷⁰ Antitrust Modernization Commission Hearings on Harmonizing FTC and DOJ Injunction Procedures 4 (Nov. 3, 2005) (Statement of Joe Sims) [hereinafter Sims Statement], available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Sims_Statement.pdf; Joint Letter, *supra* note 65, at 1.

⁷¹ Joint Letter, *supra* note 65, at 1.

⁷² *Id.*

⁷³ *Id.* at 3–5. The suggested modifications included standardizing deadlines for the clearance process; assigning dedicated staff to clearance issues; using a common lexicon and common forms and procedures; allocating enforcement responsibilities; and reducing these changes to a comprehensive Joint Clearance Manual. *Id.* at 3–7.

⁷⁴ *Id.* at 4, 8.

⁷⁵ Press Release, Fed. Trade Comm’n, FTC Chair and Antitrust Chief to Unveil Clearance Procedures for Antitrust Investigations at Press Conference (Jan. 17, 2002), available at <http://www.ftc.gov/opa/2002/01/ftcdojma.shtm>.

⁷⁶ Ilene Knable Gotts & Phillip A. Proger, *Federal Antitrust Agencies Merger Clearance Pact—Dead or Delayed?*, M&A LAW., May 2002, at 25.

⁷⁷ Jeff Bater, *FTC Chief Defends Merger Review Accord in Budget Hearing*, DOW JONES NEWSWIREs, Mar. 19, 2002.

⁷⁸ William J. Baer et al., *Taking Stock: Recent Trends in U.S. Merger Enforcement*, ANTITRUST, Spring 2004, at 15, 21. Hollings also asserted that the FTC should handle media deals because “its dual roles in competition policy and consumer protection allow it to guard against monopoly power better than the DOJ.” Jaret Seiberg, *Hollings Howls at Antitrust Agencies*, THE DEAL L.L.C. CORPORATE CONTROL ALERT, Mar. 28, 2002.

⁷⁹ Statement of Commissioners Orson Swindle and Thomas B. Leary on the Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Jan. 18, 2002), available at <http://www.ftc.gov/opa/2002/01/ftcdojostl.shtm>.

⁸⁰ Statement of Commissioner Shelia F. Anthony on the Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice Concerning Clearance Procedures for Investigations (Jan. 18, 2002), <http://www.ftc.gov/opa/2002/01/ftcdojosa.shtm>; Statement of Commissioner Mozelle W. Thompson Concerning the Abandoned Memorandum of Agreement Between The Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Jan. 2002), available at <http://www.ftc.gov/opa/2002/01/ftcdojmt.shtm>.

The 2002 Clearance Agreement

In late February 2002, the FTC announced that it and the Antitrust Division had negotiated a “Memorandum of Agreement” adopting “many, although not all” of the recommendations in the December 21 Letter.⁸¹ Released at the same time were three letters (one from eleven former heads of the FTC and the Antitrust Division, one from the Antitrust Section of the ABA and one from the Business Roundtable, the National Association of Manufacturers, and the U.S. Chamber of Commerce) applauding and endorsing the effort to clarify the areas of responsibility between the agencies and thereby improving the clearance process.⁸² The Memorandum of Agreement itself was released several days later,⁸³ despite the ongoing opposition of Senator Hollings.⁸⁴

Among the recommendations adopted in the Memorandum of Agreement was the allocation of industries, products, and service categories between the agencies.⁸⁵ These allocations were generally based on which agency had the greater experience in the industry.⁸⁶ Each agency had a “right of first refusal” to review transactions in industries allocated to it, but each also still retained the right to seek clearance for mergers in industries allocated to the other agency.⁸⁷ In the event a dispute arose, the Memorandum of Agreement created a resolution mechanism (including the use of an arbitrator) which required a clearance decision within ten days.⁸⁸

The March 2002 Memorandum of Agreement allocated enforcement responsibilities as follows:⁸⁹

⁸¹ Press Release, Fed. Trade Comm’n, FTC Releases Antitrust Clearance Process Documents (Feb. 27, 2002), available at <http://www.ftc.gov/opa/2002/02/clearance.shtm>.

⁸² Letter from Roxanne C. Busey, Chair, ABA Section of Antitrust Law, to Charles A James, Assistant Attorney Gen. for Antitrust, U.S. Dep’t of Justice & Timothy J. Muris, Chairman, Fed. Trade Comm’n (Jan. 23, 2002), available at <http://www.ftc.gov/opa/2002/02/clearance/aba.pdf>; Letter from John J. Catellani, President, The Bus. Roundtable et al., to The Honorable Timothy J. Muris, Chairman, Fed. Trade Comm’n (Feb. 5, 2002), available at <http://www.ftc.gov/opa/2002/02/clearance/brt.pdf>; Letter from Joel I. Klein et al. to Charles A James, Assistant Attorney Gen. for Antitrust, U.S. Dep’t of Justice & Timothy J. Muris, Chairman, Fed. Trade Comm’n (Feb. 4, 2002), available at <http://www.ftc.gov/opa/2002/02/clearance/multiletters.pdf>.

⁸³ Press Release, U.S. Dep’t of Justice, DOJ and FTC Announce New Clearance Procedures for Antitrust Matters (Mar. 5, 2002), available at http://www.justice.gov/atr/public/press_releases/2002/10171.pdf.

⁸⁴ Statement of Commissioner Mozelle W. Thompson Concerning the March 5, 2002 Clearance Agreement Between the Department of Justice and the Federal Trade Commission (Mar. 5, 2002), available at <http://www.ftc.gov/opa/2002/03/clearancemwt.shtm>.

⁸⁵ See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, MEMORANDUM OF AGREEMENT BETWEEN THE FEDERAL TRADE COMMISSION AND THE ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE CONCERNING CLEARANCE PROCEDURES FOR INVESTIGATIONS 3, 8–11 (Mar. 5, 2002) [hereinafter 2002 AGREEMENT], available at <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.

⁸⁶ *Id.* at 1–4.

⁸⁷ *Id.*

⁸⁸ *Id.* at 5–6.

⁸⁹ *Id.* at 8–11.

Federal Trade Commission

1. Airframes
2. Autos and Trucks
3. Building Materials
4. Chemicals
5. Computer Hardware
6. Energy
7. Healthcare
8. Industrial Gases
9. Munitions
10. Operation of Grocery Stores and Grocery Manufacturing, including distilled spirits and tobacco products
11. Operation of Retail Stores
12. Pharmaceuticals and Biotechnology (other than that associated with agriculture)
13. Professional Services
14. Satellite Manufacturing and Launch, and Launch Vehicles
15. Textiles

Antitrust Division

1. Agriculture and Associated Biotechnology
 2. Avionics, Aeronautics, and Defense Electronics
 3. Beer
 4. Computer Software
 5. Cosmetics and Hair Care
 6. Financial Services/Insurance/Stock and Option, Bond, and Commodity Markets
 7. Flat Glass
 8. Health Insurance, and Healthcare Products and Services over Which the FTC Determines It May Lack Jurisdiction
 9. Industrial Equipment
 10. Media and Entertainment
 11. Metals, Mining, and Minerals
 12. Missiles, Tanks, and Armored Vehicles
 13. Naval Defense Products
 14. Photography and Film
 15. Pulp, Paper, Lumber, and Timber
 16. Telecommunications Services and Equipment
 17. Travel and Transportation
 18. Waste
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Although the Memorandum of Agreement had reduced clearance to a one-day process and eliminated all pending clearance disputes,⁹⁰ received wide-spread support among practitioners,⁹¹ and was lauded by members of the Senate Subcommittee on Antitrust, Business Rights, and Competition for its goals of improving efficiency and streamlining the clearance process,⁹² Senator Hollings remained firmly opposed to it. Indeed, he threatened to use his position on the Senate Appropriations Committee to suspend funding for the salaries of all Commissioners and senior staff at the FTC and to slash the budget of the Department of Justice.⁹³

⁹⁰ Charles A. James, Assistant Attorney General, Antitrust Div. U.S. Dep't of Justice, Rediscovering Coordinated Effects, Address at the American Bar Association Section of Antitrust Law Annual Meeting: Rediscovering Coordinated Effects 6 (Aug. 13, 2002), available at <http://www.justice.gov/atr/public/speeches/200124.pdf>.

⁹¹ Sims Statement, *supra* note 70, at 4.

⁹² Letter from Senator Herb Kohl, Chairman, Subcomm. on Antitrust, Business Rights, and Competition & Senator Mike DeWine, Ranking Member, Subcomm. on Antitrust, Business Rights, and Competition, to The Honorable John Ashcroft, Attorney Gen., U.S. Dep't of Justice et al. 2 (Mar. 1, 2002), available at <http://www.ftc.gov/opa/2002/03/clearance/kohldewine.pdf>.

⁹³ Press Release, Fed. Trade Comm'n, Statement of FTC Chairman Timothy J. Muris (Apr. 15, 2002), available at <http://www.ftc.gov/opa/2002/04/020415stmt.shtm>; Press Release, U.S. Dep't of Justice, Statement by Charles A. James Regarding DOJ/FTC Clearance Agreement (May 20, 2002) [hereinafter James Clearance Agreement Statement], available at http://www.justice.gov/atr/public/press_releases/2002/11178.pdf. See also Robert N. Cook & Robert A. Skitol, *Fresh Thinking About the FTC/DOJ Interface: Return to the Wilson-Brandeis-Elman Vision*, ANTITRUST SOURCE, July 2002, at 4–5, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/cookskitol.authcheckdam.pdf; Appropriations for Fiscal Year 2003: *Hearing Before the Subcomm. on Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies of the Comm. on Appropriations*, 107th Cong. 420 (Statement of Sen. Hollings) ("What we will have to do is, by gosh, just come here and just cut that budget around so that we get their attention, whether we do away with the political

Unable to work out a compromise with Senator Hollings,⁹⁴ and despite the fact that “antitrust investigations were being commenced within a matter of days, and there were no clearance disputes between the agencies,” the Antitrust Division responded to Senator Hollings’ threats by announcing that the prospect of “budgetary consequences” required that it no longer adhere to the agreement.⁹⁵ The agencies thereafter returned to their pre-Memorandum of Agreement clearance process, under which delays then increased from an average of three days in 2002 to an average of about six days by 2005.⁹⁶

The Antitrust Modernization Commission

In November of 2002, Congress created the Antitrust Modernization Commission (AMC) to investigate and recommend changes in the antitrust laws.⁹⁷ Among the issues it examined was whether the clearance process should be changed. In April 2007, after three years of work (including the solicitation and receipt of testimony from former officials, including those who had been involved in the 2002 effort to reform the clearance process), the AMC issued its Report and Recommendations, which included a recommendation that Congress “authorize the DOJ and the FTC to implement a new merger clearance agreement based on the principles of the 2002 clearance agreement between the agencies.”⁹⁸ The Report urged that any future agreement should include an express allocation of primary areas of responsibility to minimize areas of dispute and also include a tie-breaker mechanism to ensure final resolution of any dispute no later than nine days from the initial filing.⁹⁹ It also recommended that Congress enact legislation explicitly *requiring* the agencies to resolve clearance disputes within a short period, i.e., nine days.¹⁰⁰ These recommendations have yet to be implemented.

The Future of the Clearance Process

But for a dual-enforcement regime that would, with narrow exceptions, permit separate FTC and Division investigations of the same conduct by the same entities, there would be no need for a clearance process. In fact, for many years, the sole goal of the clearance process was to prevent

positions, repeal 605, reprogramming authority to your Federal Trade Commission, or actually I am studying to see whether or not legally we can cut the pay. Sometimes when you cut pay, you get their final attention.”), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg78462/pdf/CHRG-107shrg78462.pdf>.

⁹⁴ Yochi J. Dreazen & John R. Wilke, *Justice Department, FTC Deal Dividing Merger Reviews Collapses*, WALL ST. J., May 21, 2002, at B6 (“In recent closed-door meetings with Mr. Hollings’s staffers, the agencies had discussed modifying the plan to restore some media oversight to the FTC in exchange for some other industries, but they couldn’t reach agreement with the senator, according to people close to the talks.”).

⁹⁵ James Clearance Agreement Statement, *supra* note 93. Congress considered, but ultimately abandoned, a legislative provision barring subsequent re-implementation of the Agreement. *Interview with Deborah P. Majoras, Chairman, Federal Trade Commission*, ANTITRUST SOURCE, March 2005, at 3, <http://www.abanet.org/antitrust/at-source/05/03/01-mar05-majoras323.pdf> (“Incidentally, the provision in the appropriations bill that forbade us from executing the abandoned clearance agreement has been removed. However, as I said during my confirmation hearing, I will not reinstitute that particular agreement.”).

⁹⁶ U.S. Department of Justice, *Antitrust Division Update* 3 (Spring 2005), <http://www.justice.gov/atr/public/244041.pdf>.

⁹⁷ Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11051-60, 116 Stat. 1856 (2002), available at http://govinfo.library.unt.edu/amc/pdf/statute/amc_act.pdf.

⁹⁸ U.S. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS iv (2007) [hereinafter AMC REPORT], available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

⁹⁹ *Id.* at 136.

¹⁰⁰ *Id.* at 137.

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2002 agreement.*

just that possibility. Over time, however, the goal of the clearance process expanded to include the *efficient* allocation of enforcement responsibilities. The difficulty, of course, is that the dual-enforcement regime is by its very nature inefficient. For many years, that inefficiency has been viewed as an acceptable price to pay for other benefits from continuing to have two agencies share enforcement duties: fresh perspectives and a healthy sense of competition based on two different agency cultures, different enforcement tools based on different statutory powers, a balance between the executive and legislative branches, and a failsafe to help guard against moribund enforcement.¹⁰¹

The Division may soon be headed by William Baer, who has repeatedly called for the adoption of a new clearance process similar to the ill-fated 2002 agreement. Mr. Baer testified to the Senate Judiciary Committee on July 26, 2012, that he has no pre-set agenda for the Division; but if he is confirmed, it seems likely that he will make some effort to rectify the shortcomings of the current clearance process. Differences between the climate in 2002 and the climate at present, however, include two that may bear particularly on his prospects for success in this arena: (1) the economic downturn of the past several years has led to a renewed interest in government efficiency; and (2) there is now a third federal agency (the Consumer Financial Protection Bureau) charged with protecting consumers. Indeed, there are calls from even within the FTC to cut the FTC's budget and hand off duties in the name of greater efficiency.¹⁰² These changes could push not only for a more efficient clearance process but also for a much broader assessment of whether the sharing of antitrust enforcement between the FTC and the Division has outlived its benefits. ●

¹⁰¹ Senate Committee Report, *supra* note 12, at 246–51. See also AMC REPORT, *supra* note 98, at 129 (“Although concentrating enforcement authority in a single agency generally would be a superior institutional structure, the significant costs and disruption of moving to a single-agency system at this point in time would likely exceed the benefits.”).

¹⁰² Ira Teinowitz, *Rosch Says FTC May Need to Give Up Some Merger Duties*, DEAL PIPELINE, Mar. 6, 2012, <http://pipeline.thedeal.com/tdd/ViewArticle.dl?id=10005681226> (subscription required).

From the Prairie to the Ocean: More Developments in State RPM Law

Michael A. Lindsay

Within the first eight days of May, two state appellate courts reached directly opposite conclusions on the legality of resale price maintenance agreements (RPM) under their admittedly very different state statutes.¹ In New York, an intermediate court of appeals determined that RPM agreements are not illegal per se under New York state law, but in Kansas, the state supreme court found RPM agreements illegal per se under state law—vertical price-fixing agreements being no different from horizontal price-fixing agreements. The difference in these two outcomes can be traced largely, but not exclusively, to differences in the language of the governing state statutes. These statutory differences and the consequently different outcomes in the courts underscore the difficulties confronting a manufacturer that wants to adopt a uniform marketing model in all fifty states. These difficulties may also explain manufacturers' continuing preference for unilateral RPM policies instead of potentially illegal RPM agreements—and ironically, in the last eight days of May the business press reported on a seeming resurgence of RPM and minimum advertised price policies.²

Since the U.S. Supreme Court's 2007 decision in *Leegin*,³ THE ANTITRUST SOURCE has maintained on its website a chart providing relevant state-law authorities for each of the fifty states.⁴ The chart has been updated to reflect the New York and Kansas decisions as well as minor developments in other states.

■ **Michael A. Lindsay** is a partner at Dorsey & Whitney LLP, where he chairs the firm's Antitrust Practice Group. He also serves as an associate editor of Antitrust magazine. Mr. Lindsay thanks Dorsey summer associate Evan Everist for his research assistance in updating the accompanying chart.

¹ The Kansas decision came down on May 4, 2012, and the New York decision on May 8, 2012.

² The *Wall Street Journal* report on MAP policies appeared on May 23, 2012. See Ann Zimmerman, *Sony, Samsung Rein In Retailers' Discounts on TVs*, WALL ST. J., May 23, 2012, available at <http://online.wsj.com/article/SB10001424052702304791704577420383631021786.html>. Others picked up on the *Wall Street Journal*'s article. See, e.g., Sam Byford, *Sony and Samsung Enforcing Minimum Pricing on TVs*, THE VERGE, May 23, 2012, available at <http://www.theverge.com/2012/5/23/3038192/sony-samsung-tv-minimum-pricing>; *TV Makers Ask Retailers to Resist Discounting*, STAR TRIB., May 23, 2012, available at <http://www.startribune.com/business/153355685.html>.

³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

⁴ The updated chart is appended to this article and is also available at <http://www.antitrustsource.com> [under "Supplementary Materials"]. For articles explaining the chart and describing key developments since its original publication, see Michael A. Lindsay, *Resale Price Maintenance and the World After Leegin*, ANTITRUST, Fall 2007, at 1, 32, available at http://www.dorsey.com/files/upload/Antitrust_Lindsay_Fall07.pdf; Michael A. Lindsay, *A Tale of Two Coasts: Recent RPM Enforcement in New York and California*, ANTITRUST SOURCE, Apr. 2011 [hereinafter *A Tale of Two Coasts*], http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr11-lindsay_4-20f.authcheckdam.pdf; Michael A. Lindsay, *An Update on State RPM Laws Since Leegin*, ANTITRUST SOURCE, Dec. 2010, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Lindsay12_21f.authcheckdam.pdf; Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, ANTITRUST SOURCE, Oct. 2009, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct09_Lindsay10_23f.authcheckdam.pdf [hereinafter *State Laws After Leegin*].

New York

In *People v. Tempur-Pedic International, Inc.*,⁵ the New York intermediate appellate court affirmed a lower court dismissal of the New York Attorney General's complaint. Tempur-Pedic sells premium mattresses and related bedding products with visco-elastic memory foam. These products are sold primarily through specialty stores, furniture stores, and department stores,⁶ although they can also be purchased directly from Tempur-Pedic for home delivery and from Internet resellers.⁷ The Tempur-Pedic reseller agreement did not include any provision establishing a minimum resale price, although it did include provisions relating to minimum *advertised* price (including, for example, prohibitions on advertising rebates, gift cards, free gifts, and store credits).⁸ Tempur-Pedic also adopted a *Colgate*⁹ policy: Tempur-Pedic had "announce[d] a policy to suspend doing business with any retailer who does not adhere substantially to [its] suggested retail price ranges."¹⁰ The policy was enforced through shipment suspensions if a retailer was substantially deviating from Tempur-Pedic's suggested retail prices (other than an isolated incident or a liquidation sale of discontinued merchandise). The policy included the standard disclaimers—that the policy was Tempur-Pedic's "unilateral decision" and was "not negotiable," that Tempur-Pedic "neither seeks nor will . . . accept its retailers' agreement with the policy," and that retailers may set prices at whatever level they believe to be in their best interests.¹¹

Section 369-a of the New York General Business Code is entitled "Price-fixing Prohibited," but the actual text of the statute only says that a minimum RPM agreement "shall not be enforceable at law."¹² Nevertheless, the New York Attorney General alleged that Tempur-Pedic had minimum RPM agreements with its independent dealers and that these agreements were illegal under state law. The lower court dismissed the claim, and the state appealed.

In a barely two-page opinion, the appellate court affirmed the dismissal on essentially the grounds identified by the lower court. First, the appellate court held that the plain language of the statute does not make minimum RPM agreements illegal—it only makes them not actionable. Second, the court found that the only agreement that the state had proved applied only to advertised prices, not actual selling prices. Even if the statute made minimum RPM agreements illegal, "[a]dvertising agreements cannot be the subject of a vertical RPM claim, because they do not restrain resale prices, but merely restrict advertising."¹³ Third, the court found that the state had not proved any actual RPM agreements were reached between Tempur-Pedic and its retailers. Instead, the state had shown "merely that Tempur-Pedic enacted its minimum price policy and that

⁵ 95 A.D.3d 539 (N.Y. App. Div. 2012).

