

The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity

Christine A. Varney

The legal landscape that governs enforcement of the antitrust laws in the agricultural sector is a complicated one. This is especially true because the Capper-Volstead Act grants certain agricultural cooperatives limited immunity from the antitrust laws, permitting their members jointly to process, prepare for market, handle, and market their commodities.¹ The scope of the immunity or, alternatively, the extent of the limitations on it, raise important legal and policy questions, which require a full understanding of the markets in which these cooperatives work. Accordingly, in 2010, the Antitrust Division of the U.S. Department of Justice, in partnership with the U.S. Department of Agriculture, hosted a series of workshops across the country to explore competition issues affecting the agricultural sector. Session topics included crops, hogs, poultry, dairy, livestock, and price margins.² The workshops and decisions in recent private litigation³ will inform the Antitrust Division's thinking about these issues in many important ways.

The Origins of the Capper-Volstead Act and the Continuing Importance of Cooperatives

The Capper-Volstead Act represented the culmination of a long struggle by farmers to guarantee their right to organize cooperatives. Agricultural cooperatives appeared in America as early as 1804, when farmers in Connecticut organized a cooperative to market milk and milk products.⁴ Efforts to organize cooperatives gained steam in the second half of the 19th century, as farmers confronted, among other developments, the emergence of national railroads and consolidation in processing industries. By 1890, the year of the Sherman Act's passage, there were about 1,000 farmer cooperatives in the United States, with more than 700 handling dairy products, about 100 handling grain, and about 100 handling fruits and vegetables. Beginning around 1895, large, centralized cooperatives and federated regional associations began to emerge, and, by the time of the Capper-Volstead Act's passage in 1922, cooperatives were a major national presence in several agricultural sectors.⁵

With the passage of the Sherman Act and many state antitrust laws, widespread concern arose that these laws would be used against agricultural cooperatives. Some observers feared

■ **Christine Varney** is the Assistant Attorney General of the Antitrust Division at the United States Department of Justice. Special thanks to Patrick M. Kuhlmann, Sarah L. Wagner, and Andrea Agathoklis, all of the Antitrust Division, for their assistance in developing this article.

¹ 7 U.S.C. §§ 291–292.

² More information on the workshops is available at the Division's Web site, <http://www.justice.gov/atr/public/workshops/ag2010/index.htm>.

³ See Second Consolidated Amended Class Action Complaint, *In re Processed Egg Prods.* Antitrust Litig., No. 08-md-02002 (E.D. Pa. Apr. 7, 2010), ECF No. 291 (direct purchaser complaint); Second Consolidated Amended Class Action Complaint, *In re Processed Egg Prods.* Antitrust Litig., No. 08-md-02002 (E.D. Pa. Apr. 7, 2010), ECF No. 293 (indirect purchaser complaint); Class Action Complaint, *Brigiotta's Farmland Produce & Garden Ctr., Inc. v. United Potato Growers of Idaho, Inc.*, No. 4:10-cv-00307-CWD (D. Idaho June 18, 2010), ECF No. 1; Class Action Complaint, *Simon v. United Potato Growers of Idaho, Inc.*, No. 2:10-cv-04647-JST-VBK (C.D. Cal. June 23, 2010), ECF No. 1.

⁴ JERRY VOORHIS, *AMERICAN COOPERATIVES: WHERE THEY COME FROM, WHAT THEY DO, WHERE THEY ARE GOING* 80 (1961).

⁵ U.S. DEP'T OF AGRIC., *RURAL BUSINESS-COOP. SERV., COOP. INFO. REPORT 59, ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT* 9–10, 19–21, 59–60 (2002).

that even the mere organization of small local farmers for mutual help could be viewed as violating the law. Indeed, some state courts sustained antitrust challenges to agricultural cooperatives, and, in response, state legislatures passed laws authorizing their existence.⁶

Congress did shelter some agricultural cooperatives with Section 6 of the 1914 Clayton Act, which provides that the antitrust laws shall not be construed to prohibit the existence and operation of agricultural organizations instituted for purposes of mutual help, if not for profit and not having capital stock.⁷ This statute also permits individual members of such organizations to carry out the “legitimate objects” of those organizations. Section 6 proved inadequate, however, as farmers were not certain what constituted “legitimate objects” of cooperatives and wanted to form capital-stock and for-profit cooperatives.⁸ Declining agricultural prices after the conclusion of World War I and prosecutions of cooperatives added additional impetus for change.⁹ Accordingly, in 1922, Congress passed the Capper-Volstead Act, which enumerated permissible activities for cooperatives and authorized capital-stock and for-profit cooperatives.¹⁰

The Capper-Volstead Act’s proponents viewed cooperatives as a bulwark against “middlemen” and “speculators” that unfairly preyed on both farmers and consumers. Small, individual farmers could sell their crops and livestock only to a few large corporate entities that then processed and distributed agricultural products. According to the Act’s proponents, these entities then paid farmers unjustifiably low prices while, in turn, charging consumers high prices.¹¹ This meant these large firms were “collecting [their] tribute from both the farmer and the consumer.”¹² As a result, farmers were made to abandon their homesteads and, ultimately, the country’s food supply was jeopardized.¹³

Cooperatives formed under the Capper-Volstead Act would address this situation by: (1) enabling farmers to combine, forming a countervailing power to bargain effectively with purchasers; and (2) enabling farmers to process, distribute, and market their products more efficiently and potentially bypass middlemen altogether.¹⁴ Thus, cooperatives were expected to benefit farmers

⁶ See *Md. & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 467–72 (1960).