⁶ The appellate opinion's otherwise admirable brevity means that we must look elsewhere for the facts. I discussed this case in an earlier article, *A Tale of Two Coasts*, *supra* note 4. These facts are drawn from that article (*id.* at 3), which in turn drew from the Verified Petition, *People v. Tempur-Pedic Int'l, Inc.*, No. 400837/10 (N.Y. Sup. Ct. N.Y. County filed Mar. 29, 2010), and from the Decision, Order, and Final Judgment [hereinafter *Tempur-Pedic Order*], filed on January 14, 2011.

⁷ For purchases from Tempur-Pedic, see <http://www.tempurpedic.com/shopping-with-us/buy-from-us.asp>. For purchases from Internet resellers, see, for example, <http://www.backtobed.com/mattresses/tempur-pedic/>.

⁸ *Tempur-Pedic Order*, *supra* note 6, at 2–3.

⁹ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

¹⁰ *Tempur-Pedic Order*, *supra* note 6, at 3.

¹¹ *Id.*

¹² N.Y. GEN. BUS. LAW § 369-a.

¹³ *Tempur-Pedic*, 95 A.D.3d at 540.

its retailers independently determined to acquiesce to the pricing scheme in order to continue carrying Tempur-Pedic's products"¹⁴—in other words, a *Colgate* policy.

Kansas

*O'Brien v. Leegin*¹⁵ involved the same basic facts as the U.S. Supreme Court's *Leegin* decision, but the claim (by a putative class of consumers) was asserted under Kansas state law. The trial court had awarded summary judgment for the defense, but the Kansas Supreme Court reversed. Under Kansas state law, vertical resale price maintenance agreements remain illegal per se.

Not Your Basic Sherman Act. The main Kansas statute—which is not patterned after the Sherman Act—reaches vertical pricing agreements in several ways. It is illegal for two or more persons to form agreements:

Under Kansas state law,

vertical resale price

maintenance

agreements remain

illegal per se.

- “to fix any standard or figure, whereby such person’s price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.”¹⁶
- to “increase or reduce the price of merchandise, produce or commodities”;¹⁷
- to “[b]ind . . . themselves not to sell [or] . . . dispose of . . . any article or commodity . . . below a common standard figure.”¹⁸
- “to keep the price of such article, commodity or transportation at a fixed or graded figure.”¹⁹
- “in any manner establish or settle the price of any article or commodity . . . between them . . . to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity.”²⁰
- “to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that such person’s price in any manner is affected.”²¹

A related Kansas statute also prohibits “[a]ll arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state . . . and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles.”²²

Rejecting Rule of Reason. The Kansas Supreme Court expressly rejected a rule of reason approach to vertical RPM agreements. The state statute does not mention reasonableness or the rule of reason; it applies instead to “any such combinations” and “all arrangements.”²³ Faced with what it considered plain language, the court considered first the federal precedent and then its

¹⁴ *Id.*

¹⁵ *O'Brien v. Leegin Creative Leather Prods., Inc.*, 277 P.3d 1062 (Kan. 2012).

¹⁶ KAN. STAT. ANN. § 50-101 cl. Fourth.

¹⁷ *Id.* cl. Second.

¹⁸ *Id.* cl. Fifth subsec. a.

¹⁹ *Id.* cl. Fifth subsec. b.

²⁰ *Id.* cl. Fifth subsec. c.

²¹ *Id.* cl. Fifth subsec. d.

²² *Id.* § 50-112.

²³ *O'Brien*, 277 P.3d at 1074.

own state precedents. As to the federal precedents, the court was very plain: “federal precedents interpreting . . . federal statutes have little or no precedential weight when the task is interpretation and application of a clear and dissimilar Kansas statute.”²⁴ In its own precedents, the court found two strands: a series of cases that held vertical RPM agreements unenforceable, and two other cases that took a reasonableness approach—although neither was a vertical RPM case. The court explicitly rejected a reasonableness approach for vertical RPM agreements: “The clear statutory language . . . leaves no room for such an approach [of considering reasonableness]. The simple, per se rule of *Mills*, *United Artists*, and *Joslin* survives. The reasonableness rubric of *Heckard* and *Okerberg* is overruled.”²⁵

Dual Distribution. The supplier in *O'Brien* (as in the federal *Leegin* case) owned some retail outlets, which raised the question of whether the rule of law should be any different for a supplier that competes with its own retailers (as opposed to a supplier that does not participate in the next level of distribution). The Kansas Supreme Court did not need to consider this distinction, because it applied the same per se rule regardless of whether the agreement was vertical or horizontal. The fact that the agreements might be a mix of vertical and horizontal was therefore irrelevant—or rather, horizontal price-fixing was an alternative theory, but under the same legal rule of per se liability.²⁶

Colgate Doctrine Survives in Kansas—or Does It? Early in its opinion the Kansas Supreme Court suggests that for at least one part of the Kansas statute a plaintiff need only show “a combination of capital, skill, or acts, by two or more persons,” and not “a relationship rising to the level of an agreement.”²⁷ Later, however, the court explicitly states that both a “combination” and an “arrangement” require “something more than merely a unilateral pricing policy adopted by a wholesale supplier.”²⁸

The court acknowledged that the manufacturer’s receipt of complaints from some resellers about the discounting practices of other resellers would not be enough to show a combination or arrangement.²⁹ The court identified several kinds of plus factors that were enough to push the facts past merely unilateral conduct (or at least enough to permit a jury inference). The most important was the existence of express written RPM agreements for a part of the period. Another plus factor was the requirement that resellers (again, for a part of the period at issue) “initial an acknowledgment stating that violation of the policy was grounds for dismissal.”³⁰ The court’s reliance on express written agreements is not surprising, and the court’s reference to written acknowledgments should remind counselors to urge manufacturers to avoid anything that might *look* like a written agreement. A reseller’s written acknowledgment of receipt of a policy may or may not increase the probability of reseller compliance with the policy, but it does increase the risk that a court (rightly or wrongly) will find a violation.

²⁴ *Id.* at 1079.

²⁵ *Id.* at 1083.

²⁶ *Id.* at 1083–84.

²⁷ *Id.* at 1066. *See also id.* at 1075 (“Mere arrangements between persons are within the scope of the statute; again, a plaintiff does not have to show a relationship rising to the level of an agreement.”).

²⁸ *Id.* at 1087.

²⁹ *Id.* (“neither communication between a manufacturer and its retailers nor the existence of complaints about discounting would be enough alone for a plaintiff in a price-fixing action to sustain its burden of proof”) (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)).

³⁰ *Id.*

Some of the other facts that the court cites are disturbingly close to the core of a *Colgate* program. For example, the court cited testimony that the manufacturer “require[d] everybody to charge the same price.”³¹ Of course it did—that’s what the policy is supposed to do. The court also cited the manufacturer’s maintenance of a “Pending Pricing Issues” file,³² and again, the manufacturer is likely going to keep these files in any program that does not provide an immediate, automatic, and permanent termination of a noncompliant reseller.

Most disturbing is the court’s citation of the manufacturer’s “conduct[ing] investigations into at least two Kansas retailers suspected of discounting.”³³ Even if a manufacturer has no due-process obligation, one would hope that a manufacturer might actually investigate the facts before terminating a reseller. The fact that one of those investigations “was launched when one retailer . . . reported another” was also a plus factor for the court.³⁴ Under a conservative reading of *O’Brien*, a manufacturer therefore not only would refrain from inviting or permitting reseller reports, but it would also prohibit itself from receiving or acting upon such reports—relying instead solely on the manufacturer’s own direct observations or on reports from third parties that are not resellers (such as services that monitor internet pricing).³⁵

A Legislative Fix? In Kansas, the state legislature considered—but did not pass—legislation to reverse *O’Brien*.³⁶ The purpose of Kansas H.B. 2797 as originally introduced in the Kansas House of Representatives was “to correct the interpretation of the Kansas restraint of trade act . . . made in *O’Brien*,” whose holding the bill described as “contrary to the intent of the Kansas legislature in enacting the Kansas restraint of trade act.”³⁷ The bill would effectively have adopted a strict rule of harmonization with federal law, because no agreement or arrangement would be illegal under Kansas law if it “is or would be deemed a reasonable restraint of trade or commerce under section 1 of the Sherman Act, 15 U.S.C. § 1, as construed and interpreted by the federal courts.”³⁸ Ultimately, the House passed a version of the bill that provided that no agreement would be considered illegal if it was “a reasonable restraint of trade or commerce,” with a reasonable restraint defined as one that “is reasonable in view of all of the facts and circumstances of the particular case and does not contravene public welfare.”³⁹ The legislative session ended without Kansas

Manufacturers continue to face a variegated landscape of differing state-law approaches to vertical RPM agreements.

³¹ *Id.*

³² *Id.*; see also *id.* at 1077.

³³ *Id.* at 1087.

³⁴ *Id.* at 1087–88.

³⁵ Likewise, a conservative manufacturer—indeed, most manufacturers—would also refrain from another of the *O’Brien* plus factors—reviewing proposed promotions and giving advance approval. (If a manufacturer does respond to reseller requests for advance approval of specific pricing programs, however, the manufacturer certainly should avoid such expressions as “spread like cancer”! See *id.* at 1069, 1087.)

³⁶ In contrast, after *Leegin* came down, the Maryland legislature considered (and did pass) a statute making minimum RPM agreements illegal per se. MD. CODE ANN., COM. LAW. § 11-204(a)(1) (2009). Maryland courts would otherwise have followed federal law and judged minimum RPM agreements under the rule of reason. MD. CODE ANN., COM. LAW. § 11-202(a)(2) (West 2009) (declaring legislative intent that courts “be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters”). This statute is discussed in Lindsay, *State Laws After Leegin*, *supra* note 4, at 2.

³⁷ H.B. 2797, 84th Leg., Reg. Sess. (Kan. 2012) at lines 3–8, available at http://kslegislature.org/li/b2011_12/measures/documents/hb2797_00_0000.pdf.

³⁸ *Id.* § 1(a). The bill would also have prohibited class actions to enforce the Kansas restraint of trade law. *Id.* § 1(b).

³⁹ House Sub. for S.B. 291, 84th Leg., Reg. Sess. (Kan. 2012) § 1(a), available at http://kslegislature.org/li/b2011_12/measures/documents/sb291_03_0000.pdf (as passed by Kansas House May 19, 2012).

Senate action on the bill, but with House passage by a vote of 98 to 16, the bill may return in the next legislature.⁴⁰

Conclusion

Manufacturers continue to face a variegated landscape of differing state-law approaches to vertical RPM agreements. Some states will treat such agreements the same as federal law does, but others will apply the harsher rule of per se illegality.

Manufacturers are well-advised to continue to treat the U.S. Supreme Court's *Leegin* decision not as a license to embark on a national program of RPM agreements, but as a risk-reduction for *Colgate* programs that slip into agreements. Manufacturers should also consciously evaluate and weigh the risks and incremental benefit of certain kinds of *Colgate* implementations (for example, the benefit of resellers' written acknowledgment of receipt of an RPM policy statement may not outweigh the risk). Finally, manufacturers should make sure that they choose the right tool for the real problem. If the problem is too much distribution (or the wrong kind of distributors), that problem might be better addressed through dealer terminations (being mindful, of course, of contractual and state-law provisions for dealer protection). If the problem is *advertising* of discounted prices, the manufacturer should consider a minimum advertised price policy, rather than an RPM policy. In short, manufacturers should remember the principle of "caveat venditor"—let the seller beware. ●

⁴⁰ For the vote tally, see the legislative history for S.B. 291, at http://kslegislature.org/li/b2011_12/measures/sb291/ ("Final Action—Substitute passed as amended; Yea: 96 Nay: 18"). The bill as passed by the Kansas House included a sunset provision, providing that the bill's rule of reason provision would expire on June 30, 2013. See House Sub. for S.B. 291 § 1(d). The lopsided vote may mean that some legislators viewed the bill as a stop-gap measure.

Overview of State RPM*

Michael A. Lindsay

| STATE | LEGISLATION | LITIGATION |
|-------|--|---|
| AL | <p>AT: ALA. CODE § 8-10-1 (LexisNexis 2012) (providing civil penalty where a person or corporation “engages or agrees with other persons or corporations or enters, directly or indirectly, into any combination, pool, trust, or confederation to regulate or fix the price of any article or commodity”); ALA. CODE § 8-10-3 (declaring it illegal for “any person or corporation . . . [to] restrain or attempt to restrain, the freedom of trade or production, or [to] monopolize, or attempt to monopolize”).</p> <p>IB: Ala. Code § 6-5-60(a) (LexisNexis 2012) (providing for the recovery of damages caused by “an unlawful trust, combine, or monopoly, or its effect, direct or indirect”).*</p> <p>* Note: ALA. CODE § 6-5-60(a) is not, strictly speaking, an <i>Illinois Brick</i> repealer statute because the statute was enacted in 1975, two years before the Supreme Court’s decision in <i>Illinois Brick</i>.</p> | <p>H: Vandenberg v. Aramark Educ. Servs., Inc., 81 So.3d 326, 335 (Ala. 2011) (noting “long-standing caselaw applying federal antitrust principles to state-law antitrust claims.” (citing <i>Ex parte Rice, 67 So.2d 825, 829 (Ala. 1953)</i>); <i>City of Tuscaloosa v. Harcros Chems., 158 F.3d 548, 555 n.8 (11th Cir. 1998)</i> (finding that federal antitrust law “prescribes the terms of unlawful monopolies and restraints of trade” under Alabama law (citing <i>Ex parte Rice, 67 So. 2d 825, 829 (Ala. 1953)</i>)).</p> |
| AK | <p>AT: ALASKA STAT. ANN. § 45.50.562 (West 2012) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>IB: ALASKA STAT. ANN. § 45.50.577 (West 2012) (authorizing attorney general, as <i>parens patriae</i>, to secure monetary relief “for injuries directly or indirectly sustained by persons by reason of any violation of” state antitrust laws).</p> | <p>H: Alakayak v. B.C. Packers, Ltd., 48 P.3d 432, 448 (Alaska 2002) (holding that federal cases construing the Sherman Act § 1 “will be used as a guide” for Alaska antitrust claims); <i>see also West v. Whitney-Fidalgo Seafoods, Inc., 628 P.2d 10, 14 (Alaska 1981)</i> (finding that Alaska legislature intended Alaska courts to look to Sherman Act for guidance).</p> |
| AZ | <p>AT: ARIZ. REV. STAT. ANN. § 44-1402 (2012) (declaring unlawful “[a] contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce”).</p> <p>H: ARIZ. REV. STAT. ANN. § 44-1412 (2012) (providing legislative intent that “courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes” and that “[t]his article shall be applied and construed to effectuate its general purpose to make uniform the [antitrust] law” among the states).</p> | <p>H: Bunker’s Glass Co. v. Pilkington PLC, 47 P.3d 1119, 1126-27 (Ariz. Ct. App. 2002) (noting that Arizona appellate courts “typically” follow federal antitrust case law and that 44-1412 permits, but does not require, courts to look to federal case law, rejecting <i>Illinois Brick</i>), <i>aff’d, 75 P.3d 99 (Ariz. 2003)</i>.</p> |

Michael Lindsay is a partner at Dorsey & Whitney LLP, where he chairs the firm’s Antitrust Practice Group.

Abbreviation Key: **AT** = Antitrust Provisions; **PF** = Price-Fixing Provisions/Cases; **H** = Federal Harmonization Clauses/Cases; **IB** = *Illinois Brick* Repealer Statute

* This chart is an updated version of the one that accompanied the article by Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, ANTITRUST SOURCE, Oct. 2009, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct09_Lindsay10_23f.authcheckdam.pdf. The Antitrust Source would like to continue to publish timely updates to this chart. If you become aware of a case or statute that should be added, please contact The Source at antitrust@att.net.

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
|-------|---|---|
| AK | <p>AT: ARK. CODE. ANN. § 4-75-309 (West 2012) (declaring it illegal “to regulate or fix, either in this state or elsewhere, the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever”).</p> <p>IB: ARK. CODE. ANN. § 4-75-315(B) (West 2012) (authorizing attorney general, as <i>parens patriae</i>, to secure monetary relief “for injury, directly or indirectly sustained” because of violations of state antitrust laws).</p> | <p>H: Ft. Smith Light & Traction Co. v. Kelley, 127 S.W. 975, 982 (Ark. 1910) (finding the state antitrust law did not apply to a contract with maximum resale restraint on natural gas because the law “was to prevent a combination among producing competitors to fix the prices to the detriment of consumers” and the contract would not be to the detriment of competitors).</p> |
| CA | <p>AT: CAL. BUS. & PROF. CODE § 16726 (West 2012) (providing that “every trust is unlawful, against public policy and void”); CAL. BUS. & PROF. CODE § 16720(A) (defining a trust as a combination “[t]o create or carry out restrictions in trade or commerce”).</p> <p>PF: CAL. BUS. & PROF. CODE § 16720(b) (West 2012) (defining a trust as a combination “[t]o limit or reduce the production, or increase the price of merchandise or any commodity”); CAL. BUS. & PROF. CODE § 16720(d) (defining a trust as a combination to “fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State”); CAL. BUS. & PROF. CODE § 16720(e) (defining a trust as a combination to “agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure” or “establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity”).</p> <p>IB: CAL. BUS. & PROF. CODE § 16750 (West 2012) (providing that a cause of action may be brought by any person injured by an antitrust violation, “regardless of whether such injured person dealt directly or indirectly with the defendant”).</p> | <p>H: Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 233 P.3d 1066, 111 Cal. Rptr. 3d 666 (Cal. 2010) (noting that in 1975, “federal antitrust cases were treated as ‘applicable’ and ‘authoritative’ on Cartwright Act questions”); State ex rel. Van de Kamp v. Texaco, Inc., 46 Cal.3d 1147, 1164 (1988), <i>overruled in part on other grounds by statute</i> (“Our Supreme Court has noted that “judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters’ intent”); Marin Cnty. Bd. of Realtors, Inc. v. Palsson, 549 P.2d 833, 835 (Cal. 1976) (recognizing that a “long line of California cases” has recognized that federal cases interpreting the Sherman Act are applicable to state antitrust cases because “both statutes have their roots in the common law”); Asahi Kasei Pharma Corp. v. CoTherix, Inc., 138 Cal. Rptr. 3d 620, 626 (Cal. Ct. App. 2012) (“[T]he Cartwright Act is not derived from the Sherman Act, but rather from the laws of other states, and the Cartwright Act and the Sherman Act differ in wording and scope.”); Freeman v. San Diego Assn. of Realtors, 77 Cal. App. 4th 171, 183 n.9 (1999) (federal precedent should be used “with caution”).</p> <p>PF: Chavez v. Whirlpool Corp., 113 Cal. Rptr. 2d 175, 179–80 (Cal. Ct. App. 2001) (applying <i>Colgate</i> doctrine to hold that supplier’s unilateral exclusion of distributor did not violate Cartwright Act); <i>see also Mailand v. Burckle, 572 P.2d 1142, 1147–48 (Cal. 1978)</i> (finding resale price maintenance to be per se violation of state antitrust statute because it is a per se violation under the Sherman Act and “federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act”); Harris v. Capitol Records Distrib. Corp., 413 P.2d 139, 145 (Cal. 1966) (finding that vendor’s resale price maintenance scheme violated the Cartwright Act and the Sherman Act); People v. Dermaquest, Inc., Final Judgment Including Permanent Injunction (consent judgment), Case No. RG 10497526 (Cal. Super. Ct. Alameda County Feb. 23, 2010) (enjoining violations of CAL. BUS. & PROF. CODE §§ 16720(a), 16720(d), and 16720(e); requiring manufacturer-defendant to inform resellers that defendant disavows “all parts of . . . distributor or reseller agreement . . . that purportedly obligated you to maintain certain resale prices”); People v. Bioelements Inc., Final Judgment Including Permanent Injunction (consent judgment), File No. 10011659 (Cal. Super. Ct., Riverside County, filed Jan. 11, 2011) (provisions substantially similar to <i>Dermaquest</i> injunction).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
|-------|---|---|
| CO | <p>AT: COLO. REV. STAT. ANN. § 6-4-104 (West 2012) (declaring illegal “[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>PF: COLO. REV. STAT. ANN. § 6-4-119 (West 2012) (instructing courts that they “shall” use “comparable” federal court decisions as guidance).</p> <p>IB: COLO. REV. STAT. ANN. § 6-4-111(2) (West 2012) (authorizing attorney general to bring a civil action on behalf of any public entity “injured, either directly or indirectly, in its business or property by reason of” an antitrust violation).</p> | <p>H: See <i>Pomerantz v. Microsoft Corp.</i>, 50 P.3d 929, 933 (Colo. App. 2002) (applying <i>Illinois Brick</i> indirect purchaser rule reasoning; recognizing legislative intent to use federal interpretations to construe state law); see also <i>Confre Cellars, Inc. v. Robinson</i>, No. 01 N 1060, 2002 U.S. Dist. LEXIS 26843, at *62 (D. Colo. Mar. 6, 2002) (federal antitrust cases “provide substantial guidance” to courts interpreting the Colorado statute).</p> |
| CT | <p>AT: CONN. GEN. STAT. ANN. § 35-26 (West 2012) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of any part of trade or commerce”).</p> <p>PF: CONN. GEN. STAT. ANN. § 35-28(A) (West 2012) (declaring unlawful contracts, combinations or conspiracies that “fix[], control[] or maintain prices, rates, quotations or fees in any part of trade or commerce”).</p> <p>H: CONN. GEN. STAT. ANN. § 35-44b (West 2012) (courts “shall” be guided by federal interpretations).</p> | <p>H: <i>Miller’s Pond Co., LLC v. City of New London</i>, 873 A.2d 965, 978 (Conn. 2005) (Connecticut courts follow federal precedent where the federal statute parallels the Connecticut statute but not where the text of Connecticut’s “antitrust statutes, or other pertinent state law, requires us to interpret it differently”); see also <i>Vacco v. Microsoft Corp.</i>, 793 A.2d 1048 (Conn. 2002) (referring to CONN. GEN. STAT. § 35-44b and following <i>Illinois Brick</i> in finding that “the legislative history makes clear that the legislature intended to [give] Connecticut an [antitrust] [l]aw, similar to the existing [f]ederal [antitrust] law in every respect.”) (quoting 14 H.R. Proc., Pt. 9, 1971 Sess., p. 4182) (Statement of Rep. Neiditz) (brackets in original); <i>Westport Taxi Serv., Inc. v. Westport Transit Dist.</i>, 664 A.2d 719, 728 (Conn. 1995).</p> <p>PF: <i>Elida, Inc. v. Harmor Realty Corp.</i>, 413 A.2d 1226, 1230 (Conn. 1979) (finding purpose of CONN. GEN. STAT. § 35-28 (d) was to codify per se violations of the Sherman Act).</p> |
| DE | <p>AT: DEL. CODE ANN. TIT. 6, § 2103 (West 2012) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>H: DEL. CODE ANN. TIT. 6, § 2113 (West 2012) (requiring that statute “shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</p> | <p>H: <i>Hammermill Paper Co. v. Palese</i>, No. 7128, 1983 Del. Ch. LEXIS 400, at *12 (Del. Ch. June 14, 1983) (declaring it “manifestly evident” that state antitrust laws should be construed in harmony with federal antitrust law).</p> |
| DC | <p>AT: D.C. CODE § 28-4502 (LexisNexis 2012) (“Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce all or any part of which is within the District of Columbia is declared to be illegal.”).</p> <p>H: D.C. CODE § 28-4515 (LexisNexis 2012) (“In construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes.”).</p> <p>IB: D.C. CODE § 28-4509 (LexisNexis 2012) (“Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured . . .”).</p> | <p>H: <i>Peterson v. Visa U.S.A., Inc.</i>, No. Civ. A. 03-8080, 2005 D.C. Super. LEXIS 17, at *9 (D.C. Super. April 22, 2005) (citing D.C. CODE § 28-4515) (“The [D.C. Antitrust Act] allows “a court of competent jurisdiction . . . [to] use as a guide interpretations given by federal courts to comparable antitrust statutes.”).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
|-------|---|--|
| FL | <p>AT: FLA. STAT. ANN. § 542.18 (West 2012) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of trade or commerce”).</p> <p>H: FLA. STAT. ANN. § 542.32 (West 2012) (describing legislative intent that “due consideration and great weight” be given to federal antitrust case law when interpreting state antitrust statute).</p> | <p>H: MYD Marine Distrib., Inc. v. Int’l Paint Ltd., 76 So.3d 42, 46 (Fla. Dist. Ct. App. 2011) (“The Florida Legislature has indicated that its intent is for courts that are construing the Florida Antitrust Act to give ‘due consideration and great weight . . . to the interpretations of the federal courts relating to comparable federal antitrust statutes.’” (quoting Fla. Stat. § 542.32 (2009)); Duck Tours Seafari, Inc. v. Key West, 875 So.2d 650, 653 (Fla. Dist. Ct. App. 2004) (“Under Florida law, ‘Any activity or conduct . . . exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter [542]”).</p> |
| GA | <p>AT: GA. CODE ANN. § 13-8-2(a)(2) (West 2011) (declaring unenforceable “contracts in general restraint of trade”).</p> | <p>H: Calhoun v. N. Ga. Elec. Membership Corp., 213 S.E.2d 596, 602–03 (Ga. 1975) (the test for all restraints of trade is whether the restraint is “injurious to the public interest”).</p> |
| HI | <p>AT: HAW. REV. STAT. § 480-4(a) (West 2012) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>PF: HAW. REV. STAT. § 480-4(b)(1) (West 2012) (no person, partnership, trust or corporation shall “[f]ix, control, or maintain, the price of any commodity”; engage in activities “with the result of fixing, controlling or maintaining its price”; or “[f]ix, control, or maintain, any standard of quality of any commodity for the purpose or with the result of fixing, controlling, or maintaining its price”).</p> <p>H: HAW. REV. STAT. § 480-3 (West 2012) (requiring Hawaii antitrust statute to be “construed in accordance with judicial interpretations of similar federal antitrust statutes”).</p> <p>IB: HAW. REV. STAT. § 480-13(a)(1) (West 2012) (providing that “indirect purchasers injured by an illegal overcharge shall recover only compensatory damages, and reasonable attorney’s fees”).</p> | <p>H: Courbat v. Dahana Ranch, Inc., 141 P.3d 427, 435 n.6 (Haw. 2006) (recognizing that federal interpretations guide the construction of Hawaii statutes “in light of conditions in Hawaii.” (quoting Ai v. Frank Huff Agency, 607 P.2d 1304, 1309 n. 11 (Haw. 1980))); <i>see also</i> Island Tobacco Co. v. R.J. Reynolds Tobacco Co., 627 P.2d 260, 262, 268 (Haw. 1981) (federal rulings will not be “blindly accepted;” rather they will “serve primarily as guides to the interpretation and application of state law in the light of the economic and business conditions of this State”), <i>rev’d on other grounds, Robert’s Haw. School Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 982 P.2d 853 (Haw. 1999)</i>.</p> |
| ID | <p>AT: IDAHO CODE ANN. § 48-104 (West 2012) (declaring unlawful “[a] contract, combination, or conspiracy between two (2) or more persons in unreasonable restraint of Idaho commerce”).</p> <p>H: IDAHO CODE ANN. § 48-102(3) (West 2012) (providing the statute “shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes”).</p> <p>IB: IDAHO CODE ANN. § 48-108(2) (West 2012) (authorizing the attorney general, as <i>parens patriae</i>, to bring a cause of action “for injury directly or indirectly sustained” because of any violation of state antitrust laws).</p> | <p>H: Afton Energy v. Idaho Power Co., 834 P.2d 850, 857 (Idaho 1992) (recognizing that federal antitrust law is traditionally “persuasive” guidance, although not binding (quoting Pope v. Intermountain Gas Co., 646 P.2d 988, 994 (Idaho 1982))).</p> <p>PF: K. Hefner v. Caremark, Inc., 918 P.2d 595, 599 (Idaho 1996) (requiring vertical price fixing restraint to fix prices for unrelated third parties in order for a <i>per se</i> rule to apply).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
|-------|--|---|
| IL | <p>AT: 740 ILL. COMP. STAT. ANN. 10/3(2) (West 2012) (declaring unlawful any “contract, combination, or conspiracy with one or more other persons [to] unreasonably restrain trade or commerce”).</p> <p>PF: 740 ILL. COMP. STAT. ANN. 10/3(1)(A) (West 2012) (declaring unlawful “any combination or conspiracy with . . . a competitor . . . for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto”).</p> <p>IB: 740 ILL. COMP. STAT. ANN. 10/7 (West 2012) (providing that “No provision of [the Illinois Antitrust] Act shall deny any person who is an indirect purchaser the right to sue for damages”).</p> | <p>H: <i>People v. Crawford Distrib. Co.</i>, 291 N.E.2d 648, 652–53 (Ill. 1972) (declaring that federal antitrust precedent is a “useful guide to our court”).</p> <p>PF: <i>People v. Keystone Auto. Plating Corp.</i>, 423 N.E.2d 1246, 1251–52 (Ill. App. Ct. 1981) (reciting legislative intent of 3(1)(a) to conclude that statute does not proscribe vertical price fixing agreements between buyers and sellers); <i>Gilbert’s Ethan Allen Gallery v. Ethan Allen, Inc.</i>, 620 N.E.2d 1349, 1350, 1354 (Ill. App. Ct. 1993) (ruling that vertical price-fixing agreements are to be tested under rule of reason because “‘per se’ violations are normally agreements between competitors or agreements that would restrict competition and decrease output” and also recognizing that federal case law is instructive but not binding), <i>aff’d</i>, 642 N.E.2d 470 (Ill. 1994); <i>but see State v. Herman Miller, Inc.</i>, No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-<i>Leegin</i> challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</p> |
| IN | <p>AT: IND. CODE ANN. § 24-1-2-1 (West 2012) (declaring illegal “[e]very scheme, contract, or combination in restraint of trade or commerce, or to create or carry out restrictions in trade or commerce”).</p> <p>PF: IND. CODE ANN. § 24-1-2-1 (West 2012) (declaring illegal “[e]very scheme, contract, or combination . . . to deny or refuse to any person participation . . . or to limit or reduce the production, or increase or reduce the price of merchandise or any commodity”).</p> | <p>H: <i>Deich-Keibler v. Bank One</i>, No. 06-3802, 2007 U.S. App. LEXIS 15419, at *10 (7th Cir. June 26, 2007) (noting practice of construing IND. CODE § 24-1-2-1 in light of federal antitrust case law); <i>Rumple v. Bloomington Hosp.</i>, 422 N.E.2d 1309, 1315 (Ind. Ct. App. 1981) (recognizing that Indiana antitrust law is modeled after section 1 of the Sherman Antitrust Act and has been interpreted consistent with federal law interpreting it).</p> <p>PF: <i>Ft. Wayne Cleaners & Dyers Ass’n v. Price</i>, 137 N.E.2d 738 (Ind. Ct. App. 1956) (affirming judgment against defendant dry cleaner association for vertical minimum price fixing).</p> |
| IA | <p>AT: IOWA CODE ANN. § 553.4 (West 2012) (providing that “[a] contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market”).</p> <p>H: IOWA CODE ANN. § 553.2 (West 2012) (requiring courts to construe Iowa statute “to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter” but not “in such a way as to constitute a delegation of state authority” to the federal courts).</p> | <p>H: <i>Max 100 L.C. v. Iowa Realty Co.</i>, 621 N.W.2d 178, 181–82 (Iowa 2001) (recognizing that Iowa Competition law is “patterned” after federal Sherman Act and that IOWA CODE § 553.2 “explicitly requires” state courts to consider federal case law and construe state law “uniformly with the Sherman Act”). <i>But cf. Comes v. Microsoft Corp.</i>, 646 N.W.2d 440, 446 (Iowa 2002) (finding that “Congress intended federal antitrust laws to supplement, not displace, state antitrust remedies” and that IOWA CODE § 553.2 does not require “Iowa courts to interpret the Iowa Competition Law the same way federal courts have interpreted federal law,” thus rejecting <i>Illinois Brick</i>).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
|-------|--|---|
| KS | <p>AT/PF: KAN. STAT. ANN. § 50-101 (West 2011) (declaring unlawful and defining trusts as any “combination of capital, skill, or acts, by two or more persons” carried out for the purpose of, <i>inter alia</i>: restricting trade or commerce; increasing or reducing the price of goods; or preventing competition).</p> <p>PF: KAN. STAT. ANN. § 50-112 (West 2011) (declaring unlawful “all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles”).</p> <p>IB: KAN. STAT. ANN. § 50-161(B) (West 2011) (providing that a cause of action “may be brought by any person who is injured in such person’s business or property by reason of” an antitrust violation, “regardless of whether such injured person dealt directly or indirectly with the defendant”).</p> | <p>H: <i>Bergstrom v. Noah</i>, 974 P.2d 520, 531 (Kan. 1999) (finding federal antitrust case law “persuasive” but “not binding” on the interpretation of the Kansas antitrust statute).</p> <p>PF: <i>O’Brien v. Leegin Creative Leather Prods., Inc.</i>, 101,000, 2012 WL 1563976, at *23 (Kan. May 4, 2012) (holding that both vertical and horizontal price maintenance agreements are per se illegal under Kansas law) (overruling <i>Okerberg v. Crable</i>, 341 P.2d 966 (Kan. 1959)); <i>Joslin v. Steffen Ice & Ice Cream Co.</i>, 54 P.2d 941, 943 (Kan. 1936) (holding that resale price maintenance scheme by ice cream wholesaler violated KAN. STAT. ANN. § 50-112).</p> |
| KY | <p>AT: KY. REV. STAT. ANN. § 367.175 (West 2011) (declaring unlawful “[e]very contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce”).</p> | <p>H: <i>Mendell v. Golden-Farley of Hopkinsville, Inc.</i>, 573 S.W.2d 346, 349 (Ky. Ct. App. 1978) (applying federal antitrust case law to interpret Kentucky statute but noting that federal law is not binding).</p> |
| LA | <p>AT: LA. REV. STAT. ANN. § 51:122 (2011) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> | <p>H: <i>Free v. Abbott Lab.</i>, 982 F. Supp. 1211, 1214 (M.D. La. 1997) (recognizing that “Louisiana courts routinely look to federal anti-trust jurisprudence as ‘a persuasive influence on interpretation of our own state enactments’” (citing <i>La. Power & Light v. United Gas Pipe Line</i>, 493 So. 2d 1149, 1158 (La. 1986))); <i>see also Red Diamond Supply, Inc. v. Liquid Carbonic Corp.</i>, 637 F.2d 1001, 1003, 1005 n.6 (5th Cir. 1981). (The state antitrust statutes . . . were fashioned after the federal antitrust statutes”);</p> <p>PF: <i>Van Hoose v. Gravois</i>, 70 So.3d 1017, 1023 (La. Ct. App. 2011) (“Where the alleged restrictions are vertical, and not directed at fixing prices, their legality is governed by the rule of reason, and in order to prevail under the rule of reason, a plaintiff must show that the defendants’ conduct has an adverse effect on competition.”); <i>Red Diamond Supply Inc. v. Liquid Carbonic Corp.</i>, 637 F.2d 1001, 1005 n.6 (5th Cir. 1981) (“Vertical price restrictions are per se illegal.” (dictum) (citing <i>Continental T.V., Inc. v. GTE Sylvania Inc.</i>, 433 U.S. 36, 51 n.18 (1977)).</p> |
| ME | <p>AT: ME. REV. STAT. ANN. TIT. 10, § 1101 (2011) (declaring illegal “[e]very contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>IB: ME. REV. STAT. ANN. TIT. 10, § 1104(1) (2011) (providing a right of action for any person “injured directly or indirectly in its business or property by any other person or corporation by reason of” an antitrust violation).</p> | <p>H: <i>Davric Maine Corp. v. Rancourt</i>, 216 F.3d 143, 149 (1st Cir. 2000) (noting that the Maine antitrust statutes parallel the Sherman Act, “and analyzing state claims according to federal law” (quoting <i>Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.</i>, 998 F.2d 1073, 1081 (1st Cir. 1993))).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
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| MD | <p>AT: MD. CODE ANN., COM. LAW § 11-204(a)(1) (West 2012) (prohibiting any “contract, combination, or conspiracy” that unreasonably restrains trade).</p> <p>PF: MD. CODE ANN., COM. LAW § 11-204(b) (West 2012) (defining any “contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service” to be an unreasonable restraint of trade or commerce).</p> <p>H: MD. CODE ANN., COM. LAW § 11-202(a)(2) (West 2012) (declaring legislative intent that courts “be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters”).</p> <p>IB: MD. CODE ANN., COM. LAW § 11-209(b)(ii) (West 2012) (providing that the State or any political subdivision thereof may maintain an action for damages stemming from an antitrust violation “regardless of whether it dealt directly or indirectly” with the defendant).</p> | <p>H: <i>Davidson v. Microsoft Corp.</i>, 792 A.2d 336, 340–41 (Md. Ct. Spec. App. 2002) (citing MD. CODE ANN., COM. LAW § 11-202(A)(2) when applying <i>Illinois Brick</i> indirect purchaser rule to state statute); <i>see also Purity Prod., Inc. v. Tropicana Prod., Inc.</i>, 702 F. Supp. 564, 574 (D. Md. 1988) (finding that the Court’s application of the Maryland Antitrust Act “should be guided by the Court’s similar interpretation of the federal antitrust statutes).</p> |
| MA | <p>AT: MASS. GEN. LAWS ANN. CH. 93, § 4 (2012) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>H: MASS. GEN. LAWS ANN. CH. 93, § 1 (2012) (requiring the Massachusetts antitrust laws to be “construed in harmony with judicial interpretations of comparable federal statutes insofar as practicable”).</p> | <p>H: <i>Ciardi v. F. Hoffmann La Roche, Ltd.</i>, 762 N.E.2d 303, 307–08 (Mass. 2002) (reconciling state antitrust law with <i>Illinois Brick Co. v. Illinois</i>, 431 U.S. 720, 729–736 (1977) because MASS. GEN. LAWS CH. 93, § 1 requires state courts to harmonize state antitrust law with comparable federal law); <i>see also C. R. Bard, Inc. v. Med. Elec. Corp.</i>, 529 F. Supp. 1382, 1391 (D. Mass. 1982) (noting that sections 4 and 5 of the Massachusetts Antitrust Act are “directly comparable” to sections 1 and 2 of the Sherman Act).</p> |
| MI | <p>AT: MICH. COMP. LAWS ANN. § 445.772 (West 2012) (declaring unlawful any “contract, combination, or conspiracy” that is “in restraint of, or to monopolize, trade or commerce in a relevant market”).</p> <p>H: MICH. COMP. LAWS ANN. § 445.784(2) (West 2012) (declaring intent of legislature that “in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason”).</p> <p>IB: MICH. COMP. LAWS ANN. § 445.778 (West 2012) (providing that the state, any political subdivision, or any other person “threatened with injury or injured directly or indirectly” by an antitrust violation may bring an action for damages and injunctive relief).</p> | <p>H: <i>Little Caesar Enters. v. Smith</i>, 895 F. Supp. 884, 898 (D. Mich. 1995) (finding no practical difference between federal and state vertical price fixing claims because “Michigan antitrust law is identical to federal law and follows the federal precedents”).</p> <p>PF: <i>State v. Herman Miller, Inc.</i>, No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-<i>Leegin</i> challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
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| MN | <p>AT: MINN. STAT. ANN. § 325D.51 (West 2012) (declaring unlawful every “contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce”).</p> <p>PF: MINN. STAT. ANN. § 325D.53, SUBDIV. 1(1)(a) (West 2012) (declaring unlawful any “contract, combination, or conspiracy . . . for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price, rate, or fee of any commodity or service”).</p> <p>IB: MINN. STAT. ANN. § 325D.57 (West 2012) (providing a cause of action and treble damage remedy for any person or governmental body that is “injured directly or indirectly” by an antitrust violation).</p> | <p>H: <i>Lorix v. Crompton Corp.</i>, 736 N.W.2d 619, 627–29 (Minn. 2007) (Minnesota generally follows federal law but rejects <i>Associated Gen. Contractors v. Cal. State Council of Carpenters</i>, 459 U.S. 519 (1983)); see also <i>State v. Rd. Constructors, Inc.</i>, Nos. C1-95-2263, C9-95-2110, 1996 WL 266415, at *2 (Minn. Ct. App. May 21, 1996) (recognizing that “Minnesota antitrust law is to be interpreted consistently with the federal courts’ construction of federal antitrust law” (quoting <i>State v. Alpine Air Prods., Inc.</i>, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992) <i>aff’d</i>, 500 N.W.2d 788 (Minn. 1993))).</p> <p>PF: <i>State v. Alpine Air Prods., Inc.</i>, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992) (holding vertical minimum price fixing agreement a per se violation and recognizing that Minnesota courts consistently interpret state law in harmony with the federal courts’ construction of federal antitrust law) (citing <i>Keating v. Philip Morris, Inc.</i>, 417 N.W.2d 132, 136 (Minn. App. 1987) and <i>State v. Duluth Board of Trade</i>, 121 N.W. 395, 399 (Minn. 1909)), <i>aff’d</i>, 500 N.W.2d 788 (Minn. 1993).</p> |