⁷ 15 U.S.C. § 17. This provision also applies to certain horticultural organizations.

⁸ David L. Baumer, Robert T. Masson & Robin A. Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 189–91 (1986).

⁹ See U.S. DEP’T OF JUSTICE, MILK MARKETING: REPORT OF U.S. DEP’T OF JUSTICE TO THE TASK GROUP ON ANTITRUST IMMUNITIES 32–33, 49, 51 (1977) [hereinafter ANTITRUST IMMUNITIES REPORT]; Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341, 356 (1975).

¹⁰ Additional agricultural exemptions followed the Capper-Volstead Act’s enactment. These include the Cooperative Marketing Act of 1926, which authorizes Capper-Volstead-type cooperatives to acquire and exchange “past, present, and prospective crop, market, statistical, economic, and other similar information,” 7 U.S.C. § 455, and the Agricultural Marketing Agreement Act of 1937, which exempts from the antitrust laws marketing agreements between the Secretary of Agriculture and processors, producers, associations of producers, and others engaged in the handling of agricultural commodities, 7 U.S.C. § 608b. Additionally, the Agricultural Fair Practices Act of 1967 makes it unlawful for handlers to coerce any producer in deciding whether to join a cooperative. 7 U.S.C. §§ 2301–2306.

¹¹ See, e.g., 62 CONG. REC. 2058–60 (1922) (statement of Sen. Capper).

¹² *Id.* at 2059.

¹³ See, e.g., 59 CONG. REC. 8031 (1920) (statement of Rep. Upshaw) (“So appalling is the need of greater production and so fraught with danger is the desertion of the farm for the congestion of the city that thoughtful, farseeing men are gravely concerned.”).

¹⁴ See, e.g., *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816, 824–26 (1978) (“By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors.”); 62 CONG. REC. 2059 (1922) (statement of Sen. Capper) (claiming that cooperation “will cut costs of production and risk and reduce the spread between the consumer and the producer.”).

through “fair” prices for their output and also benefit ultimate consumers through lower prices for agricultural products.¹⁵ As Senator Capper, one of the Act’s namesakes, explained:

There is a nation-wide demand for greater efficiency all along the line. Cooperation . . . will cut costs of production and risk and reduce the spread between the consumer and the producer. Thus it will give farm products to the consumer cheaper and at the same time yield larger returns to the man who produces by eliminating much of the excessive cost of distribution under the present system in which speculation plays so dominant a part. Furthermore, participation by farmers in the marketing of farm products through cooperative associations, giving them the right to bargain collectively with buyers, will result in stabilizing the market, preventing waste, and, as I have said, bring about more efficient distribution. . . . The way to accomplish this is through cooperative marketing, which eliminates the unessential and speculative middleman, and which gives the producer and the consumer their due.¹⁶

Today, the importance of cooperatives to farmers is indisputable. Cooperatives handle, process, and market farmers’ products; negotiate with processors and other buyers on their behalf; enable them to purchase inputs at a discount; and provide them credit and other financial services. Their growth and scope is remarkable: According to one trade association, there are over 3,000 farmer cooperatives across the United States, whose members include a majority of our nation’s two million farmers¹⁷; in 2008, cooperatives had a total business volume of \$191.1 billion, had total assets of \$57 billion, and had members employing an estimated 250,000 people. Marketing and supply cooperatives accounted for a third of both total farm sector revenue and input purchases.¹⁸ This growth and dynamism was enabled by the passage of the Capper-Volstead Act.

Capper-Volstead Immunity and Current Litigation

The Capper-Volstead Act’s framers intended to empower farmers to bargain more effectively and to bring their products to market more efficiently. The grant of immunity, however, was not unbounded. As the Supreme Court observed, Congress did not intend “to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way.”¹⁹ Similarly, according to the House Report, “[i]nstead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporation so the farmers can take advantage of it.”²⁰

Accordingly, Congress imposed a number of specific limitations on the scope of immunity granted to Capper-Volstead cooperatives:

- The Capper-Volstead Act, by its terms, authorizes farmers to act together only “in collectively processing, preparing for market, handling, and marketing” their products.²¹

¹⁵ See, e.g., 60 CONG. REC. 363 (1920) (statement of Sen. Smith) (“While the farmer as the result of organization will receive more compensation for his labor, the ultimate consumer may expect to receive his product as a rule at a smaller cost.”).

¹⁶ 62 CONG. REC. 2059-60 (1922) (statement of Sen. Capper).

¹⁷ Nat’l Council of Farmer Coops., Comments Regarding Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy (Dec. 30, 2009), available at <http://www.justice.gov/atr/public/workshops/ag2010/comments/255175.htm>.

¹⁸ *Cooperative Facts*, NAT’L COUNCIL OF FARMER COOPS., <http://www.ncfc.org/content/view/32/58/>.

¹⁹ *Md. & Va. Milk Producers Ass’n*, 362 U.S. at 467.

²⁰ H.R. REP. NO. 67-24 at 2 (1921).

²¹ 7 U.S.C. § 291.

- Membership in the cooperative must be limited to producers of agricultural products.²²
- The cooperative must operate “for the mutual benefit of [its] members.”²³
- The cooperative either must limit each member to one vote, regardless of the amount of stock or membership capital owned, or must limit dividends to eight percent per year or less.²⁴
- The cooperative must not “deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.”²⁵
- The Capper-Volstead Act authorizes the Secretary of Agriculture to bring an administrative action against an association that “monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced.”²⁶

In addition, the Supreme Court has held that the Act does not shelter a cooperative when it employs “predatory” practices that violate Section 2 of the Sherman Act or when it colludes with others who do not enjoy immunity.²⁷

Some of these limitations currently are at issue in pending private lawsuits. In these cases, plaintiffs—buyers of agricultural products—have sued cooperatives, producers, processors, and others, claiming that the defendants violated federal and state antitrust laws by, among other acts, conspiring to restrict the production of agricultural commodities. For example, private party lawsuits against United Egg Producers, Inc., a cooperative of egg growers, egg producers, and others in this space, center on the claim that these parties conspired to raise egg prices by reducing the supply of eggs.²⁸

Similarly, lawsuits against the United Potato Growers of America, Inc. (UPGA), a federated cooperative with ten member cooperatives, United Potato Growers of Idaho, Inc. (UPGI), a cooperative and a member of UPGA, individual potato growers, potato packers and processors, produce companies, and others, center on an alleged overarching agreement to manage the supply of potatoes in the United States with the purpose of elevating the price of fresh and processed potatoes. Among other acts, UPGA and UPGI allegedly required members to limit acres planted and paid growers to destroy existing stocks or refrain from growing new stock.²⁹

The plaintiffs in these suits allege that these actions violate Section 1 of the Sherman Act, as well as state antitrust laws. Additionally, plaintiffs allege that the cooperatives and cooperative members are not entitled to Capper-Volstead immunity because the defendants conduct activities outside the scope of the Act’s protections and fail to satisfy the Act’s other requirements.

²² See *id.* (authorizing “[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers” to form cooperatives); *Nat’l Broiler Marketing Ass’n*, 436 U.S. at 822–23.

²³ 7 U.S.C. § 291.

²⁴ *Id.* (stating that cooperatives either must not allow “more than one vote because of the amount of stock or membership capital he may own therein” or must not “pay dividends on stock or membership capital in excess of 8 per centum per annum”).

²⁵ *Id.*

²⁶ 7 U.S.C. § 292. One treatise reports that the Secretary has never used this power. 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST* ¶ 249a, at 5 n.3 (3d ed. 2006).

²⁷ *Id.* & *Va. Milk Producers Ass’n*, 362 U.S. at 463–64. See generally AREEDA & HOVENKAMP, *supra* note 26, ¶ 249c.

²⁸ See Second Consolidated Amended Class Action Complaint, *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-02002 (E.D. Pa. Apr. 7, 2010), ECF No. 291 (direct purchaser complaint); Second Consolidated Amended Class Action Complaint, *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-02002 (E.D. Pa. Apr. 7, 2010), ECF No. 293 (indirect purchaser complaint).

²⁹ See Class Action Complaint, *Brigiotta’s Farmland Produce & Garden Ctr., Inc. v. United Potato Growers of Idaho, Inc.*, No. 4:10-cv-00307-CWD (D. Idaho June 18, 2010), ECF No. 1; Class Action Complaint, *Simon v. United Potato Growers of Idaho, Inc.*, No. 2:10-cv-04647-JST-VBK (C.D. Cal. June 23, 2010), ECF No. 1.

Among other allegations, plaintiffs contend that the cooperatives are not legitimate agricultural cooperatives and do not market, process, or sell agricultural commodities; the cooperatives have engaged in predatory conduct; the cooperatives have non-farmer members; the cooperatives have conspired with third parties; and the supply-restriction and price-fixing efforts fall outside the Act's limited purposes.³⁰

As these cases continue to make their way through the courts, it goes without saying that to the extent they produce decisions on the Act's scope, in particular whether production or supply limitations fall within the immunity provided by the Act, these decisions will educate and inform the Division's enforcement efforts.

The Production Restrictions Debate

[D]ecisions on the Act's scope, in particular whether production or supply limitations fall within the immunity provided by the Act . . . will educate and inform the Division's enforcement efforts.

The issue of whether the Capper-Volstead Act immunizes production restrictions between cooperatives and their members is of particular interest. Courts have not provided definitive guidance on this issue, and there are well-reasoned arguments supporting each side. This debate is complex but a focus on some of the most salient points is instructive.