| MS | <p>AT: MISS. CODE ANN. § 75-21-1(a) (West 2011) (declaring unlawful any trust and defining trusts as a “combination, contract, understanding or agreement” that would be “inimical to public welfare and the effect of which would be . . . to restrain trade”).</p> <p>PF: MISS. CODE ANN. § 75-21-1(c) (West 2011) (defining a trust as a combination, contract, understanding or agreement that would, among other things, “limit, increase or reduce the price of a commodity”).</p> <p>IB: MISS. CODE ANN. § 75-21-9 (West 2011) (providing a right of action for any person injured by a trust or combine, “or by its effects direct or indirect”).</p> | <p>H: <i>Futurevision Cable Sys., Inc. v. Multivision Cable TV Corp.</i>, 789 F. Supp. 760, 780 (D. Miss. 1992) (dismissing state law violations because the federal law violations failed) (citing <i>Walker v. U-Haul of Miss.</i>, 734 F.2d 1068, 1070 n.5 (5th Cir. 1984) (treating Mississippi and federal antitrust claims as “analytically identical”)), <i>aff’d</i>, 986 F.2d 1418 (5th Cir. 1993).</p> |
| MO | <p>AT: MO. ANN. STAT. § 416.031 (West 2011) (declaring unlawful “[e]very contract, combination or conspiracy in restraint of trade or commerce” and defining a trust as lease or sale “of any commodity . . . for use, consumption, or resale within this state, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in this state”).</p> <p>H: MO. ANN. STAT. § 416.141 (West 2011) (requiring that state antitrust statute “shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</p> | <p>H: <i>Hamilton v. Spencer</i>, 929 S.W.2d 762, 767 n.3 (Mo. Ct. App. 1996) (recognizing that MO. REV. STAT. § 416.141 requires Missouri antitrust laws to be harmonized with federal law and therefore citing federal precedent to limit indirect purchasers’ standing to sue); see also <i>Stensto v. Sunset Memorial Park, Inc.</i>, 759 S.W.2d 261, 266 (Mo. App. 1988) (state antitrust laws should be harmonized with federal antitrust laws).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
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| MT | <p>PF: MONT. CODE ANN. § 30-14-205 (2011) (declaring it unlawful for a person or persons to enter into “an agreement for the purpose of fixing the price or regulating the production of an article of commerce” or to “fix a standard or figure whereby the price of an article of commerce intended for sale, use, or consumption will be in any way controlled”).</p> | <p>H: <i>Smith v. Video Lottery Consultants</i>, 858 P.2d 11, 12–13 (Mont. 1993) (recognizing that MONT. CODE ANN. § 30-14-205 is “modeled after § 1 of the Sherman Act,” but broader and therefore prohibits unilateral horizontal refusals to deal).</p> |
| NE | <p>AT: NEB. REV. STAT. § 59-801 (LexisNexis 2011) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>H: NEB. REV. STAT. § 59-829 (LexisNexis 2011) (mandating that courts “shall follow the construction given to the federal law by the federal courts” when any provision is the same as or similar to the language of a federal antitrust law).</p> <p>IB: NEB. REV. STAT. § 59-821 (LexisNexis 2011) (providing a right of action for any person injured due to an antitrust violation, “whether such injured person dealt directly or indirectly with the defendant”).</p> | <p>H: <i>Heath Consultants, Inc. v. Precision Instruments, Inc.</i>, 527 N.W.2d 596, 601 (Neb. 1995) (explaining that the “legal reality” is that “federal cases interpreting federal legislation which is nearly identical to the Nebraska act constitute persuasive authority”); <i>see also</i> <i>Arthur v. Microsoft Corp.</i>, 676 N.W.2d 29, 35 (Neb. 2004) (interpreting NEB. REV. STAT. § 59-829 to require courts to look to federal law unless federal interpretation would not support the state’s statutory purpose).</p> <p>PF: <i>State ex rel. Douglas v. Associated Grocers of Neb. Coop., Inc.</i>, 332 N.W.2d 690, 693 (Neb. 1983) (citing federal precedent as authority that “[b]oth horizontal price-fixing among wholesalers and vertical price-fixing between wholesalers and retailers are presumed to be in restraint of trade and are per se violations” of state antitrust laws).</p> |
| NV | <p>AT: NEV. REV. STAT. ANN. § 598A.060 (West 2011) (declaring unlawful several categories of activities that constitute a “contract, combination or conspiracy in restraint of trade”).</p> <p>PF: NEV. REV. STAT. ANN. § 598A.060 (West 2011) (enumerating unlawful activities including “price fixing, which consists of raising, depressing, fixing, pegging or stabilizing the price of any commodity or service”).</p> <p>H: NEV. REV. STAT. ANN. § 598A.050 (West 2011) (declaring provisions “shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes”).</p> <p>IB: NEV. REV. STAT. ANN. § 598A.210 (West 2011) (providing a right of action and treble damage remedy for “any person injured or damaged directly or indirectly” by an antitrust violation).</p> | <p>H: <i>Boulware v. Nev. Dep’t of Human Res.</i>, 960 F.2d 793, 800–01 (9th Cir. 1992) (finding Nevada statute adopts by reference applicable federal antitrust case law).</p> |
| NH | <p>AT: N.H. REV. STAT. ANN. § 356:2 (LexisNexis 2012) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of trade” and expressly making unlawful “fixing, controlling or maintaining prices, rates, quotations or fees in any part of trade or commerce”).</p> <p>H: N.H. REV. STAT. ANN. § 356:14 (LexisNexis 2012) (permitting courts to be “guided by interpretations of the United States’ antitrust laws”).</p> | <p>H: <i>Minuteman, LLC v. Microsoft Corp.</i>, 795 A.2d 833, 836 (N.H. 2002) (recognizing that it has “long been the practice” to rely on interpretation of federal antitrust legislation because the legislature “expressly encouraged a uniform construction with federal antitrust law”).</p> <p>PF: <i>Wheeler v. Mobil Chem. Co.</i>, Civ. No. 94-228-B, 1994 U.S. Dist. LEXIS 16697, at *2–3 (D.N.H. Nov. 17, 1994) (relying on federal case law to apply rule of reason to nonprice vertical restraints under N.H. REV. STAT. ANN. § 356:14).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
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| NJ | <p>AT: N.J. STAT. ANN. § 56:9-3 (West 2012) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>PF: N.J. STAT. ANN. § 56:4-1.1 (West 2012) (“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law”).</p> <p>H: N.J. STAT. ANN. § 56:9-18 (West 2012) (requiring that act “shall be construed in harmony” with interpretations of comparable federal antitrust statutes to effectuate uniformity among the states “insofar as practicable”).</p> | <p>H: <i>State v. Lawn King, Inc.</i>, 417 A.2d 1025, 1032–33 (N.J. 1980) (relying on “persuasive” interpretations of federal antitrust laws to hold that vertical price restraints are per se violations but that nonprice vertical restraints are subject to the rule of reason); see also <i>Glasofer Motors v. Osterlund, Inc.</i>, 433 A.2d 780, 787 (N.J. Super. Ct. App. Div. 1981) (New Jersey’s statute “to be construed in harmony with ruling judicial interpretations of federal antitrust statutes.”).</p> <p>PF: <i>Exit A Plus Realty v. Zuniga</i>, 930 A.2d 491, 497 (N.J. Super. Ct. App. Div. 2007) (post-<i>Leegin</i> reference to N.J. STAT. ANN. § 56:4-1.1 (declaring vertical price fixing agreements per se unenforceable), but without any discussion of <i>Leegin</i>).</p> |
| NM | <p>AT: N.M. STAT. ANN. § 57-1-1 (West 2012) (declaring unlawful “[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce”).</p> <p>H: N.M. STAT. ANN. § 57-1-15 (West 2012) (requiring that act “shall be construed in harmony with judicial interpretations of the federal antitrust laws” in order to achieve uniform application of the state and federal antitrust laws).</p> <p>IB: N.M. STAT. ANN. § 57-1-3 (West 2012) (providing a right of action and treble damage remedy for “any person threatened with injury or injured in his business or property, directly or indirectly,” by an antitrust violation).</p> | <p>H: <i>Romero v. Philip Morris Inc.</i>, 242 P.3d 280, 291 (N.M. 2010) (stating that courts have a “duty . . . to ensure that New Mexico antitrust law does not deviate substantially from federal interpretations of antitrust law.”); <i>Smith Mach. Corp. v. Hesston, Inc.</i>, 694 P.2d 501, 505 (N.M. 1985) (recognizing that New Mexico courts look to federal antitrust cases “[i]n the absence of New Mexico decisions directly on point”).</p> |
| NY | <p>AT: N.Y. GEN. BUS. LAW § 340 (McKinney 2012) (declaring unlawful “[e]very contract, agreement, arrangement or combination . . . whereby [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained”).</p> <p>PF: N.Y. GEN. BUS. LAW § 369-a (McKinney 2012) (“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law”).</p> <p>IB: N.Y. GEN. BUS. LAW § 340 (McKinney 2012) (providing that a person who sustains damages as a result of an antitrust violation shall not have their recovery limited due to the fact that that person “has not dealt directly with the defendant”).</p> | <p>H: <i>Sperry v. Crompton Corp.</i>, 863 N.E.2d 1012, 1018 (N.Y. 2007) (noting that courts generally construe Donnelly Act in light of federal antitrust case law, but that it is “well settled” that New York courts will interpret Donnelly Act differently “where State policy, differences in the statutory language or the legislative history justify such a result.” (quoting <i>Anheuser-Busch, Inc. v. Abrams</i>, 520 N.E.2d 535, 539 (N.Y. 1988)); see also <i>Aimcee Wholesale Corp. v. Tomar Prod., Inc.</i>, 237 N.E.2d 223, 225 (N.Y. 1968) (recognizing that New York antitrust law was modeled on Sherman Act).</p> <p>PF: <i>Anheuser-Busch, Inc. v. Abrams</i>, 520 N.E.2d 535, 536–37 (N.Y. 1988) (recognizing that vertical restraints are not per se illegal under New York law but may be illegal if they unreasonably restrain trade); <i>People v. Tempur-Pedic Int’l, Inc.</i>, 95 A.D.3d 539, 539 (N.Y. App. Div. 2012) (holding that under N.Y. GEN. BUS. LAW § 369-a (2009) RPM agreements are unenforceable but not illegal; agreements on minimum advertised prices “cannot be the subject of a vertical RPM claim, because they do not restrain resale prices, but merely restrict advertising.”); <i>Dawn to Dusk, Ltd. v. Frank Brunckhorst Co.</i>, 23 A.D.2d 780, 781 (N.Y. App. Div. 1965) (applying rule of reason to vertical price restraints); <i>State v. Herman Miller, Inc.</i>, No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-<i>Leegin</i> challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
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| NC | <p>AT: N.C. GEN. STAT. ANN. § 75-1 (West 2011) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> | <p>H: <i>Madison Cablevision, Inc. v. Morganton</i>, 386 S.E.2d 200, 213 (N.C. 1989) (finding that the Sherman Act is instructive though not binding when interpreting state antitrust statute) (citing <i>Rose v. Vulcan Materials Co.</i>, 194 S.E.2d 521, 530 (N.C. 1973)); <i>see also</i> <i>N.C. Steel, Inc. v. Nat’l Council on Comp. Ins.</i>, 472 S.E.2d 578, 582–83 (N.C. Ct. App. 1996) (noting extensive North Carolina history of reliance on interpretations of federal antitrust law), <i>aff’d in part and rev’d in part</i>, 496 S.E.2d 369 (N.C. 1998).</p> <p>PF: <i>State v. McLeod Oil Co.</i>, No 05 CVS 13975 (N.C. Super CL, Wake Co., July 30, 2007) (consent decree in case where state challenged minimum resale price agreements between gasoline distributor and resellers).</p> |
| ND | <p>AT: N.D. CENT. CODE ANN. § 51-08.1-02 (West 2011) (making unlawful a “contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market”).</p> <p>IB: N.D. CENT. CODE ANN. § 51-08.1-08 (West 2011) (providing that recovery for damages caused by an antitrust violation shall not be barred because of the fact that the person threatened with injury or injured “has not dealt directly with the defendant”).</p> | No cases on point—statute only. |
| OH | <p>AT: OHIO REV. CODE ANN. § 1331.01(B)(1) (West 2011) (declaring unlawful any trust that is “[t]o create or carry out restrictions in trade or commerce”).</p> <p>PF: OHIO REV. CODE ANN. § 1331.01(B)(4) (West 2011) (declaring unlawful any trust that is “[t]o fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use or consumption”); OHIO REV. CODE ANN. § 1331.02 (prohibiting any person from entering into a combination, contract or agreement “with the intent to limit or fix the price or lessen the production or sale of an article or service of commerce, use, or consumption, to prevent, restrict, or diminish the manufacture or output of such article or service”).</p> | <p>H: <i>Johnson v. Microsoft Corp.</i>, 834 N.E.2d 791, 794–95 (Ohio 2005) (recognizing that “Ohio has long followed federal law in interpreting the Valentine Act” because the state statute is “patterned after the Sherman Antitrust Act” (quoting <i>C.K. & J.K., Inc. v. Fairview Shopping Ctr. Corp.</i>, 407 N.E.2d 507, 509 (Ohio 1980)); <i>Google, Inc. v. MyTriggers.com, Inc.</i>, No. 09CVH10-14836, 2011 WL 3850286 (Ohio Com. Pl. Aug. 31, 2011) (“[T]he Ohio Supreme Court has . . . ‘interpreted the statutory language in light of federal judicial construction’ of federal antitrust statutes. . . . [F]ederal policy and federal cases interpreting the Sherman Act must be examined to ascertain the meaning of the Valentine Act.” (quoting <i>Johnson v. Microsoft Corp.</i>, 834 N.E.2d 791, 797 (Ohio 2005) and <i>Schweizer v. Riverside Methodist Hosps.</i>, 671 N.E.2d 312, 314 (Ohio Ct. App. 1996))).</p> <p>PF: <i>McCall Co. v. O’Neil</i>, 1914 WL 1669, at *4 (Ohio Com. Pl. Nov. 12, 1914) (interpreting statute to prohibit scheme to fix prices at which goods may be resold by the reseller); <i>see also</i> <i>Ohio ex. rel. Brown v. Andrew Palzes, Inc.</i>, 317 N.E.2d 262, 266 (Ohio Com. Pl. 1973) (interprets OHIO REV. CODE ANN. § 1331.01(B) as a per se bar to maximum resale price agreements).</p> |
| OK | <p>AT: OKLA. STAT. ANN. TIT. 79 § 203 (West 2011) (declaring unlawful “[e]very act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>H: OKLA. STAT. ANN. TIT. 79 § 212 (West 2011) (requiring that act “shall be interpreted in a manner consistent with Federal Antitrust Law” and applicable case law).</p> | <p>H: <i>Star Fuel Marts, LLC v. Sam’s E., Inc.</i>, 362 F.3d 639, 648 n.3 (10th Cir. 2004) (Oklahoma’s antitrust act is required by statute to be interpreted in accordance with federal antitrust case law).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
|-------|--|--|
| OR | <p>AT: OR. REV. STAT. ANN. § 646.725 (West 2012) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>H: OR. REV. STAT. § 646.715(2) (West 2012) (declaring legislative intent that federal court decisions interpreting federal antitrust law “shall be persuasive authority”).</p> <p>IB: OR. REV. STAT. § 646.780(1)(a) (West 2012) (providing a right of action and treble damage remedy for antitrust violations, “regardless of whether the plaintiff dealt directly or indirectly with the adverse party”).</p> | <p>H: <i>Jones v. City of McMinnville</i>, No. 05-35523, 2007 U.S. App. LEXIS 11235, at *8 (9th Cir. 2007) (finding that Oregon and federal antitrust statutes are “almost identical” and that Oregon courts look to federal decisions as “persuasive”) (quoting OR. REV. STAT. § 646.715; <i>Or. Laborers-Emp’rs Health & Welfare Trust Fund v. Philip Morris, Inc.</i>, 185 F.3d 957, 963 n.4 (9th Cir. 1999)), cert. denied, 528 U.S. 1075 (2000); see also <i>Willamette Dental Group, P.C. v. Or. Dental Serv. Corp.</i>, 882 P.2d 637, 640 (Or. Ct. App. 1994) (with no reported Oregon decisions on point, “we look to federal decisions interpreting Section 2 of the Sherman Act for persuasive, albeit not binding, guidance”).</p> |
| PA | <p>No statute—common law remedies only.</p> | <p>PF: <i>Shuman v. Bernie’s Drug Concessions, Inc.</i>, 187 A.2d 660, 662 (Pa. 1963) (finding horizontal price-fixing agreements to be unlawful at common law and holding that vertical restraints that are the “incidents or fruits of an unlawful [horizontal] conspiracy . . . are infected with the illegality of the horizontal conspiracy and are hence unenforceable”).</p> <p>H: <i>Collins v. Main Lind Bd. of Realtors</i>, 304 A.2d 493, 496 (Pa. 1973) (court looks to United States Supreme Court case for guidance in determining whether an agreement unreasonably restrains trade).</p> |
| RI | <p>AT: R.I. GEN. LAWS ANN. § 6-36-4 (West 2012) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of, or to monopolize, trade or commerce”).</p> <p>H: R.I. GEN. LAWS ANN. § 6-36-2(b) (West 2012) (requiring that act “shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable, except where provisions of this chapter are expressly contrary to applicable federal provisions as construed”).</p> <p>IB: R.I. GEN. LAWS ANN. § 6-36-12(g) (West 2012) (providing that, in an antitrust action, the fact that a person “has not dealt directly with the defendant shall not bar or otherwise limit recovery”).</p> | <p>H: <i>UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp.</i>, 599 A.2d 1033, 1035 (R.I. 1991) (statute requires court to interpret state antitrust statute in harmony with federal antitrust statutes).</p> <p>PF: <i>Auburn News Co. v. Providence Journal Co.</i>, 504 F. Supp. 292, 300 (D.R.I. 1980) (reasoning that “vertical arrangements in general, often are competitive in effect” and therefore subject to the rule of reason), rev’d on other grounds, 659 F.2d 273 (1st Cir. 1981), cert. denied, 455 U.S. 921 (1982).</p> |
| SC | <p>AT: S.C. CODE ANN. § 39-3-10 (2011) (declaring unlawful arrangements, contracts, agreements, trusts or combinations which “lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State or in the manufacture or sale of articles of domestic growth or of domestic raw material”).</p> <p>PF: S.C. CODE ANN. § 39-3-10 (2011) (declaring unlawful “arrangements, contracts, agreements, trusts or combinations . . . which tend to advance, reduce or control the price or the cost to the producer or consumer of any such product or article”).</p> | <p>H: <i>Drs. Steuer & Latham, P.A. v. Nat’l Med. Enters.</i>, 672 F. Supp. 1489, 1521 (D.S.C. 1987) (recognizing that South Carolina has “long adhered to a policy of following federal precedents” in antitrust cases), aff’d, 846 F.2d 70 (4th Cir. 1988) (quoting <i>In re Wiring Device Antitrust Litig.</i>, 498 F. Supp. 79, 87 (E.D.N.Y. 1980)).</p> <p>PF: <i>Walter Wood Mowing & Reaping Co. v. Greenwood Hardware Co.</i>, 55 S.E. 973, 975–76 (1906) (analyzing vertical restraint under rule of reason analysis).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
|-------|--|---|
| SD | <p>AT: S.D. CODIFIED LAWS § 37-1-3.1 (2011) (making unlawful any “contract, combination, or conspiracy between two or more persons in restraint of trade or commerce”).</p> <p>H: S.D. CODIFIED LAWS § 37-1-22 (2011) (allowing courts to “use as a guide interpretations given by the federal or state courts to comparable antitrust statutes”).</p> <p>IB: S.D. CODIFIED LAWS § 37-1-33 (2011) (providing that “[n]o provision of this chapter may deny any person who is injured directly or indirectly in his business or property” by an antitrust violation).</p> | <p>H: <i>Byre v. City of Chamberlain</i>, 362 N.W.2d 69, 74 (S.D. 1985) (because of the similarity of language between federal and state antitrust statutes and because of the legislative suggestion for interpretation found in S.D. CODIFIED LAWS § 37-1-22, “great weight should be given to the federal cases interpreting the federal statute”); <i>see also In re S.D. Microsoft Antitrust Litig.</i>, 707 N.W.2d 85, 99 (S.D. 2005) (reaffirming that “great weight should be given to the federal cases interpreting the federal statute” and citing <i>Byre</i> for the proposition that, when state courts lack precedent on an issue, they look to federal case law for guidance).</p> <p>PF: <i>Assam Drug Co. v. Miller Brewing Co.</i>, 624 F. Supp. 411, 412–13 (D.S.D. 1985) (applying rule of reason to vertical territorial restraint and suggesting rule of reason is appropriate for all vertical restraints), <i>aff’d</i>, 798 F.2d 311 (8th Cir. 1986).</p> |
| TN | <p>AT: TENN. CODE ANN. § 47-25-101 (West 2012) (declaring unlawful “[a]ll arrangements, contracts, agreements, trusts, or combinations . . . to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material”).</p> <p>PF: TENN. CODE ANN. § 47-25-101 (West 2012) (declaring unlawful “all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article”).</p> | <p>H: <i>Spahr v. Leegin Creative Leather Prods.</i>, No. 2:07-CV-187, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), <i>appeal dismissed</i>, File No. No. 08-6165 (6th Cir. Nov. 20, 2008) (recognizing argument that every Tennessee case decided under the Tennessee Trade Practice Act has relied heavily on federal precedent, but noting at least one circumstance where Tennessee Supreme Court has extended the reach of the TTPA beyond that permitted by the Supreme Court’s interpretation of the Sherman Act); <i>Freeman Indus. LLC v. Eastman Chem. Co.</i>, 172 S.W.3d 512, 519 (Tenn. 2005) (declining to follow <i>Illinois Brick</i> when interpreting state statute and noting that Tennessee does not have a statutory “harmony clause” requiring courts to interpret the state antitrust laws consistently with federal law).</p> <p>PF: <i>Spahr v. Leegin Creative Leather Prods.</i>, No. 2:07-CV-187, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), <i>appeal dismissed</i>, File No. No. 08-6165 (6th Cir. Nov. 20, 2008) (applying rule of reason to antitrust challenge of minimum RPM agreement under Tennessee state law).</p> |
| TX | <p>AT: TEX. BUS. & COM. CODE ANN. § 15.05(A) (West 2011) (making unlawful “[e]very contract, combination, or conspiracy in restraint of trade or commerce”).</p> <p>H: TEX. BUS. & COM. CODE ANN. § 15.04 (West 2011) (declaring that the statute “shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose”).</p> | <p>H: <i>Star Tobacco, Inc. v. Darilek</i>, 298 F. Supp. 2d 436, 440 (E.D. Tex. 2003) (finding that the Texas antitrust statute is intended to be construed in accordance with federal antitrust statutes (citing <i>Abbot Labs., Inc. v. Segura</i>, 907 S.W.2d 503, 511 (Tex. 1995) (Gonzalez, J., concurring)); <i>see also Gonzalez v. San Jacinto Methodist Hosp.</i>, 880 S.W.2d 436, 441 (Tex. App. 1994) (Texas Antitrust Act “should be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes”); <i>Puentes v. Spohn Health Network</i>, No. 13 08 00100, 2009 Tex. App. LEXIS 4131, at *15 (Tex. App. June 11, 2009) (cites <i>Leegin</i> for principle that a per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
|-------|---|--|
| UT | <p>AT: UTAH CODE ANN. § 76-10-914(1) (West 2011) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>H: UTAH CODE ANN. § 76-10-926 (West 2011) (declaring legislative intent that “the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes”).</p> | <p>H: Evans v. State, 963 P.2d 177, 181 (Utah 1998) (citing and following statutory mandate to look to federal and state courts for guidance when construing Utah statute).</p> |
| VT | <p>AT: VT. STAT. ANN. TIT. 9, § 2453(a) (West 2012) (declaring unlawful “[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce”).</p> <p>H: VT. STAT. ANN. TIT. 9, § 2453(b) (West 2012) (declaring that in construing the statute, “the courts of this state will be guided by the construction of similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act”).</p> <p>IB: VT. STAT. ANN. TIT. 9, § 2465(b) (West 2012) (providing that the fact that a person “has not dealt directly with a defendant shall not bar or otherwise limit recovery” for an antitrust action).</p> | <p>H: Elkins v. Microsoft Corp., 817 A.2d 9, 15–17 (Vt. 2002) (holding that “harmonization provision” requiring courts to look to regulations and decisions of the Federal Trade Commission and federal court decisions of the FTC Act does not require courts to look to other federal antitrust statutes or corresponding decisions, thus rejecting <i>Illinois Brick</i>); see also State v. Heritage Realty, 407 A.2d 509, 511 (Vt. 1979) (interpreting VT. STAT. ANN. TIT. 9, § 2453(a) in light of federal case law to find that horizontal price fixing is per se unlawful).</p> |
| VA | <p>AT: VA. CODE ANN. § 59.1-9.5 (West 2011) (declaring unlawful “[e]very contract, combination or conspiracy in restraint of trade or commerce”).</p> <p>H: VA. CODE ANN. § 59.1-9.17 (West 2011) (declaring legislative intent that act “shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions”).</p> | <p>H: Williams v. First Fed. Sav. & Loan Ass’n, 651 F.2d 910, 930 (4th Cir. 1981) (recognizing statutory mandate to harmonize state law with federal interpretations of comparable federal antitrust statutes).</p> |
| WA | <p>AT: WASH. REV. CODE ANN. § 19.86.030 (West 2012) (declaring unlawful “[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>H: WASH. REV. CODE ANN. § 19.86.920 (West 2012) (declaring legislative intent that construction of act “be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters” but that the act “shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se”).</p> | <p>H: Blewett v. Abbott Labs., 938 P.2d 842, 846 (Wash. Ct. App. 1997) (recognizing that although federal antitrust precedent is only a “guide,” in practice Washington courts have uniformly followed federal precedent in matters described under the Washington antitrust laws and any departure from federal law “must be for a reason rooted in our own statutes or case law and not in the general policy arguments that this court would weigh if the issue came before us as a matter of first impression”).</p> |