Reasons for Holding that Production and Supply Restrictions Fall Outside Capper-Volstead Immunity. In arguing that the Capper-Volstead Act does not immunize production restrictions, one might start with the text itself. The Act reads that farmers "may act together . . . in collectively processing, preparing for market, handling, and marketing" their agricultural products,³¹ and in all post-production activities that relate to bringing products to market. It does not mention specifically farmers acting collectively in planting their crops, or raising their animals, or in planning those activities. Some have argued that this absence of language suggests a broad construction of permitted activities. On the other hand, principles of statutory construction suggest that where a statute includes an explicit list, items not included in the list should not be read into the statute.³² Moreover, Supreme Court cases "consistently hold that exemptions from the antitrust laws must be construed narrowly,"³³ and the Court has followed this principle in cases interpreting the Act.³⁴

Importantly, the Fisherman's Collective Marketing Act (the FCMA), which focuses on fisherman cooperatives, authorizes fishermen to act together in "preparing for market, processing, handling, and marketing" fish. This is similar to the Capper-Volstead Act but the FCMA goes further to permit fisherman to work together in "catching" and "producing" fish.³⁵ This textual divergence raises a reasonable question as to whether Congress intended to treat cooperatives in the fishing industry differently from those in the agricultural industry.

The Capper-Volstead Act's legislative history also could be read as supporting the argument that the Act does not authorize production restrictions. The legislative history contains statements

³⁰ See also Op. & Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss, *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-cv-00230-cr, 27 (D. Vt. Aug. 30, 2010), ECF No. 81 (finding that plaintiffs "have pled their way around Capper-Volstead immunity sufficient to survive a motion to dismiss" by alleging, inter alia, that defendant cooperative does not qualify as a Capper-Volstead entity and has not acted for its members' benefit).

³¹ 7 U.S.C. § 291.

³² See, e.g., *Bates v. United States*, 522 U.S. 23, 29 (1997).

³³ *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982).

³⁴ See *Nat'l Broiler Mktg. Ass'n*, 436 U.S. at 822–23 (construing the Capper-Volstead Act as not exempting cooperatives that include even a single non-producing member); *United States v. Borden*, 308 U.S. 188, 204–05 (1939) (refusing to imply an exemption when the Act did not authorize expressly cooperatives to act with non-cooperatives).

³⁵ 15 U.S.C. § 521.

that legislators believed that middlemen were preying on farmers and consumers and that, by giving farmers countervailing power, the Act would lead to increased production—as opposed to production limitations—and therefore, lower prices for consumers. For example, one congressman predicted that cooperatives

will bring producers and consumers closer together. The excessive charges of unnecessary middlemen will be eliminated, and the cost of marketing, manufacturing, and distributing farm products will be greatly reduced. The producers and consumers will share equitably in the profits derived from cooperative business organizations among farmers. The so-called middlemen should not be in a position to demand excessive profits. Our system of marketing should be such as will give to the farmers the greatest possible proportion of the wealth they produce.³⁶

Historically, the Division has taken the position that the Act does not exempt production limits from the antitrust laws. For example, in the 1950s, the Division filed a pair of civil suits against cooperatives that allegedly implemented production limits.³⁷ In addition, in 1968, the Division issued a business review letter that refused to approve a wheat-growers association's proposal to limit its members' production of wheat.³⁸ Then, in the mid-1970s, the Division again challenged production limits instituted by a cooperative, though the Division later dropped its allegations concerning production limitations in order to facilitate appellate resolution of another issue.³⁹ Finally, a 1977 report issued by the Division reviewed the Act's legislative history and found "some evidence that Congress was concerned about the right or ability of cooperatives to restrict the supply of agricultural commodities."⁴⁰

The Federal Trade Commission and U.S. Department of Agriculture publications have advanced similar views. In a 1977 decision, the Federal Trade Commission observed that "there are strong indications [in the legislative history] that Congress did not intend to allow farmers to use cooperatives as a vehicle by which they could effectively agree to limit production" and that Congress "reinforced" that interpretation "by adding to the . . . Act a comprehensive statutory scheme for controlling supply in the form of the Agricultural Marketing Act of 1937," which contains "important procedural safeguards."⁴¹ A Department of Agriculture publication, for its part,

³⁶ 59 CONG. REC. 7852 (1920) (statement of Rep. Morgan). See also 62 CONG. REC. 2058 (1922) (statement of Sen. Capper) ("[F]armers can do something to cut down the spread between the prices they now receive and those paid by consumers. Even though the farmers should keep all of this saving it will stimulate production, thus insuring more adequate supply of necessities."); 59 CONG. REC. 8028 (1920) (statement of Rep. Larson) ("[Cooperatives] will increase production and solve the food problem for our too rapidly increasing city population."); 59 CONG. REC. 8026 (statement of Rep. Towner) ("[T]he only object and purpose of the bill is to provide that when cooperative effort is necessary to facilitate and increase production it might be authorized and protected.").

³⁷ *United States v. Shade Tobacco Growers Agric. Ass'n*, 1954 Trade Cas. (CCH) ¶ 67,751 (D. Conn. 1954) (suit charging that a tobacco-growers cooperative and its members agreed to limit the production of tobacco settled with a consent decree barring such agreements); *United States v. Grower-Shipper Vegetable Ass'n of Cent. Cal.*, No. 30561 (N.D. Cal. 1951), *aff'd per curiam*, 344 U.S. 901 (1952) (government filed suit challenging an agreement among members of lettuce-growers' association to restrict the amount of lettuce produced; the government won a preliminary injunction and defeated a defendant's motion to dismiss on Capper-Volstead grounds, and the case was subsequently dismissed as moot).

³⁸ Letter from Edwin Zimmerman, Ass't Att'y Gen., to Ray Obrecht, Master, Colo. Grange (Oct. 2, 1968) (stating that the Division believes that "the Capper-Volstead antitrust exemption applies only to marketing and not production agreements").

³⁹ *Nat'l Broiler Mktg. Ass'n*, 436 U.S. at 819 n.5.

⁴⁰ U.S. DEP'T OF JUSTICE, ANTITRUST IMMUNITIES REPORT, *supra* note 9, at 68. See also *id.* at 68–69 (concluding that "it would not be the act of a rational legislature to give the cooperatives the power to deal with overproduction, a factor which had been demonstrated was not a cause of the crisis it was addressing").

⁴¹ *Cent. Cal. Lettuce Producers*, 90 F.T.C. 18, 62 n.20 (1977).

has stated that “it is not legal for cooperatives to control members’ production. The basic role of cooperatives is to market the available supply in the most effective manner possible, not to limit production.”⁴²

Reasons for Holding that Production and Supply Restrictions Are Immune Under the Capper-Volstead Act. There are also a number of arguments supporting the position that the Capper-Volstead Act allows cooperatives and their members to restrict production. Many point to the Act’s operative language—“processing, preparing for market, handling, and marketing”—and argue that this encompasses the full range of farming activities, from pre-planting, through harvest and processing, to sale. Some reason that “preparing [products] for market” includes determining how much to produce, and that “marketing” includes determining how much to produce for market. Arguments relating to practicality and efficiency in support of production limits are commonly proffered and are the kinds of arguments articulated by private litigants and others in the industry. Some have argued that, as part of “marketing,” cooperatives are allowed to withhold a portion of their members’ output from the market—for example, destroying it or donating it to charity—and that it would be more efficient to permit them to accomplish this directly with production limits. The argument continues that, as a matter of economic efficiency and common sense, it is counterintuitive to permit destruction of crops post-harvest but deny coordination upfront in the planting of those crops because permitting such an outcome results in unnecessary costs, wasted resources, opportunity costs, and negative environmental impacts.

Some also find support for production limits in the Act’s legislative history. There are statements in the legislative history indicating that particular legislators contemplated cooperatives managing the production of their members.⁴³ Additionally, during their debates, members of Congress stated that the Act would treat cooperatives like single corporate entities, allowing them to act in the same fashion as the large corporations farmers faced when they went to sell their products. As Senator Capper himself explained, “[t]he Capper-Volstead bill . . . was designed simply to give the growers or the farmers the same opportunity for successful organization and distribution of their products that the great corporations of America have enjoyed for many years.”⁴⁴ These statements support the argument that, because an industrial corporation can decide how much it (or each of its divisions) will produce, Congress must have intended to allow agricultural coop-

⁴² U.S. DEP’T OF AGRIC., RURAL BUS.-COOP. SERV. COOP. INFO. SERV. REPORT 1, § 3, COOPERATIVE BENEFITS & LIMITATIONS 17 (1980, reprinted 1990); *see also* U.S. DEP’T OF AGRIC., AGRIC. COOP. SERV. COOP. INFO. REPORT 38, MANAGING COOPERATIVE ANTITRUST RISK 23–24 (1989) (“There is a limited body of case law indicating producers may use their cooperative as a vehicle to agree among themselves to limit the quantity of a commodity they will produce. The conventional belief among cooperative scholars is that this goes beyond the extent of the protection available under the Capper-Volstead Act.”); U.S. DEP’T OF AGRIC., COMMENTS ON THE DEPARTMENT OF JUSTICE REPORT ON MILK MARKETING 16 (1977) (stating that “a cooperative cannot . . . [r]estrict the amount of production of producers”).

⁴³ *See, e.g.*, 62 CONG. REC. 2225 (1922) (statement of Sen. Lenroot) (“If the farmers of the United States could, through cooperation, have some control and agreement as to production and as to prices, . . . we would see . . . immediately an upward turn toward prosperity. [W]e are justified in enacting this legislation which will enable the farmers of this country to put themselves somewhat nearer an equality of bargaining power and control of output in production that all other industries have today.”); 61 CONG. REC. 1043 (1921) (statement of Rep. Hersey) (“[The Act] enables the producers to act together for their mutual interests in the planting, care, and marketing of agricultural products.”); 60 CONG. REC. 376 (1920) (statement of Sen. Townsend) (“without the right to cooperate in production and disposition of products, the farm will continue to be a very unprofitable, unsuccessful place”).