Overview of State RPM

| STATE | LEGISLATION | LITIGATION |
|-------|--|--|
| WV | <p>AT: W. VA. CODE ANN. § 47-18-3(a) (West 2012) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>PF: W. VA. CODE ANN. § 47-18-3(b)(1) (West 2012) (deeming unlawful certain contracts, combinations or conspiracies including those with “the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service” or “[f]ixing, controlling, maintaining, limiting or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity or service”).</p> <p>H: W. VA. CODE ANN. § 47-18-16 (West 2012) (declaring legislative intent that statute “shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</p> | <p>Kessel v. Monongalia Cnty. Gen. Hosp. Co., 648 S.E. 2d 366, 374–80 (W. Va. 2007) (holding West Virginia intended to codify existing federal per se violations when it enacted W. VA. CODE § 47-18-3 and setting forth factors for deciding whether to follow modern federal precedent when construing per se categories).</p> |
| WI | <p>AT: WIS. STAT. ANN. § 133.03 (West 2011) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>IB: WIS. STAT. ANN. § 133.18(1)(a) (West 2011) (providing a right of action and treble damage remedy for “any person injured, directly or indirectly, by reason of” an antitrust violation).</p> | <p>H: Emergency One v. Waterous Co., 23 F. Supp. 2d 959, 962, 970 (D. Wis. 1998) (noting that Wisconsin courts have “repeatedly” stated that federal antitrust law guides the interpretation of WIS. STAT. § 133.03 (citing <i>Grams v. Boss</i>, 294 N.W.2d 473, 480 (Wis. 1980)); <i>but cf. Ostad v. Microsoft Corp.</i>, 700 N.W.2d 139, 144, 154–55 (Wis. 2005) (finding that one of the major objectives of revisions made to the state’s antitrust law in 1980 was to reverse the holding in <i>Illinois Brick</i>, and that Wisconsin’s antitrust laws are to be interpreted “in a manner which gives the most liberal construction to achieve the aim of competition”).</p> <p>PF: Slowiak v. Hudson Foods, Inc., No. 91-C-737-2, 1992 U.S. Dist. LEXIS 9387, at *25–30 (D. Wis. 1992) (holding vertical maximum price restraint lawful because there was no antitrust injury).</p> |
| WY | <p>AT: WYO. STAT. ANN. § 40-4-101(a)(i) (West 2012) (prohibiting “any plan, agreement, consolidation or combination of any kind whatsoever to prevent competition or to control or influence production or prices thereof”).</p> | <p>PF: Bulova Watch Co. v. Zale Jewelry Co., 371 P.2d 409, 420 (Wyo. 1962) (declining to hold that Fair Trade Law’s authorization for resale price maintenance violates the state constitution but noting that it is “certainly out of harmony with its spirit”).</p> |

What Goes Up, Doesn't Come Down: The Absence of the Mitigating-Role Adjustment In Antitrust Sentencing

Mark Rosman and Jeff VanHooreweghe

A single point can make the difference between winning and losing, passing and failing, and, in the context of antitrust prosecutions, jail and freedom. The more than 250 individuals who have been sentenced to jail for their involvement in antitrust conspiracies know what a difference a point can make, particularly those prosecuted in recent years. From 2000 to 2010, the average number of months of incarceration for antitrust defendants has tripled (i.e., increased from ten months to thirty months).

One of the means the Department of Justice's Antitrust Division uses to bump up jail sentences is the "aggravating-role adjustment" in the U.S. Sentencing Guidelines Manual.¹ That adjustment allows the Division to add points to an individual defendant's sentencing calculation when he or she plays a more significant role in the alleged offense relative to other participants. A review of recent prosecutions reveals that the aggravating-role adjustment has increased the Guidelines' sentencing range 60 to 80 percent for some individuals.² The review also reveals that the Antitrust Division has used the aggravating-role adjustment in roughly 50 percent of all individual prosecutions in recent years. In the marine hose investigation, the Antitrust Division used the aggravating-role adjustment in seven of the nine instances in which an individual defendant pled guilty.

Yet, it appears that the Antitrust Division has *never* used the corollary "mitigating-role adjustment."³ The mitigating-role adjustment allows the Antitrust Division to subtract points from an individual defendant's sentencing calculation when he or she plays a less significant role in the alleged offense relative to other participants. While the commentary to the Guidelines and case law suggest using a portion of the mitigating-role adjustment "infrequently," this does not mean "never."⁴ Ignoring the mitigating-role adjustment contradicts the purpose of the Guidelines, leads potentially to significant disparities in sentencing, is patently unfair to some antitrust defendants, and, in some instances, handicaps the Antitrust Division's enforcement efforts.

U.S. Sentencing Guidelines—Offense Role Adjustments

The Guidelines' role-adjustment provisions are intended to "serve the guidelines' objective of ensuring that sentences appropriately reflect the defendant's culpability and specific offense

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Mark Rosman is a partner and **Jeff VanHooreweghe** is an associate at Wilson Sonsini Goodrich & Rosati in Washington, D.C.

¹ U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2010).

² The review comprised the Antitrust Division's prosecutions in the following industries: Vitamins (1998–2000), Graphite Electrodes (1998–2001), Marine Hose (1999–2007), DRAM (2004–2006), Air Transportation (Cargo, Passenger) (2007–2011), Liquid Crystal Displays (2009–2012), and Auto Parts (varies). The 60–80 percent increase in the sentencing range does not necessarily correlate to the same percentage increase in the actual sentence because most prosecutions end in a negotiated plea agreement. However, the sentencing range often serves as the starting point in plea negotiations.

³ U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1.

⁴ *Id.* cmt. n.4 ("It is intended that the downward adjustment for a minimal participant will be used infrequently.")

conduct.”⁵ They do this by setting forth varying increases and decreases to a “Base Offense Level” based on the size and scope of the criminal activity and the defendant’s particular role in the activity. The Base Offense Level for antitrust offenses starts at twelve (for price-fixing and market-allocation offenses) or thirteen (for bid-rigging offenses). It then is adjusted up or down based on a number of factors (e.g., volume of commerce affected, the defendant’s acceptance of responsibility, and the number of counts). One of those factors is the defendant’s role in the alleged offense.

The aggravating-role provision,⁶ on the one hand, can increase a defendant’s Base Offense Level by two to four points depending on the criminal activity and the defendant’s role relative to other participants.⁷ It is designed to address “concerns about relative responsibility.”⁸ The mitigating-role adjustment, on the other hand, can decrease the Base Offense Level of a defendant who is “substantially less culpable than the average participant.”⁹ The mitigating-role adjustment operates to decrease the offense level as follows:

- (1) If the defendant was a “minimal” participant in any criminal activity, decrease by four levels.
- (2) If the defendant was a “minor” participant in any criminal activity, decrease by two levels.
- (3) If the defendant’s participation falls between “minimal” and “minor,” decrease by three levels.

The Guidelines’ commentary explains, albeit in sparse detail, how the mitigating-role adjustment should be applied. The commentary states that the “minimal” participant adjustment (four level decrease) is reserved for “defendants who are plainly among the least culpable of those involved in the conduct of a group.”¹⁰ It elaborates that the “defendant’s lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.”¹¹

The “minor” participant adjustment (two level decrease), is one who is substantially less culpable than the average participant and “who is less culpable than most other participants, but whose role could not be described as minimal.”¹² The commentary provides no explanation of culpability considerations for the defendant who falls between “minimal” and “minor.”

⁵ OFFICE OF THE GENERAL COUNSEL, U.S. SENTENCING COMMISSION, AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS PRIMER §§ 3B1.1 & 3B1.2, Apr. 2012, at 1 [hereinafter Guidelines Adjustments Primer], available at http://www.uscc.gov/Legal/Primers/Primer_Role_Adjustment.pdf.

⁶ U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1.

⁷ Specifically, the aggravating-role provision states: “(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels. (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels. (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described [above], increase by 2 levels.” U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 3B1.1.

⁸ *Id.* cmt. background.

⁹ *Id.* § 3B1.2, cmt. n.3(A).

¹⁰ *Id.* at cmt. n.4.

¹¹ *Id.*

¹² *Id.* at cmt. n.5.

Finally, the commentary states that the downward adjustment for a “minimal participant will be used infrequently;” it provides no instruction on how often to apply the downward adjustment for “minor” participants or those who fall between “minor” and “minimal.”¹³

Infrequent or not, nothing suggests that the Antitrust Division can ignore the adjustment entirely. Yet, canvassing the Antitrust Division’s prosecutions reveals that it has never used the mitigating-role adjustment in an antitrust criminal case.¹⁴ It seems unlikely that there have been no individual defendants who played a minor or minimal role in all the cases prosecuted by the Division.

Why The Antitrust Division Should Use The Mitigating-Role Adjustment

Whatever the reason the Antitrust Division has ignored the mitigating-role adjustment in prosecuting antitrust conspiracies, we believe that the adjustment should not be ignored. Indeed, there are several reasons why the Antitrust Division should apply the mitigating-role adjustment: (1) it is the law, (2) it is only fair to individual defendants, (3) it serves the Guidelines’ primary objective of ensuring the sentence fits the defendant’s culpability, and (4) it is simply good enforcement policy.¹⁵

It Is the Law: The Antitrust Division Cannot Cherry-Pick the Guidelines’ Provisions

While it is not mandatory for a court to sentence an individual defendant under the Guidelines, it is mandatory for a sentencing court to consider the Guidelines when determining the sentence to impose.¹⁶ Prosecutors, therefore, are responsible for considering and presenting the Guidelines’ recommended sentence. Indeed, the U.S. Attorney’s Manual (USAM) instructs prosecutors to assist the court in making sentencing recommendations.¹⁷ The USAM further instructs that “sentencing recommendations should be consistent with the [Guidelines] for sentencing antitrust violations.”¹⁸ Thus, it is common for Antitrust Division prosecutors to present the Guidelines’ calculation in sentencing reports and plea agreements.

In presenting the Guidelines’ calculation, prosecutors must apply them as a “cohesive and integrated whole,” not piecemeal.¹⁹ In other words, prosecutors are not allowed to cherry-pick the Sentencing Guidelines’ provisions.²⁰ And, the Guidelines advise that *all* of its provisions should be applied.²¹ The Guidelines further instruct that the role adjustments (both of them) be applied after

Yet, canvassing the Antitrust Division’s prosecutions reveals that it has never used the mitigating-role adjustment in an antitrust criminal case.

¹³ *Id.* at cmt. n.4.

¹⁴ We found only a few instances when the Antitrust Division used the mitigating-role adjustment, but none of those instances involved antitrust conspiracies (i.e., price fixing, bid rigging, market allocation agreements). These instances involved charges like wire fraud and obstruction.

¹⁵ To be clear, we are not advocating that the mitigating-role adjustment be used to increase the number of individuals that the Antitrust Division prosecutes; we are advocating that the Division use the adjustment for prosecuting those it targets under current standards (i.e., those the Division has already carved out of plea agreements or otherwise seeks to indict).

¹⁶ 18 U.S.C. §§ 3553(a)(4), (a)(5); *United States v. Booker*, 543 U.S. 220, 264 (2005) (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”).

¹⁷ U.S. ATTORNEY’S MANUAL, Title 9, § 27.710, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrmtm#9-27.710.

¹⁸ *Id.* Title 7, § 5.613.

¹⁹ *United States v. Stephenson*, 921 F.2d 438 (2d Cir. 1990).

²⁰ See, e.g., *United States v. Lawrence*, 916 F.2d 553, 555 (9th Cir. 1990); see also U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 1B1.11(b)(2) (“The Guidelines Manual in effect on a particular date shall be applied in its entirety.”).

²¹ U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1, § 1B1.1(a) (setting forth the order in which all provisions of the Manual should be applied).

determining the base offense level.²² By employing only the aggravating role adjustment, the Antitrust Division is ignoring this mandate.

It Is Only Fair: It Would Help Eliminate Sentencing Disparity

By employing only the aggravating-role adjustment, the Antitrust Division is also creating a disparity in sentencing: sentencing ranges go up but cannot go down for an individual’s role. Defendants who play only a minor or minimal role in a conspiracy are treated similarly to defendants who play a more significant role. The effect of not accounting for the difference is significant.

Consider, for example, that the DOJ has targeted three individuals for prosecution in an investigation of a price-fixing conspiracy. The three individuals work for separate companies, all of which have already entered into plea agreements and now are in separate plea negotiations with the DOJ. The three individuals are similarly situated by all accounts except that the first (Dan) played an “aggravating” role in the alleged conspiracy, the second (Jim) played a “mitigating” (minimal) role, and the third (Nancy) played a role that does not qualify as “mitigating” but also did not qualify as “aggravating,” i.e., Nancy’s role would not qualify for either adjustment.

Under the Antitrust Division’s current practice, Jim and Nancy could easily have the same sentence despite having different levels of culpability. The Guidelines calculation would be as follows (assuming all three defendants accepted responsibility, all are employed by companies with volume of commerce (VOC) affected between \$250 and \$500 million, and all fall within the first criminal history category of the sentencing table):

By employing only the aggravating-role adjustment, the Antitrust Division is also creating a disparity in sentencing: sentencing ranges go up but cannot go down for an individual’s role.

| | Dan (aggravating role) | Jim (mitigating role) | Nancy (neither role) |
|------------------------------|----------------------------------|---------------------------------|--------------------------------|
| Base Offense Level | 12 | 12 | 12 |
| VOC Adjustment | +10 | +10 | +10 |
| Role Adjustment | +3 | None | None |
| Accept Adjustment | -3 | -3 | -3 |
| Offense Level | 22 | 19 | 19 |
| Sentence Range (mos.) | 41-51 | 30-37 | 30-37 |

Under the Antitrust Division’s current practice, Jim and Nancy would have the same recommended sentence (30–37 months). But, if the Division used the mitigating (minimal) role adjustment for Jim, his offense level would decrease by four points (for a total of fifteen), which results in a sentencing range of 18–24 months, instead of 30–37 months. In other words, Jim’s sentencing range increases by one year (or 67 percent) by not accounting for his mitigating role.²³

This disparity is only highlighted by adjusting the assumptions (all of which are well within the realm of possibility). Say, for example, that Dan and Nancy work for companies that had VOC affected between \$10 million and \$40 million, and Jim works for a company with a VOC affected between \$500 million and \$1 billion, but Jim otherwise plays a “minor” or “minimal” role. In individual prosecutions the DOJ uses the VOC attributed to the individual’s employer to calculate the

²² *Id.* (“Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.”)

²³ Again, the recommended sentence does not necessarily represent the time served by antitrust defendants. The time served is typically negotiated as part of a plea agreement (and determined by a sentencing court) or determined solely by a sentencing court in the event of a conviction. Even so a defendant who played a relatively minimal role would certainly appreciate starting the negotiations or sentencing determination at one year below what he or she would face under the current practice.

sentencing range, not the VOC attributed to the conspiracy as a whole; therefore, under current practice, the calculation would be:

| | Dan (aggravating role) | Jim (mitigating role) | Nancy (neither role) |
|------------------------------|---------------------------|--------------------------|-------------------------|
| Base Offense Level | 12 | 12 | 12 |
| VOC Adjustment | +4 | +12 | +4 |
| Role Adjustment | +3 | None | None |
| Accept Adjustment | -3 | -3 | -3 |
| Offense Level | 16 | 21 | 13 |
| Sentence Range (mos.) | 21-27 | 37-46 | 12-18 |

Under this hypothetical, Jim would likely face a sentence range that is over one year greater than Dan's sentence (16–19 months more) and over two years greater than Nancy's sentence (25–28 months more), despite having the least culpability. This undoubtedly would lead to a greater incarceration period for Jim even though Jim played a relatively lesser role in the conspiracy than both Dan and Nancy. Furthermore, Nancy would be eligible to serve her sentence, in part, under home detention or supervised release because her Offense Level puts her in a different category of sentencing under the Guidelines (i.e., Zone C category under USSG § 5C1.1), whereas Jim could only serve his sentence by imprisonment.

While these hypotheticals are meant only to illustrate the disparities that can occur by ignoring the mitigating-role adjustment, they are not far-fetched examples. Antitrust conspiracies tend to involve a variety of defendants with significantly different roles. The mitigating-role adjustment provides one means of recognizing these variances and eliminating potential sentencing disparities.

It Is Meant To Be: Role Adjustments Are Intended for Offenses Involving Varied Roles and Culpability

The Sentencing Commission may have had antitrust offenses in mind when it considered the role adjustments, particularly the antitrust conspiracies prosecuted in recent years. The Antitrust Division tends to prosecute conspiracies that span several years and involve several large multinational companies with complex organizational structures. Conspiracies in which these companies engage typically require numerous people at various levels in the organization playing various roles. The Guidelines therefore must have a means for accommodating the varied conduct and culpability. The role adjustments do just that: "Together, §§ 3B1.1 and 3B1.2 serve the guidelines' objective of ensuring that sentences appropriately reflect the defendant's culpability and specific offense conduct."²⁴

The Guidelines' Commentary instructs courts to consider a defendant's role relative to the other participants in the criminal activity to determine whether a defendant receives a mitigating-role adjustment. Some courts look to the defendant relative to other participants in the criminal activity at issue; some courts look to the defendant relative to the typical participant in that criminal activity. Under either approach, it is not uncommon for antitrust defendants to have significantly different roles justifying the Division's use of the mitigating-role adjustment. Consider the following:

²⁴ Guidelines Adjustments Primer, *supra* note 5, at 1.

- An individual attended only one meeting of an alleged cartel that met several times a year over the course of several years. Under the Division's current practice, this individual would be held to the same sentencing standard as the individual who attended every meeting.
- An individual with no pricing authority is instructed to exchange pricing information for purposes of executing a price-fixing conspiracy. This individual would be held to the same sentencing standard as the individual who instructs the exchange and who makes pricing decisions.
- A manager is aware of a conspiracy entered into by her employees and does not seek to stop it, but otherwise plays no role in its formation or execution. This individual would be held to the same sentencing standard as her counterpart manager at another company who was aware of the conspiracy, helped form it, and played an active role in executing it.

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Depending on the facts of the conspiracy charged, all of these individuals may very well deserve the same sentence. Yet, each individual had very different levels of participation. And under current practice, the Antitrust Division would not use the mitigating-role adjustment to account for the varying roles these individuals played. The mitigating-role adjustment, even if used sparingly, could provide one means for acknowledging the differences. Nothing in the Guidelines suggests that the adjustment should not be used; indeed, it is difficult to identify another type of offense to which it more appropriately applies.²⁵

It Is Good Policy: The Number of Plea Agreements Is Likely to Increase

The Antitrust Division handicaps itself by ignoring the mitigating-role adjustment because the Division could use the adjustment as an additional tool for negotiating plea agreements. It is not uncommon for individuals the Division targets to argue that their minor role (relative to others) is a reason not to prosecute them. Individuals who take this position are more likely to fight the Division's allegations at trial. In fact, the Antitrust Division tends to have less success at trial against individual defendants "farther removed" from the conspiracy.²⁶ Three times in the last four years the Division has failed to convict individuals who played arguably less culpable roles in the alleged conspiracy.²⁷ The mitigating-role adjustment could be the Division's fix for these cases. If the Division employed a means to recognize this relative culpability, i.e., the mitigating-role adjustment, then individuals might be more likely to enter into plea agreements rather than fight the allegations in court.

The Division has acknowledged that it usually tries the "tougher cases" because most individuals playing a significant role in the conduct plead before trial. Scott Hammond, Deputy Assistant

²⁵ The mitigating-role adjustment is commonly used in drug offense cases, most often in relation to the sentencing of drug "runners," i.e., those used to transport drugs (and nothing more). While drug cartels can involve complex factual situations with individuals playing significantly different roles, antitrust conspiracies also can, and often do, present similar complex issues of relative culpability.

²⁶ One of the more notable losses came at the trial of Francesco Scaglia in the marine hose investigation. Mr. Scaglia was a product manager for Manuli Rubber Industries SpA, a company that pled guilty to the conspiracy and agreed to pay a fine of \$2 million. At trial, the evidence revealed that Mr. Scaglia attended one meeting of the conspiracy (in the eight years the conspiracy was in place), that he did not really understand what the meeting was about until he was there, and that he did not actively engage in the meeting (he sat there and did not leave for fear he would look like a "crazy boy" for announcing that he was leaving). The jury acquitted Mr. Scaglia.

²⁷ In the recent trial against AU Optronics and several executives, the Division won conviction of AU Optronics and two of its top executives but failed to convict three "lower-level" employees who were arguably less culpable. In February 2008, a court declared a mistrial in the Division's prosecution of Gary Swanson in the DRAM investigation after the jury returned ten to two in favor of acquittal. In November 2008, Val Northcutt was acquitted in the same marine hose investigation as Mr. Scaglia.

Attorney General in charge of criminal prosecutions, has stated that the Division intends to hold more individuals accountable, and in doing so, he recognized that “[a]s you try to hold more individuals accountable, you [bring] cases against people farther removed The tougher cases go to trial.”²⁸ Some of those “farther removed” from the heart of the conspiracy may well be “minor” or “minimal” participants, almost by definition. The mitigating-role adjustment may be the answer to these “tougher cases” because it could save the Division the costs and risks associated with trying them.

Potential Reasons Why the Antitrust Division Does Not Use the Mitigating-Role Adjustment Today

The Antitrust Division has not explained why it does not use the mitigating-role adjustment in its prosecutions, nor is there much commentary on the issue. It is simply accepted as standard practice and left (mostly) unquestioned. We offer a few potential reasons for why this may be so.

First, it may be that the individuals qualifying for the mitigating-role adjustment are never subject to prosecution in the first place. In other words, the Division offers the individuals who would otherwise qualify an opportunity to walk (usually in return for cooperation against other defendants), and thus there is no need to employ the adjustment. While this may be true for most individuals who are found to play lesser roles in the alleged conspiracies prosecuted, we do not believe it is true for all. As noted above, the conspiracies being prosecuted involve varied roles and participants and it is unlikely that no one targeted for prosecution has ever qualified for a downward adjustment. To be clear, the mitigating-role adjustment should not be used to increase the number of individuals that the Antitrust Division prosecutes; we are advocating that the Division use the adjustment for prosecuting those it targets under current standards, i.e., those it seeks to indict or carve out of plea agreements.

Second, there may be a concern that applying the mitigating-role adjustment, even infrequently, would open the door for all defendants to argue for lesser sentences under the adjustment. The Division would then need to expend the resources necessary to defend against these arguments. In other words, it may be much easier to stick to a blanket refusal policy, rather than open a perceived Pandora’s Box. But easy does not make good policy. And, if it did, it would be easier for the Division to negotiate plea agreements, rather than litigate, which it could do more often if it employed the mitigating-role adjustment.

Third, there could be a concern that using the mitigating-role adjustment would lead to lesser sentences on average overall, which would decrease the incentives for individuals to cooperate during an investigation—i.e., the mitigating-role adjustment will decrease the average individual sentence and thus decrease the deterrent effect of such sentences. This concern has some merit and goes to the core purpose of sentencing: deterrence. But if used properly, the mitigating-role adjustment could increase, rather than decrease, the average sentence for individuals. As explained above, the mitigating-role adjustment would help reduce the number of individuals tried (and thus increase the number who plead guilty) and therefore avoid the decrease in the average sentence that results from failed convictions.

The mitigating-role adjustment should be reserved for those who have been targeted by the Division for prosecution. And, among those individuals, it should be reserved for only those who played significantly less roles in the conspiracy, as the Guidelines suggest. By limiting the use of

²⁸ See Leah Nylen, *Antitrust Complexities Provide Hurdle to Trials*, MLEX, Dec. 28, 2011 (quoting Scott Hammond) (on file with authors).

the mitigating-role adjustment in this way, it would in no way guarantee its availability to potential defendants. Individuals would face the same risks as they do today during the investigation, thus they would face the same incentives to cooperate. The only difference would be that when the Division seeks a conviction, the Division would have an additional tool for reaching resolution without going to trial. ●

A Fundamental Shift: Brazil's New Merger Control Regime and Its Likely Impact On Cross-Border Transactions

Fiona Schaeffer and Michael Culhane Harper

On May 29, 2012, Brazil joined the growing number of merger control regimes that may drive the timing and potentially the outcome of cross-border mergers and acquisitions. In the most dramatic change to Brazil's competition law since its inception, reportable transactions now must be approved by Brazil's newly consolidated competition authority before they can be consummated.¹ Merging parties now will have to wait up to 330 days to obtain approval from the Administrative Council for Economic Defense (CADE) before they can close their deal. CADE also has issued regulations (Merger Regulations) that clarify which types of transactions are covered by the new law and provide a procedural framework and requirements for notification and review of reportable transactions.²

The modernization of Brazil's competition laws underscores the growing importance and sophistication of its economy and its competition law enforcement activities. There are many positive aspects to Brazil's new merger control regime, which consolidates investigative and decision-making power in one antitrust enforcement agency and introduces a pre-merger control system that covers "economic concentration acts" with an economic nexus to Brazil. These changes are generally consistent with the recommended practices of the International Competition Network (ICN) and the Organization for Economic Co-operation and Development (OECD). Ultimately, these reforms should improve the efficiency and effectiveness of merger control in Brazil as befits one of the world's largest, diversified economies.

As the ICN and the OECD have advocated, competition agencies need to have appropriate tools and resources to successfully enforce their merger review laws.³ Recognizing this, CADE has been authorized to hire 200 new antitrust staff to help fulfill its new responsibilities.⁴ However, few of these positions have been filled due to the lengthy civil service hiring process. This may explain why the Ministries of Justice and Finance decided to further increase the turnover thresholds as soon as the new law went into effect.⁵ Raising the thresholds will reduce the number of expected

¹ Law No. 12,529/11 (Brazil), available at http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2011/Lei/L12529.htm.

² CADE Resolution No. 1/12 (Brazil), available at http://cade.gov.br/upload/Resolu%C3%A7%C3%A3o%201_2012%20-%20RICADE%20%282%29.pdf. An English version is available at <http://www.cade.gov.br/upload/LAW%20N%C2%BA%2012529%202011%20%28English%20version%20from%2018%2005%202012%29.pdf>.

³ INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES § XII.A (Sept. 2002) [hereinafter ICN Recommended Practices], <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>; OECD, Recommendation of the Council on Merger Review § 1.C (Mar. 23, 2005) [hereinafter OECD Recommendation], available at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False>.

⁴ Law No. 12,529/11, *supra* note 1.

⁵ Portaria Interministerial No. 994/12, available in Clipping do IBRAC no. 18/2012, at 14, available at http://www.ibrac.org.br/Uploads/PDF/Clipping2012/Clipping_do_ibrac_18_2012.pdf.

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Fiona Schaeffer is a partner in the New York office and **Michael Harper** is an associate in the São Paulo office of Jones Day.

notifications, but concerns remain about other elements of the new merger control system, which:

- Adopts an expansive concept of “control” that is likely to capture more transactions than the EU or U.S. model;
- Includes turnover of the target’s entire economic group (not just the target itself) to determine whether the jurisdictional thresholds are met;
- Lacks a formal “first phase” or “initial” waiting period that would assure timely approval of the vast majority of transactions that do not pose significant competition concerns; and
- Requires merging parties to provide a voluminous amount of information with their notification form, rather than limiting the information burdens to the minority of transactions that raise potentially significant competition issues.

Companies . . . need to understand the practical impact of these changes and what is required of them to successfully navigate the new merger review system.

Companies contemplating deals that may be reportable in Brazil need to understand the practical impact of these changes and what is required of them to successfully navigate the new merger review system. This article describes the most significant changes, analyzes how the new regime compares to other pre-merger control jurisdictions and international best practices, and highlights areas where additional guidance is needed.

Consolidation of Reviewing Agencies into a Single “Super” Agency

Under the prior merger control regime, three separate government entities in Brazil had overlapping responsibility for reviewing mergers and consolidations: the Secretariat of Economic Law of the Ministry of Justice (SDE), the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), and CADE. This tripartite institutional structure was cumbersome and inefficient.⁶ The new merger control regime consolidates investigative and decision-making authority within CADE, an independent competition agency analogous in structure to the U.S. Federal Trade Commission. Brazil’s institutional reforms are consistent with recent moves in the UK, Spain, and France to consolidate enforcement powers in a single institution.⁷

The new CADE is composed of three principal sections:

- (i) the Superintendence General, led by an appointed Superintendent General (the Superintendent), reviews all notified transactions and decides whether they should be approved or submitted to the Administrative Tribunal (Tribunal) in complex cases where the Superintendent believes remedies or even a prohibition decision may be warranted;⁸

⁶ ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COMPETITION LAW AND POLICY IN BRAZIL: A PEER REVIEW 7 (2005), available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf> (pointing to a 2000 OECD report that determined the triangular system to be inefficient and duplicative).

⁷ Autorité de la Concurrence, Reform of the French Competition Regulatory System: the Conseil de la Concurrence Becomes the Autorité de la Concurrence (Competition Authority) (Mar. 2009), available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=317; ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, SPAIN: COMPETITION LAW AND POLICY (2001), available at <http://www.oecd.org/dataoecd/33/28/2489091.pdf>; DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, GROWTH COMPETITION AND THE COMPETITION REGIME: GOVERNMENT RESPONSE TO CONSULTATION (Mar. 2012), available at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf>.

⁸ The Superintendent can clear notified transactions without review by the Tribunal. However, if the Superintendent believes that a transaction should be restricted or blocked, he must present a written opinion to the Tribunal. One of the Commissioners (the Reporting Commissioner) will review the transaction and the Tribunal will vote on the decision. The decision of the Superintendent to approve a transaction without restrictions becomes final within fifteen days of its publication unless appealed by a third party or by CADE’s Tribunal (if it disagrees with the decision) within the fifteen-day time period. Law No. 12,529/11, *supra* note 1, art. 65.

(ii) the Tribunal, whose seven Commissioners render final and binding administrative decisions in merger cases referred to them; and

(iii) the Department of Economic Studies,⁹ led by CADE's chief economist, which conducts market studies and provides nonbinding economic opinions in merger and conduct cases as requested by the Superintendent or the Tribunal.

CADE's Superintendent General and Commissioners are political appointments confirmed by the Senate. On May 29, 2012, President Dilma Rousseff nominated Vinícius Marques de Carvalho to be the new president of CADE and Carlos Ragazzo to be the first Superintendent General.¹⁰ Both have since been confirmed by the Senate.

Pre-Merger Review

One of the most significant changes to Brazil's merger review system is the introduction of a pre-merger notification system. Unlike the prior system, in which transactions could be completed before CADE rendered a decision,¹¹ the new regime allows CADE to assess the competitive effects of reportable mergers ex ante and to block a transaction or impose structural remedies to address competition concerns before the transaction is consummated. Merging parties no longer have the option to close their deal prior to CADE's approval. At the same time, they no longer have to live with the legal uncertainty inherent in the prior system, which always held the possibility of post-merger remedial action.

Timing of Notification and Gun-Jumping. Parties can notify CADE of their deal at any time after execution of a binding agreement as long as they do so before the deal has been consummated. There is no longer a deadline by which to notify the deal. The pre-merger notification system also implements new rules for "gun-jumping." Parties that fail to notify reportable transactions before closing may have the deal declared void and may be subject to fines that range from R\$60,000 (US\$30,000) to R\$60 million (US\$30 million).¹² Furthermore, pending CADE approval, merging parties cannot: (i) modify their physical structures or transfer or combine assets; (ii) influence another party's decisions; or (iii) exchange competitively sensitive information that is not necessary for reaching a preliminary binding agreement.¹³ Presumably these prohibitions would not reach integration activities outside of Brazil's borders (such as the merger of two foreign parent companies) as long as their operating companies, assets, and businesses in Brazil continued to be independent. However, there is no clear guidance or precedent yet. If CADE's review process does become a significant impediment to closing international transactions (e.g., because CADE's decision is still pending long after other mandatory clearances have been obtained), it is likely that this thesis will be tested.

Permission to Close Pending Approval. Upon request, CADE may authorize parties to close a notified transaction before clearance if: (a) there would be no irreparable harm to competition,

⁹ The third agency that formerly reviewed mergers, SEAE, will no longer have merger review responsibilities, but will instead focus on competition advocacy.

¹⁰ Fabio Amato, *Dilma Nomeia Novos Presidente e Superintendente do CADE* [Dilma Nominates New President and Superintendent of CADE], G1 (May 29, 2012), available at <http://g1.globo.com/economia/noticia/2012/05/dilma-nomeia-novos-presidente-e-superintendente-do-cade.html>.

¹¹ Law No. 8,884/94 (Brazil), available at <http://www.cade.gov.br/english/internacional/Law-8884-1994b.pdf>.

¹² CADE Resolution No. 1/12, *supra* note 2, art. 112.

¹³ *Id.* art. 108.

(b) the merger would be easily reversible if CADE later concluded that the transaction harmed competition, and (c) the target company would face serious financial losses if it could not proceed more quickly.¹⁴ Like its counterpart provision (“derogation from suspension” in the European Union), we anticipate that CADE will grant such approvals only in exceptional cases.

With respect to public takeover bids, notification may be made on public announcement and the bid may be completed pending CADE’s approval.¹⁵ However, during this time, the acquirer cannot exercise voting rights to stock acquired except with CADE’s permission, where it is necessary to preserve the value of the investment.

Covered Transactions (“Concentration Acts”)

Under the prior law, the types of transactions subject to merger control were very broad and reached certain cooperative agreements as well as traditional mergers and acquisitions, joint ventures, and acquisitions of non-controlling stakes. The breadth of the prior statutory language and its expansive interpretation in CADE decisions meant that a range of cooperative agreements, such as long-term exclusive supply contracts, were routinely notified to CADE.¹⁶ The new law does not retain the very broad language of its predecessor. It defines a “concentration act” as a transaction where: (i) two or more previously independent companies merge; (ii) one or more companies acquire, directly or indirectly, by any means, partially or fully, the control of one or more companies; (iii) one or more companies incorporate another company or companies; or (iv) two or more companies execute a joint venture or any other form of association agreement, with an exception for consortia that are formed in connection with public bids.¹⁷

However, the concept of “control,” which is fundamental to the definition of “concentration act,” appears to be broader than in the United States or the European Union. Article 90 of the new law excludes transactions that do not confer control, defined as those transactions in which the acquirer is unable to influence the behavior of the company being acquired.¹⁸ The Merger Regulations state that a minority acquisition confers “control” where:

- (i) The transaction results in the acquirer holding at least 20 percent of the target company, or increasing its interest by at least 20 percent, where the groups involved are neither competitors nor vertically related; or
- (ii) The transaction results in the acquirer holding at least 5 percent of a target company that is a competitor of, or vertically related to, the purchaser.