⁴⁴ 62 CONG. REC. 2058 (1922); *see also* H.R. Rep. No. 67-24, at 2 (1921) (“Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. . . . Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. . . . This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.”).

eratives to determine its members' production volumes. On the other hand, the statute also could be read to allow cooperatives to act as corporations only for the purposes specified in the statute, meaning that common marketing would be permissible but common production schemes may not be. For example, Senator Capper stated that "the cooperative form of organization . . . maintains individuality of production but enables them to unite for marketing purposes."⁴⁵

Some argue that support for production limits can also found in the case law. First, there is at least one case, *Alexander v. National Farmers Organization*, holding that a cooperative may withhold its members' products to negotiate a higher price,⁴⁶ which some claim establishes the broad proposition that the Act authorizes all forms of "supply management." Some may argue in response that the withholding of existing product fits much more comfortably under the rubric "preparing for market, handling, and marketing" than production limits and that the practices can have very different practical economic consequences. Second, *Alexander* could be read as suggesting that cooperatives may limit production: "Co-ops cannot, for example, conspire or combine with nonexempt entities to fix prices or control supply, even though such activities are lawful when engaged in by co-ops alone."⁴⁷

Finally, proponents of production limits have cited a pair of government enforcement actions involving the FCMA, which, as described above, is similar to the Capper-Volstead Act for the fishing industry. In one case, the Federal Trade Commission held that the FMCA immunized an agreement among fishermen in a cooperative to refrain from fishing for several weeks while negotiating with buyers, analogizing a fishermen's association to a single corporation and observing that "[t]here is no obligation on the single corporation to produce at capacity."⁴⁸ In another case, the Division entered into a consent decree prohibiting fishermen from agreeing to refrain from fishing while negotiating with buyers, except as members of FCMA associations.⁴⁹ The FCMA, however, is textually distinct from the Capper-Volstead Act in that the FCMA expressly permits fishermen to act together in "catching" and "producing" fish.⁵⁰

Additional arguments on either side of the debate remain. This is an issue that provides an intellectual challenge to lawyers and judges, but, much more importantly, it has great practical consequences for farmers and the agricultural community as a whole. As cases make their way through the court system, the Division will continue to monitor developments closely and evaluate any potential impacts on enforcement of the antitrust laws.

Conclusion

Cooperatives are important to farmers, to rural economies, to our food supply, and consequently, to the economy and this country as a whole. The livelihoods of many farmers, particularly small-

⁴⁵ 62 CONG. REC. 2058 (1922) (statement of Sen. Capper).

⁴⁶ 687 F.2d 1173, 1188 (8th Cir. 1982) (finding that a cooperative's withholding of milk for two weeks was within the scope of the Act's protection).

⁴⁷ *Id.* at 1182.

⁴⁸ Wash. Crab Ass'n, 66 F.T.C. 45 (1964).

⁴⁹ See *Oregon v. Mulkey*, 1997-1 Trade Cas. (CCH) ¶ 71,859 (D. Or. 1997); see also U.S. DEP'T OF AGRIC., *supra* note 5, at 291 ("It is uncontested that, under the rationale of the [majority opinion in *Washington Crab Association*], that a value-added cooperative can, just like its non-cooperative competitors, limit the amount of product it offers for sale. These precedents [*Alexander*, *Washington Crab Association*, and *Mulkey*] suggest that members of a cooperative may voluntarily agree among themselves to limit their production as well.").

⁵⁰ Compare 15 U.S.C. § 521 (providing that fishermen "may act together in associations . . . in collectively catching, producing, preparing for market, processing, handling, and marketing" products), with 7 U.S.C. § 291 (providing that farmers "may act together in associations . . . in collectively processing, preparing for market, handling, and marketing" products).

er farmers, depend on the services that cooperatives provide, and cooperatives are essential in ensuring that food lands on grocery shelves, and ultimately on the tables of American consumers. Cooperatives also provide thousands of jobs, particularly in rural communities. Cooperatives that act within the Capper-Volstead Act's scope are immune from the antitrust laws and will not be prosecuted. Congress does not grant antitrust exemptions lightly, and the congressional decision to shelter certain cooperative activities will be respected. By extension, where Congress chose to impose certain limitations on cooperatives, the Antitrust Division will take all appropriate enforcement actions against activities that exceed those limitations. ●

Competition and Consumer Protection: Strange Bedfellows or Best Friends?

Julie Brill

Many practitioners of consumer protection or competition law have no doubt noticed an increasing number of issues at the Federal Trade Commission involving both consumer protection and competition claims. Consumer protection and competition are, of course, the two core missions of the FTC, and their intersection is of growing significance to the business community, consumers, and practitioners, as well as to regulators. Sometimes the principles at the heart of these two areas of law point to conflicting results, while at other times they work in harmony towards the same end. This article discusses some of the different modes of interaction between consumer protection and competition law, with a particular focus on cases and other actions by the FTC. The Commission's recent antitrust case *Intel* and its recently proposed framework for privacy present two particularly salient examples of the interplay of consumer protection and competition concerns, and demonstrate that the FTC is uniquely positioned to harmonize these two areas of the law.