By comparison, in the United States, the Hart-Scott-Rodino Act (HSR Act) only requires the notification for acquisitions of voting securities, i.e., those that entitle the holder to vote for the issuer’s board of directors. If the transaction results in the acquisition of non-voting securities, then there is no requirement for notification.¹⁹ Furthermore, foreign-to-foreign transactions generally are

¹⁴ Law No. 12,529/11, *supra* note 1, arts. 56 & 57.

¹⁵ CADE Resolution No. 1/12, *supra* note 2, art. 109.

¹⁶ For an example of how the former law addressed this issue, see Merger Case No. 08012.000182/2010-71 (Parties: Monsanto do Brasil S.A. and Iharabras S.A. Industrias Quimicas), in which CADE thoroughly addresses this phenomenon.

¹⁷ Law No. 12,529/11, *supra* note 1, art. 90.

¹⁸ Control was very broadly defined under the previous regime as the “power to command, direct or indirectly, internally or externally, in fact or legally, individually or by agreement, the social activities and/or the operation of the company.” CADE Resolution No. 15/98 (Brazil), available at <http://www.cade.gov.br/english/internacional/Resolution15b.pdf>.

¹⁹ 15 U.S.C. § 18a; 16 C.F.R. § 802.30; 43 Fed. Reg. 33,450, 33,495 (July 31, 1978).

exempt from the HSR Act except where the acquisition will confer control²⁰ of the foreign issuer and that issuer's business has a sufficient nexus to the United States.²¹ In the European Union, a notifiable concentration is deemed to occur only where a change of control (defined as "decisive influence") occurs on a lasting basis through a joint venture, merger, or acquisition.²²

While the new law does not, on its face, appear to require the notification of cooperative arrangements such as licensing, distribution, supply, and technology transfer agreements, CADE has indicated that it will clarify this through further regulations. It is hoped that CADE's further guidance will not open the door to notification of standalone cooperative agreements (i.e., not ancillary to a reportable merger or full function joint venture), which other jurisdictions have concluded do not belong in a pre-merger control regime.

New Thresholds

The new merger control regime creates a minimum turnover threshold for the second party and eliminates the much-criticized 20 percent market share test. When the new law went into force, the Ministries of Justice and Finance issued a joint decision to increase the turnover thresholds²³ so that a "concentration act" is notifiable if:

(i) The corporate group of one of the parties to the transaction had turnover of at least R\$750 million (approximately US\$375 million) in Brazil in the last calendar year; and

(ii) the corporate group of another party to the transaction had turnover of at least R\$75 million (US\$37.5 million) in Brazil in the last calendar year.

CADE maintains the right to review "concentration acts" that do not meet the thresholds within one year of completion.

Adopting two higher financial thresholds (rather than the single threshold as in the prior regime) based on turnover derived in Brazil is consistent with recommended best practices that focus on "activity within the jurisdiction" by "at least two parties to the transaction."²⁴ However, the new thresholds do not conform to the ICN's recommended best practices because they include the turnover of all of the members of the corporate group of the seller, not just the target.²⁵ The ICN's recommended practice is that thresholds should focus on the sales of the target(s) being acquired, not the sales of entities not being transferred to the buyer.²⁶ This deficiency should be remedied—there is no reason to require the notification of foreign-to-foreign transactions that have no material connection to or effect in Brazil.

CADE maintains the right to review "concentration acts" that do not meet the thresholds within one year of completion.

²⁰ For corporate entities, control is defined as holding 50 percent or more of the outstanding voting securities of an issuer or having the contractual power to designate 50 percent or more of the directors of a corporation. For an unincorporated entity that has no voting securities, control is defined as having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity. See 16 C.F.R. § 801.1(b).

²¹ The issuer and entities it controls must either hold assets located in the United States having an aggregate total value of over \$68.2 million, or have made aggregate sales in or into the United States of over \$68.2 million in the most recent fiscal year. *Id.* § 802.51(b)–(c).

²² Council Regulation (EC) No. 139/2004 of 20 January 2004, arts. 3(1), 3(2), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF>.

²³ Originally, the new law stated that a transaction must be notified if (i) the corporate group of one of the parties to the transaction had turnover of at least R\$400 million (US\$200 million) in Brazil in the last calendar year and (ii) the corporate group of another party to the transaction had turnover of at least R\$30 million (US\$15 million) in Brazil in the last calendar year.

²⁴ ICN Recommended Practices, *supra* note 3, § I.C.

²⁵ *Id.* § I.B.3.

²⁶ *Id.*

It is important to note that the definition of corporate group is also broader than in other jurisdictions, encompassing not only entities subject to common control, but also entities in which any company subject to common control holds a direct or indirect share of at least 20 percent. In the context of investment funds, the Merger Regulations provide that “control” includes: (a) funds subject to common control or a common manager or managing entity, (b) investors that hold a direct or indirect share of more than 20 percent of any of the funds, and (c) portfolio companies in which at least one of the funds holds a direct or indirect share of at least 20 percent.

We understand that CADE is preparing further guidance on the practical application of this control group test to investment funds. We hope that this guidance will take into account the potential difficulty of accessing information from companies in which a fund has a minority interest as well as minority investors in the fund, especially when information that is not accessible to merging parties may hold off the completion of the notification and, thus, the commencement of the waiting period. More fundamentally, this expansive view of what constitutes a corporate group may result in the notification of transactions that have little nexus to, or impact, in Brazil. We recognize that vertical or horizontal relationships between the businesses being acquired and other assets under common management may be relevant to the competition assessment of the acquisition. However, a less intrusive way of addressing this issue would be to require additional information to be reported for “associates”²⁷ along the lines of the U.S. amendments to the HSR Form.²⁸ In this way, competitive overlaps with entities that are under common investment or operational management with, but that are not “controlled” by the acquirer, can be identified without unnecessarily expanding the scope of reportable transactions.

Waiting Period and Review Process

The new merger law details the timeframe and procedural rules for the review of mergers.²⁹ There is a maximum statutory time period for the review of a transaction: a final administrative decision must be issued within 240 days from the date of notification.³⁰ This may be extended by sixty days at the request of the merging parties or ninety days if CADE determines the transaction requires further review for a maximum of 330 days.³¹

As described further below, the inclusion of a short-form notification for “non-complex” transactions to streamline the notification of non-complex transactions is to be commended, but it lacks a critical element, namely an intermediate (“first phase” or “initial”) waiting period for the review and approval of non-problematic deals. The OECD recommends that competition jurisdictions provide clearly defined, expedited time frames for these types of transactions to “provide procedures that seek to ensure that mergers that do not raise material competitive concerns are sub-

²⁷ The term “associate” is defined in Section 801.1(d)(2) of the HSR Rules as “an entity that is not an affiliate of such person but: (A) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a ‘managing entity’); or (B) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or (C) directly or indirectly controls, is controlled by, or is under common control with a managing entity; or (D) directly or indirectly manages, is managed by, or is under common operational or investment management with a managing entity.”

²⁸ Premerger Notification Reporting and Waiting Period Requirements, 76 Fed. Reg. 42,472, 42,472–73 (July 19, 2011) (codified at 16 C.F.R. § 801.1).

²⁹ See Law No. 12,529/11, *supra* note 1, tit. VII, ch. I, tit. VI, ch. II.

³⁰ *Id.* art. 88.

³¹ *Id.*

ject to expedited review and clearance.”³² Even though CADE has stated publicly that it expects non-complex transactions to be cleared within thirty days and complex mergers to be reviewed within 240 days, this is not a binding commitment.³³ It is hoped that CADE can continue to meet this self-imposed deadline, but as a matter of law, merging parties still must take into account the almost eleven-month statutory period in developing their deal timetable, closing conditions, and termination date.

Notification Forms

Consistent with international best practice recommendations, the Merger Regulations include two notification forms: the first is for complex transactions (the Non-Summary Procedure), and the second is the Summary Procedure.³⁴ As discussed below, the information requirements differ drastically depending on the category in which the deal falls.

Non-Complex Transactions—Short Form Notification. A short-form notification or Summary Procedure is available for non-complex transactions that CADE has identified have “less potential to harm competition.”³⁵ Although the Superintendent ultimately decides whether a transaction qualifies for the Summary Procedure, the following types of transactions are stated to qualify: (i) transactions involving no or only modest overlaps (horizontal overlap below 20 percent and poses no potential harm to competition; vertical overlap below 20 percent); (ii) greenfield joint ventures or cooperatives; (iii) consolidation of controlling interests; (iv) entry of a new player; and (v) any other deals that the Superintendent believes do not pose a threat to competition.³⁶ The information requests focus on the details of the transaction and the operations of the notifying parties. The Summary Procedure does not require information regarding the demand structure, the conditions of entry, or the competition in the relevant markets affected by the transaction, all of which are required in the long form described below.

The creation of a Summary Procedure is consistent with other established pre-merger control jurisdictions and recommended practices of both the ICN and OECD.³⁷ However, there is still uncertainty for filing parties as to whether their transaction will qualify as a non-complex transaction. There is no formal pre-merger consultation process, which means that filing parties will not know in advance of filing whether the transaction will benefit from the Summary Procedure and the streamlined notification form. Therefore, in appropriate cases, it may be preferable to seek informal guidance from the Superintendent before filing so that the parties can assess before their transaction is notified whether it will be treated as complex rather than risk the notification being rejected or found incomplete. The lack of a formal proceeding and deadline to con-

³² OECD Recommendation, *supra* note 3, § I.A.1.2(iv).

³³ At a New York State Bar Association Antitrust Section program on July 17, 2012, Superintendent Ragazzo stated that “[s]imple cases will be reviewed in less than 30 days, and I don’t think a merger will ever get to 240 days, and if it happens it will be the most complex case ever.” Melissa Lipman, *Brazilian Antitrust Official Vows Quick Merger Reviews*, LAW360 (July 17, 2012), available at http://www.law360.com/competition/articles/361266?nl_pk=226e624a-2fc5-4e38-8115-340ee6f35562&utm_source=newsletter&utm_medium=email&utm_campaign=competition (by subscription).

³⁴ Both notification forms can be found at http://cade.gov.br/upload/Resolu%C3%A7%C3%A3o%202_2012%20-%20An%C3%A1lise%20Atos%20Concentra%C3%A7%C3%A3o.pdf.

³⁵ CADE Resolution No. 2/12 (Brazil) art. 6, available at http://www.cade.gov.br/upload/Resolu%C3%A7%C3%A3o%202_2012%20-%20An%C3%A1lise%20Atos%20Concentra%C3%A7%C3%A3o.pdf.

³⁶ CADE Resolution No. 2/12 (Brazil), *supra* note 35, art. 8.

³⁷ ICN Recommended Practices, *supra* note 3, § V.B; OECD Recommendation, *supra* note 3, § I.A.1.2(iv).

firm the completeness of the notification and trigger the 240 days waiting period also raises some uncertainty.

Complex Transactions—Long Form Notification. If a Summary Procedure form is rejected by CADE or if the transaction is known to be complex *ex ante*, parties must fulfill the requirements of the long form notification or Non-Summary Procedure. The information requested in the long form is voluminous and may be challenging to collect. It includes, among other things:

[I]f the transaction is known to be complex ex ante, parties must fulfill the requirements of the long form notification or Non-Summary Procedure.

- Internal company documents, such as market assessment studies, board and committee minutes, as well as ordinary course strategy and marketing reports and business plans.
- Detailed information on all overlapping products, including five years' worth of sales and other financial data, and detailed information concerning the relevant market(s), including distribution channels, entry conditions, intellectual property (patents, know-how, etc.), infrastructure, brand loyalty, estimates of market production, and pricing strategies.
- Identification and contact details for competitors, customers, and suppliers in all overlapping product areas, information on customer preferences, and a "counterfactual" description, i.e., what competition in the market would look like if the notified transaction was not completed.
- Extensive information about minority interests (5 percent or more) even if they do not overlap with the business of the target company.
- Portuguese translation of all documents submitted.

As it stands, the Superintendent will need to review a significant amount of information and documents in every "long-form" notification, which creates significant burdens for the filing parties and may further strain CADE's already stretched resources. Further, the fact that the new merger regime requires notifying parties to present so much information up front means that much more work will need to go into a merger notification in Brazil than other major jurisdictions, such as the United States, Canada, and the European Union, which use a phased approach to try to limit the burden of notification and provide targeted, follow-up information requests for transactions that merit further investigation.³⁸ Furthermore, the phased approach allows the authority to customize additional information requests to focus on the issues in the particular case.

It is hoped that CADE will prioritize streamlining its information requests once it has gained more experience with the new regime and notification forms. Reducing the burden of completing the current long form would expedite the review process for transactions that do not raise significant competition concerns and allow CADE to tailor additional information requests to the specific issues raised by potentially problematic transactions.³⁹

³⁸ In the United States, the HSR Form requires the parties to report turnover by industries and to identify those industries where the transaction in which the parties' products overlap. Together with annual reports, financial statements, and pre-existing documents analyzing the transaction, this provides an objective initial screen based on readily obtainable data that allows the antitrust agencies to quickly identify which transactions merit further investigation. It is only after this initial screen that the U.S. antitrust agencies may require additional information for those transactions it deems to be potentially problematic, with a Request for Additional Information and Documents, or "Second Request."

Similarly, in the European Union, the concept of "affected" markets (defined by reference to specific minimum market shares held by the merging parties) is used as a screen to determine when detailed information needs to be provided in the Form CO. When completing a Form CO, parties to a transaction must identify information concerning their activities, but detailed requests apply only to "affected markets." See Form CO Relating to the Notification of a Concentration Pursuant to Regulation (EEC) No. 4064/89 (Dec. 31, 1994), available at http://ec.europa.eu/competition/mergers/legislation/co_en.html.

³⁹ INTERNATIONAL COMPETITION NETWORK, INFORMATION REQUIREMENTS FOR MERGER NOTIFICATION 3 (2009), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc328.pdf>.

Settlement Procedures. Merging parties can negotiate remedies with CADE from the moment of filing until thirty days after the Superintendent has sent the case to the Tribunal for further review.⁴⁰ The parties negotiate with the Superintendent or the Reporting Commissioner, but ultimately the settlement must be approved by the entire Tribunal.

Conclusion

The new merger law significantly overhauls Brazil's merger review system, consolidates investigation and decision-making power into one agency, introduces a pre-merger control requirement with more objective and higher notification thresholds, and provides two tracks for notification of complex and non-complex transactions. All of these changes reflect a commendable effort by Brazil's competition authorities to create a modernized system in line with international recommended practices for merger review.

However, while the new merger control regime is a big step in the right direction, it does have some flaws and areas where further guidance would be useful. These include a turnover threshold based on the target's entire economic group, the lack of a first phase or initial waiting period to facilitate the approval of transactions that pose no competitive concerns, the expansive concept of control, and the onerous notification form that likely will be required for most transactions. The new merger control regime will undoubtedly continue to evolve, just as the European Union has refined its approach, made adjustments, and issued detailed guidance in key areas since its merger control regulation was adopted in 1989.⁴¹ Similarly, we hope that CADE will be open to refining its process and addressing issues of concern through additional regulations and case law.

Of course, just as the Brazilian merger control system has become more robust, it also has become a more significant regulatory hurdle for merging companies. Adding a pre-merger review requirement, consolidating government agency authority, and expanding regulatory resources will likely lead to a more active and effective system for reviewing and sometimes challenging reportable mergers. Acquisitive companies with local operations or revenues derived from Brazil should take steps to prepare for the new pre-merger control regime, as it may significantly affect the course and timetable of their next deal. ●

All of these changes reflect a commendable effort . . . to create a modernized system in line with international recommended practices for merger review.

⁴⁰ CADE Resolution No. 1/12, *supra* note 2, art. 115. President Rousseff also vetoed the provision that enabled the Superintendence General to negotiate a settlement with the parties before CADE had commenced its review of the transaction. President Rousseff was concerned that the provision was too narrow and might be interpreted to preclude CADE from negotiating settlement agreements at other stages of the investigation. Removing the provision should remove any doubt that settlements can be negotiated throughout the merger review process. The vetoes are available at http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2011/Msg/VEP-536.htm.

⁴¹ Council Regulation (EEC) No 4064/89 of 21 December 1989, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R4064:EN:HTML>.

Book Review

Lessons from Kahneman's *Thinking, Fast and Slow*: Does Behavioral Economics Have a Role in Antitrust Analysis?

Daniel Kahneman

Thinking, Fast and Slow

Farrar, Straus & Giroux 2011

Reviewed by Hal Singer and Andrew Card

Through April 2012, Daniel Kahneman's *Thinking, Fast and Slow* had endured for half a year as a top twenty nonfiction best seller according to the *New York Times*.¹ That staying power is a testament to the book's popular rendition of decades of research into the role of cognitive psychology in economic decision-making. Although Kahneman is a great writer and a great economist (he is a psychologist by training), the book is no tiptoe through the tulips; reading it is like running uphill both ways. But the rewards for making it through to the end are bountiful. One of those rewards was an expansion of our insight into how antitrust might improve its analytical framework by acknowledging and incorporating the limitations of our cognitive powers.

Kahneman's empirical research (much of which, as the book recounts, was done in conjunction with his frequent collaborator, the late Amos Tversky) pioneered the field of behavioral economics, which sought to shake the fundamental building blocks of microeconomic analysis, and netted him a Nobel Prize. To formalize economic activity into a set of predictable behaviors, economists (who generally insist on rigorous mathematical underpinnings) needed to postulate certain assumptions about peoples' preferences, the way we process information, and the way we make decisions. It turns out many of these assumptions are not as axiomatic as they first seemed.

Through their numerous experiments in cognitive psychology, Kahneman and Tversky showed that most consumers fall far short of the ideal of "homo economicus." In the real world, consumers systematically err when assessing costs and benefits, are prone to errors in mental accounting, and employ shortcuts in the face of complex decisions that often lead to choices that fail to maximize utility. Kahneman and Tversky are credited with uncovering several biases in human decision-making, including that consumers favor choices presented as default options (the "status quo bias"); consumers often assess the probability of an event by asking whether relevant examples come to mind (the "availability heuristic"); and consumers make choices based on sunk, rather than incremental costs (the "sunk cost fallacy").²

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Hal Singer and Andrew Card are economists at Navigant Economics.

They would like to thank Kevin Caves, Jeff Eisenach, Howard Langer, and Josh Wright for comments.

¹ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

² These errors plague even the best of us: One of us inadvertently watched *The Muppets* with his daughters in reverse order. Having arrived at the theater a few minutes late, we entered the wrong screening room during a musical number (the finale) only to see the credits roll in twenty minutes; the sunk cost fallacy doomed us to watch the middle third of the movie in the correct screening room next door, and the first third in the screening room we originally entered.

In light of these biases, should we junk everything we learned about microeconomics in graduate school? Of course not: Economic models yield important insights about human behavior despite their dependence on technical assumptions that are unlikely to hold for all individuals in all situations at all times. We should be willing to revisit our fundamental assumptions, however, and place more emphasis on empirical outcomes and less on first principles—like the one that structurally competitive markets will always generate competitive outcomes. The incorporation of behavioral insights into policymaking does not imply a heavy dose of intervention; for example, behavioral economists modestly suggest heightened disclosure rules or a change in default options to counteract behavioral biases.

Lessons for Lawyers

By making Kahneman and Tversky's research accessible to a popular audience, the book has many lessons for the non-economist, non-psychologist lawyer. The first that comes to mind is framing: Human beings (including judges and jurors) are influenced by the way in which choices are presented. This observation is not new. But Kahneman's experiments are designed to show precisely how we err when our choice set is slightly modified. With superior information and with control of the frames, both lawyers in the courtroom and firms in the marketplace could exploit these errors to their advantage and for their own ends.

One experiment involving a mild form of torture is particularly revealing. Because our memory gives too much consideration to the tail end of an experience (what psychologists call the "recency effect"), human guinea pigs in the cold-hand experiment repeatedly elected to subject themselves to longer torture sessions. Subjects were exposed to two sessions in which their hands were submerged into freezing cold water: a shorter session and a longer session. Although both the shorter session and the longer session involved sixty seconds at the same, freezing cold temperature, the *longer* session also included a period of slightly warmer water temperatures at the tail end. When asked which session they preferred to repeat, the subjects overweighted *in their memories* the relatively warmer ends of the longer session. Thus, the subjects inadvertently chose the inferior (that is, longer) torture session.

Kahneman explains that our memory selves are in conflict with our experiential selves, and argues that economic models incorrectly assume that the two are in sync. In that sense, the conflict is analogous to a model of competition that assumes perfect information, even in the face of imperfect information, which has widely been accepted in economics to yield outcomes that diverge from the model's first-principles framework. This is because imperfect information can create economically "irrational" outcomes even from otherwise rational individuals. Behavioral economics explains that information asymmetries exist not only *between* two economic actors (for example, a seller and a buyer), but also *within* an economic actor, in terms of what he has experienced and what he remembers (and can access again).

Another lesson for the non-economist, non-psychologist lawyer is whether to present regression analysis to a jury or judge (or law clerk) in support of economic testimony. Kahneman explains that the party who must explain regression is bound to lose. The likely explanation is that our brains are programmed to reject the counter-intuitive lessons of regression—namely, that the best prediction is to ignore idiosyncratic evidence and to revert instead to the mean of a comparable sample ("mean reversion"). Instead, we are hardwired to overweight factors in our predictions that are only loosely correlated with what we are trying to predict. Furthermore, when presented with tough questions on a subject about which we know little, we substitute the hard question with an easier one (the availability heuristic), which often leads to biased answers. Telling a juror to ignore factors that he thinks are predictive (but are not) is a tough sell.

Suppose you have been asked to predict Mary's GPA in her freshman year in college, but there is something about Mary that throws off the calculation—she was an early reader in elementary school. Consequently, when presented with making this prediction along with data on the average freshman GPA at Mary's college, subjects tend to overweight the early reading evidence and thereby overstate Mary's GPA: Because Mary was in the top 90th percentile in reading in elementary school, subjects reason, she must be several standard deviations above the average freshman GPA. But Mary is almost always closer to the average than we think. Kahneman offers a correction for what he calls "non-regressive intuitive predictions," which should be taught to all economics students—namely, discount the seemingly important evidence by the correlation between that factor and the value you are trying to predict.

This example may explain why damages experts in antitrust litigation still use simple benchmarking, which involves averaging among a set of comparables: Benchmarking implicitly discounts the potentially related evidence in the background, while regression analysis makes the discounting explicit. Regression therefore invites the audience into an unhelpful debate on how to weight different factors, many of which seem intuitive—and more important than they really are—to the audience. And, of course, regression is also a lot harder to explain than benchmarking.

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Rethinking Antitrust

Does *Thinking, Fast and Slow* contain any lessons for antitrust? If the measure of influence is the number of mentions of, or citations to, antitrust or competition in his book, then the quick answer is "no." But Kahneman's critique of the fundamental tenets of microeconomics can be interpreted as a critique of any analytical framework that relies on these principles, including competition law. After all, predictions about competitive outcomes depend on lots of assumptions about human behavior, including the ability of consumers to process information about their choices, product quality, and relative prices. If consumers cannot or will not consider quality-adjusted prices when making decisions, and if consumers cannot or will not learn from repeated experience, then we cannot expect market forces necessarily to drive prices down to competitive levels in the presence of structural competition (low entry barriers, many firms).

As *Nudge*, another *New York Times* bestseller on behavioral economics, pointed out, markets do not tend to eliminate less than fully rational behavior; rather, firms will often exploit a consumer's irrationality.³ Richard Thaler and Cass Sunstein, the co-authors of *Nudge*, illustrate how consumers' difficulty in calculating the costs and benefits of complex products like insurance (which necessarily involves probability analysis and mental accounting) can lead to scenarios where markets will fail to discipline prices. Oren Bar-Gill offers several instances where firms tailor their terms and prices to capitalize on consumers' misperceptions and cognitive biases.⁴ For example, many credit cards structure their terms and pricing to take advantage of a consumer's consideration of only immediate prices as opposed to total costs over the life of a transaction ("hyperbolic discounting").

But can't markets be counted on to discipline such exploitation? After all, if predatory or unfair conduct is leading to excessive profits, as an FTC economist may argue, then enterprising firms should be able to bid those profits away by acting and competing responsibly. There are at least four reasons why we cannot expect rival sellers to systematically correct the problem of consumer misperceptions. First, a seller might find it beneficial to exploit the misperception itself. Second, if a seller invests in educating a consumer about its superior offering—"I won't take advantage of you on the extended warranty like my rival"—then its rivals will free ride on that seller's efforts,

³ RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

⁴ Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008).

reducing their product differentiation and competing away the profit. Third, even assuming no free riding, the costs of informing consumers about a rival's mispricing (through advertising or direct solicitation) may outweigh the gains from doing so. Fourth, education might attract consumers who are thereafter very price-sensitive with respect to the attribute over which you promised to improve—and who wants those types of customers? For these reasons, firms may be more likely to accommodate and mimic the exploitative behavior of their rivals than to differentiate themselves as model firms (an example of the latter being Southwest's Bags-Fly-Free campaign).

Even at competitive levels, behavioral economics teaches that prices might still be too high for consumers' own good. In addition to the list of biases mentioned above, two other behavioral biases contribute to poor decision-making by consumers—narrow bracketing (a consumer's tendency to evaluate risky decisions separately) and the endowment effect (a consumer's tendency to demand greater compensation to forfeit something than to acquire it). As explained by Thaler, these two biases combined will induce consumers to be willing to pay \$100 for an extended warranty that has an expected value to them of \$50. Competition may be expected to drive price down to \$90 because the cost of selling the product exceeds zero, but it will not prevent consumers from doing something dumb.⁵

In general, economists have established that when (1) information available to consumers is limited or costly, (2) consumers are imperfectly rational, or (3) the good or service at issue is an “ancillary” or “add-on” item, even structurally competitive markets may fail to discipline prices and protect consumers. That markets are susceptible to failure in the presence of information barriers is as old as disco music. In 1971, Peter Diamond showed that if consumers are unaware that other firms in a market are charging lower prices, a firm can charge supracompetitive prices without losing sales.⁶ Nobel Laureate Joseph Stiglitz and Professor Steven Salop found that when search costs are sufficiently high (implying that many consumers have limited information), firms will either charge the monopoly price or a range of prices between the competitive price and the monopoly price.⁷ In a seminal article in the *American Economic Review*, Stiglitz upended the widespread belief that all that is required for markets to work well is for there to be some individuals who are informed and who engage in arbitrage.⁸ The informed confer only a limited positive externality on the uninformed, in the sense that without them there would be fewer stores charging the competitive price. It is remarkable how little influence these economists have had in the antitrust arena—Salop being the possible exception—compared to Chicago School economists, who preached the efficiency of markets. The behavioral economists identified a likely and important source of the information barrier that prevents competitive outcomes—namely, our sometimes misfiring synapses.

Vulnerable Aftermarkets

Much of the debate that Kahneman has stirred up seems to be directed at aftermarkets. And once again, behavioral economists were not the first to the party but they have illuminated the picture. Economists have shown that structural competition may fail to discipline prices if the product at

⁵ To be fair, evidence of the endowment effect has been criticized by Kathryn Zeiler and Charles Plott, who could not replicate Thaler's results after controlling for other causes of subject misconceptions. See Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay—Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530 (2005).

⁶ Peter A. Diamond, *A Model of Price Adjustment*, 3 J. ECON. THEORY 156 (1971).

⁷ Steven Salop & Joseph Stiglitz, *Bargains and Rip-offs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUD. 493 (1977).

⁸ Joseph E. Stiglitz, *Equilibrium in Product Markets with Imperfect Information*, 69 AM. ECON. REV. 339 (1979).

The behavioral economists identified a likely and important source of the information barrier that prevents competitive outcomes—namely, our sometimes misfiring synapses.

issue is an ancillary or add-on good, and if consumers face significant switching costs. Such consumers are often referred to as “captive” or “locked-in” customers. Paul Klemperer showed that when consumers incur costs to switch between suppliers, “firms’ incentives to exploit repeat purchasers” lead to higher prices.⁹

The literature on switching costs and ancillary markets is vast, but a few examples should drive home the point. Severin Borenstein, Jeffrey MacKie-Mason, and Janet Netz analyzed the pricing incentives of firms that are the sole provider of products in ancillary markets with switching costs.¹⁰ They show that under certain conditions “a firm that has market power over sales in its associated aftermarkets will exercise that power at least to some extent, pricing aftermarket goods and services above their competitive levels.”¹¹ They also show that firms with a degree of market power over ancillary goods may successfully sustain prices at supracompetitive levels “regardless of the structure” of the underlying primary market.

In a similar vein, Xavier Gabaix and David Laibson modeled a hotel market in which the participating firms sold rooms, the primary service, along with proprietary add-on services like room service and movies.¹² They showed that when consumers were prone to hyperbolic discounting, “firms exploit myopic consumers” by increasing the prices of the proprietary add-on goods. They also showed that firms would find it more profitable to pursue a pricing strategy that exploited myopic consumers with higher prices than to attempt to steal customers from one another by slashing prices of ancillary services, even in “highly competitive markets.” In a recent article on the pricing of concessions at movie theaters, Richard Gil and Wesley Hartmann explain that when consumers lack alternatives in the ancillary market, firms may profitably raise the prices of ancillary goods to a level that reduces consumer surplus for individuals purchasing both the primary and the ancillary good.¹³

At least one competition authority appears to be doing something about these vulnerable aftermarkets. In December 2003, the UK Competition Commission conducted a study on the market for extended warranties sold in retail stores.¹⁴ Among its major findings, the Commission reported that almost all extended warranties are purchased at the point of sale; few consumers seek information on extended warranties prior to their purchase; and consumers have little opportunity to consider alternatives to the extended warranty on offer at the point of sale. The report also uncovered that extended warranties on offer at the point of sale are nearly always all from one provider, usually the retailer or a third party that is the sole supplier to the retailer, and there is generally no information available at the point of sale on prices, terms, or conditions of extended warranties available from alternative providers, such as manufacturers, insurers, credit card companies, or others. It doesn’t take a Ph.D. in economics to know that when these conditions are

⁹ Paul Klemperer, *Competition When Consumers Have Switching Costs: An Overview with Applications to Industrial Organization, Macroeconomics, and International Trade*, 62 REV. ECON. STUD. 515 (1995).

¹⁰ Severin Borenstein, Jeffrey K. MacKie-Mason & Janet S. Netz, *Exercising Market Power in Proprietary Aftermarkets*, 9 J. ECON. & MGMT. STRATEGY 157 (2000).

¹¹ *Id.* at 184.

¹² Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505 (2006).

¹³ Richard Gil & Wesley R. Hartmann, *Empirical Analysis of Metering Price Discrimination: Evidence from Concession Sales at Movie Theaters*, 28 MKTG. SCI. 1046 (2009).

¹⁴ UNITED KINGDOM COMPETITION COMMISSION, EXTENDED WARRANTIES ON DOMESTIC ELECTRICAL GOODS: A REPORT ON THE SUPPLY OF EXTENDED WARRANTIES ON DOMESTIC ELECTRICAL GOODS WITHIN THE UK, SUMMARY AND CONCLUSIONS (2003), available at http://www.competition-commission.org.uk/rep_pub/reports/2003/fulltext/485c01.pdf.

present, no amount of *ex ante* choices among retailers will deliver competitive prices for extended warranties in the secondary markets.

Policy Implications

Should antitrust law be adapted in any way to accommodate the lessons of behavioral economics? We offer some modest suggestions, and as noted below, recognize that we are not the first to address this question.

First, structural competition should be deemphasized in relation to evidence-based, direct effects of anticompetitive behavior. A common element of any proof of anticompetitive effects is the existence of market power; the premise is that a firm cannot generate anticompetitive effects without having market power. Unfortunately, market power is typically established through structural analysis—for example, counting up the number of competitors, calculating market shares, or demonstrating ease of entry. But the behavioral economics literature establishes that, under certain conditions, a firm can wield market power—that is, raise prices over competitive levels with impunity—even when the market is structurally competitive. In this sense, the exploitation of consumers' irrationality is both an expression of market power and an act of calculated nondisclosure, perhaps bordering on fraud. The irony is that Chicago School economists have been arguing for years that high market concentration is insufficient to demonstrate market power, citing direct evidence of competitive prices in such markets. We agree, but conversely, a firm can also have considerable market power (at least in ancillary markets) even in the face of low concentration. Thus, concentration is neither a necessary nor a sufficient condition for market power.

Second, antitrust enforcement could be expanded to take on a class of conduct that degrades consumers' choices by exploiting information asymmetries and cognitive limitations in a way that results in higher prices and lower output without offsetting efficiencies. Think about the class of unilateral conduct that may get a firm in trouble with the antitrust laws: tie-ins, exclusive dealing, and raising-rival-cost strategies. One purpose of such conduct is to reduce the available options for the buyer, which makes the buyer less price-sensitive (technically by shifting the firm's residual demand curve), which in turn permits higher prices. To the extent that catering to a buyer's cognitive limitations triggers the same mechanism of harm, why prosecute it under a different set of laws?

Further inroads made by behavioral insights into antitrust could bring about a convergence of consumer protection and antitrust enforcement. Historically, deciding which product offerings are acceptable may be fair game for consumer protection, but is arguably anathema to the objectives of antitrust. At a minimum, the economic modeling of the conduct is the same in either setting. Joshua Wright explains that the intellectual rift between the rational-choice approach and the behavioral approach that shapes the development of antitrust and consumer protection, respectively, will continue for some time.¹⁵

Consider a not-so-hypothetical fact pattern: At the point of sale, a heavy equipment rental company informs its customers that they must buy a damages waiver unless they have a certificate of insurance. The damages waiver is set equal to 15 percent of the daily rental rate. The rental company relays the deductible information in a way that is hard for the buyer to interpret (for example, in fine print on the back of the policy, the deductible is calculated as the minimum of some

¹⁵ Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L. REV. 2216 (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2071434.

complex function of variables). The deductible is set in a way that ensured the policy was never worth having on an *ex ante* basis. Finally, the rental company does not inform buyers of the payouts (for example, the historical probability of having an accident is known only to the rental car company), and it pays its agents a commission for each damage waiver sold. This case was actually pursued under the consumer protection laws. But it is not a stretch to see how the same conduct could be challenged under the antitrust laws. For those who have not rented heavy equipment recently (including your delicate economic authors), a similar experience may be felt upon arriving at a Caribbean resort, only to learn that the inescapable resort fee boosts the daily rate by 15 percent. Had the resort fee been clearly posted on the resort's website, the total rate would have been incorporated into the customers' decision-making, and some customers may well have chosen a different hotel.

The difficulty in prosecuting such cases under the antitrust laws is that the rental equipment agency and the resort are hardly monopolists in their respective primary markets. But conditional on selecting a given heavy-equipment rental company (or resort), the customer is captive and thus can be exploited in the add-on sale of the damage waiver (or resort fee) if the seller engages in selective nondisclosure.

The Supreme Court has weighed in on the issue of vulnerable aftermarkets. In *Eastman Kodak Co. vs. Image Technical Services, Inc.*, plaintiff Image Technical Services claimed that Kodak attempted to monopolize the aftermarket for repair services on high-volume photocopiers and other equipment Kodak manufactured.¹⁶ The district court dismissed the case on summary judgment, reasoning that because the primary market for the sale of equipment and parts was structurally competitive, Kodak did not have the ability to charge supracompetitive prices for servicing in the tied aftermarket. According to traditional economic logic, if Kodak were to charge supracompetitive prices in the secondary market, consumers would respond by decreasing their purchases of Kodak products in the primary market, rendering such a strategy unprofitable.

The district court's decision was overturned by the Ninth Circuit Court of Appeals, and the Ninth Circuit's decision was affirmed by the Supreme Court in 1992. Both appellate courts observed that for prices in the servicing market to affect demand in the primary equipment market, customers must be able to inform themselves of the entire cost of the "package" (equipment plus aftermarket parts and service for the life of the equipment) at the time they purchased the equipment. They also must be able to switch to an alternative equipment manufacturer upon encountering supracompetitive prices for servicing. The appellate courts deemed both requirements unrealistic for several reasons. Acquiring information on prices was difficult or impossible for customers. Prices for parts and services changed over time, pricing was often customer-specific, and gathering such information was expensive and time consuming. Moreover, customers who had already purchased Kodak equipment faced prohibitive switching costs; because Kodak was the only entity that could service Kodak machines, customers wishing to switch servicers would also have to buy entirely new equipment from an alternative supplier. Channeling the lessons of behavioral economics, these factors led the appellate courts to conclude that Kodak's lack of market power in the tying market did not rule out the potential for supracompetitive pricing in the tied aftermarket.¹⁷

¹⁶ 504 U.S. 451 (1992).

¹⁷ As explained by David Goldfine and Kenneth Vorrasi, however, federal district courts "have bent over backwards to construe *Kodak* as narrowly as possible," thereby narrowing *Kodak* "to the point where it is simply no longer an effective weapon for antitrust plaintiffs." David A.J. Goldfine & Kenneth M. Vorrasi, *The Fall of the Kodak Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 ANTITRUST L.J. 209 (2004).

Signs of Influence?

Although one will not find the phrase “behavioral economics” in the 2010 Merger Guidelines,¹⁸ the agencies seem to be paying more attention to the lessons from Kahneman. For example, in April 2007, the FTC held a “Behavioral Economics and Consumer Policy Conference” that examined, among other items, how consumers process information and how it affects their purchasing decisions. In May 2012, the FTC hosted a seminar on drip pricing (that is, revealing hidden costs late in a multi-stage purchase process), which attracted several economists noted for their research into the ability (or lack thereof) of competition to limit harm to consumers in situations where firms shroud pricing from customers. The FTC also appears to be investigating Google under a theory of deception: although Google has claimed in the past that it wants users to get off its webpage as quickly as possible, it is increasingly providing its own answers in the form of “specialized search” results to users’ queries. Robert Litan and one of us (Singer) explain why such conduct does not likely harm competition, and why to the extent it does, the FTC could simply compel Google to change the disclaimer on its website.¹⁹

Despite the acknowledgment by some courts that under certain conditions markets cannot always be counted on to prevent supracompetitive pricing, the application of behavioral economics to antitrust faces an uphill battle. Recently, proponents of behavioral economics have shown how behavioral theories might explain inconsistencies between the traditional assumptions embraced by antitrust authorities and observed behavior in the real world. Amanda Reeves and Maurice Stucke explain why firms and individuals may fall prey to cognitive biases and informational limitations that prevent them from acting “rationally,” and from pursuing socially optimal outcomes.²⁰ For example, potential entrants often enter markets when they should not (“optimism bias”), and they fail to enter markets when they should. Behavioral economics offers several insights into why predicted merger-related efficiencies do not occur—including the tendency for executives to overestimate their own management abilities (“self-attribution bias”), and the potential for companies to let passion trump rationality in bidding wars.

Stucke and Reeves, as well as others advocating a “behavioral antitrust” approach, have provoked responses from those who believe that a “behaviorally informed” approach to competition policy is premature or unnecessary. For example, Gregory Werden, Luke Froeb, and Mikhael Shor conclude that behavioral insights do not add much to standard merger analysis.²¹ James Cooper and William Kovacic do suggest, however, integrating behavioral insights into the decision-making of regulators.²² Last, but not least, Joshua Wright and Judd Stone argue that behavioral economics does not yet undermine traditional microeconomic theories based upon the rational choice paradigm.²³ Further, they call into question the assertion by behavioral antitrust proponents that incorporating cognitive insights uniformly leads to more antitrust intervention. For example, if one

¹⁸ U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines (2010), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

¹⁹ Robert Litan & Hal Singer, Are Google’s Search Results Unfair or Deceptive Under Section 5 of the FTC Act? (Working Paper, Apr. 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2054751.

²⁰ Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1529 (2010).

²¹ Gregory J. Werden, Luke Froeb & Mikhael Shor, *Behavioral Antitrust and Merger Control* (Vanderbilt L. & Econ. Research Paper No. 10-14, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612282.

²² James C. Cooper & William E. Kovacic, Behavioral Economics: Implications for Regulatory Behavior (Working Paper, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892078.

²³ Joshua D. Wright & Judd E. Stone, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517 (2012).

assumes that a given behavioral bias applies equally to all firms or actors in a market (incumbents and entrants) rather than only some firms, the predictions of theories grounded in behavioral economics may not materially differ from those offered by the rational-choice models embraced by mainstream antitrust analysis. Wright and Stone's pushback to the behavioral enthusiasts is less a rebuke of behavioral economics in general, however, and more an invitation to further develop applications of behavioral economics (both from an empirical and theoretical standpoint). While Wright and Stone are probably correct that behavioral economics does not yet provide a unifying rubric for antitrust analysis, they acknowledge that current mainstream antitrust paradigms fail to reconcile theory with much of the observed behavior of firms and individuals.

Although Kahneman's lessons have not upended the traditional antitrust paradigm, his work will likely have a lasting impact on the way we think about competition law. ●