Consumer Protection and Competition Laws Both Address Distortions in the Marketplace

Consumer protection and competition law share at least one core concept: protecting consumers by removing distortions in the marketplace. Often the underlying conduct prohibited by these two areas of law impacts consumers in different ways. Conduct prohibited by consumer protection law usually involves individual businesses acting in a way that has a direct impact on consumers—for example, by deceiving or misleading them through false or deceptive advertising. Conduct prohibited by competition law also affects consumers, but the impact may not be as direct because the prohibited practices in the first instance affect competition between businesses, and then have an impact on consumers—for example, in the form of higher prices.

But as former FTC Commissioner Tom Leary has noted, it takes only a few more moments of thinking about consumer protection and competition law to understand that these two areas of law share the common goal of addressing distortions in the marketplace that are designed to increase, or have the effect of increasing, the sales and profitability of a business or an industry to the detriment of consumers. Consumer protection law addresses distortions that take place on the demand side of the transaction: consumers' choices in the marketplace are infringed, for example, by deceptive advertising that gives consumers the false impression that a product or service is worth more than it really is. Competition law addresses distortions that take place on the supply side: anticompetitive practices like price fixing or exclusive dealing restrict supply among competitors and elevate prices.¹

■ **Julie Brill** is Commissioner, Federal Trade Commission. This article is an expanded and updated version of remarks delivered at the ABA Section of Antitrust Law Masters Course VI in Williamsburg, Virginia (Sept. 30, 2010).

¹ See Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTITRUST L.J. 1147, 1147–48 (2005).

However, as with most things in the real world, the distinction is not always so neat. Occasionally, competition law addresses distortions that take place on the demand side—for example, when challenging anticompetitive practices that increase consumer switching costs. On these occasions, competition law is even more closely aligned with consumer protection law because the competition law focuses on demand side conduct that decreases consumer choice or autonomy. Similarly, consumer protection law occasionally addresses conduct aimed at competitors—for example, deceptive practices targeting the perceived performance of competitor products, which in turn harms consumers. An examination of some cases will illustrate how the principles promoted by consumer protection and competition law have interacted in the recent past.

Tension Between Competition and Consumer Protection Laws

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Sometimes the principles promoted by competition law have the potential to trump consumer protection concerns. The *California Dental* case is a good illustration.² There, the FTC challenged the association's ethical code that governed competing dentists' advertisements of the price, quality, and availability of their services. For example, in order to ensure truthful and nondeceptive advertising, the ethical code prohibited the dentists from making claims of across-the-board discounts off the dentists' regular prices for certain groups of patients, such as senior citizens.³

The dental association claimed that the restrictions were needed because, even though some of the ads truthfully described the dentists' fees, the association was concerned that the inability of the ads to disclose all variables related to the fees could render them misleading. Officials of the association testified that in making a determination of whether a particular ad was in violation of the code, they would attempt to determine whether the ad in its entirety would be misleading to a prudent person.⁴

Superficially, the prohibitions seemed consistent with consumer protection objectives. But the Commission concluded that, as enforced, the code was anticompetitive because it effectively prohibited even accurate advertising of prices and quality, and restricted broad categories of advertising claims, without distinguishing between those that were deceptive and those that were not.⁵ As such, the dentists' ability to compete through advertisements was impaired. Thus, the Commission viewed its enforcement action as ensuring that practices aimed at promoting consumer protection objectives did not violate antitrust principles.

The Ninth Circuit essentially upheld the Commission's opinion,⁶ but the Supreme Court concluded that the Ninth Circuit used a standard for analyzing the advertising restrictions—a "quick look" rule of reason analysis—that was too abbreviated under the circumstances, and remanded the case for further proceedings.⁷ The Court did not say the restrictions had to be examined under a full-blown rule of reason (which would require the FTC to define a market and demonstrate anticompetitive effects using a more elaborate analysis of the industry). Rather, the Court simply said that the justifications for the restraints were sufficiently substantive that "[f]or now, at least, a less

² Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999).

³ Cal. Dental Ass'n, 121 F.T.C. 190, 192–94 (1996), *aff'd sub nom.* Cal. Dental Ass'n v. FTC, 128 F.3d 720 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999).

⁴ *Id.* at 347–48 (Azcueña, Comm'r, dissenting).

⁵ *Id.* at 300–03, 307.

⁶ See Cal. Dental Ass'n v. FTC, 128 F.3d 720, 726–30 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999).

⁷ See *California Dental*, 526 U.S. at 769–81.

quick look was required.”⁸ The Court based its ruling on a belief that the advertising restrictions could have had a net procompetitive effect on competition, or no effect at all, and that the restrictions were, on their face, designed to avoid false and deceptive advertising, something particularly important in a market characterized by disparities in the information available as between patients and dentists.⁹

An important lesson to be drawn from the *California Dental* case is that it is not always easy to strike the right balance between competition and consumer protection concerns. Under a reasonable interpretation of the Supreme Court’s ruling, the Commission’s analysis of the association’s activities did not strike the appropriate balance. While misuse of consumer protection objectives can clearly lead to liability under the competition laws, in the *California Dental* case the Commission was not adequately sensitive to the consumer protection aspects of the underlying conduct. This raises the obvious question of what the appropriate level of legal scrutiny should be in matters where consumer protection is asserted as a justification for conduct that encroaches on competition concerns. At a minimum, before competition principles can trump consumer protection concerns, any legitimate consumer protection issues must be identified and balanced against the competitive harm.

The fact that the *California Dental* case involved a self-regulatory body is an important aspect of the competitive analysis and judicial decision. The California Dental Association was a large professional association composed of competing members engaging in self-regulation.¹⁰ Industry self-regulation is often a very good thing and should be encouraged. It can be the most efficient way for an industry to combat fraud in the marketplace and otherwise protect consumers. This theme is implicit in the Supreme Court’s opinion.

Association self-regulation, however, may heighten concerns about harm to competition among members of the profession or trade. When competitors form a trade association to self-regulate, and collectively have a dominant position in the marketplace, the risk of competitive concerns grows, and the conduct must be closely examined. In *California Dental*, the fact that the members accounted for 75 percent of practicing dentists in California bolstered the Commission’s competition concerns: the association’s dominant position exacerbated the harm from the advertising restrictions; if the membership complied with the code requirements, then 75 percent of the practicing dentists would not engage in vigorous competition based on price.¹¹

Other matters involving industry self-regulation addressed concerns that adopted regulations may further entrench competitors’ positions. Notably, the Commission recently brought several cases involving professional licensing boards that have taken self-regulatory actions or issued rules under the auspices of “consumer protection,” which the Commission believed harmed competition and consumers because they reduced competitive alternatives. For example, in 2007 the Commission settled a case against the South Carolina Board of Dentistry involving the board’s newly imposed requirement that a dentist examine every child before a dental hygienist could provide preventive care, such as cleanings.¹² The rule prohibited the previously common practice of

⁸ *Id.* at 781.

⁹ *Id.* at 771–72; *see also id.* at 774–76, 778.

¹⁰ *Id.* at 759–62.

¹¹ *See* Cal. Dental Ass’n, 121 F.T.C. 190, 314–16 (1996), *aff’d sub nom.* Cal. Dental Ass’n v. FTC, 128 F.3d 720 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999).

¹² Press Release, Fed. Trade Comm’n, South Carolina Board of Dentistry Settles Charges that It Restrained Competition in the Provision of Preventive Care by Dental Hygienists (June 20, 2007), available at <http://www.ftc.gov/opa/2007/06/dentists.shtm>.

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using dental hygienists as an alternative to dentists in certain settings, such as schools. The Commission found that the rule led to fewer children receiving preventive dental care. The rule was particularly egregious in the Commission's view because it largely affected economically disadvantaged children.¹³ In another recent case, the Commission filed an adjudicative complaint against the North Carolina Dental Board for taking actions to block non-dentists from providing teeth whitening services.¹⁴

In both of these cases, the dental boards argued that the rule was needed to prevent physical harm to consumers from non-dentists, an objective grounded in consumer protection. But the Commission's pursuit of both cases struck a different balance between consumer protection and competition concerns. In both cases, the Commission believed that the boards were using a consumer protection rationale as a pretext for their desire to limit competition from non-dentists.

In a variety of other important matters, consumer protection principles often take precedence over competition principles. For example, consumer protection principles may have the effect of limiting entry into markets by new firms and products, even though the concept of "entry" traditionally plays an important role in addressing competition concerns.

From the standpoint of competition law, there is less likely to be competitive harm from mergers in markets where entry by new firms and products is unimpeded. Relatively easy entry decreases the chances of both unilateral competitive effects and coordinated interaction among the competitors in a market. Concomitantly, competition law frowns on activities that make entry in a market more difficult. For instance, some practices can violate the Sherman Act if they have the effect of making entry by rivals more difficult. Illegal tying is one example.¹⁵ The competition agencies also frown on state regulations that increase barriers to entry, such as state Certificate of Need (CON) laws in the health care industry.¹⁶

Notwithstanding the important role of market entry to competition, consumer protection concerns sometimes trump the otherwise important goal of promoting entry. Advertising substantiation in the food industry presents one example of the primacy of consumer protection over competition concerns. New food products introduced in a market often are heavily advertised to gain consumer awareness. But new entrants can get into trouble if, for example, their advertising contains health claims that are not substantiated. The Commission imposes a fairly rigorous sub-

¹³ Opinion and Order of the Commission at 1–3, South Carolina State Bd. of Dentistry, FTC Docket No. 9311 (July 30, 2004), available at <http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf>.

¹⁴ Press Release, Fed. Trade Comm'n, Federal Trade Commission Complaint Charges Conspiracy to Thwart Competition in Teeth-Whitening Services (June 17, 2010), <http://www.ftc.gov/opa/2010/06/ncdental.shtm>; see also Complaint, North Carolina Bd. of Dental Examiners, FTC Docket No. 9343 (filed June 17, 2010), available at <http://www.ftc.gov/os/adjpro/d9343/100617dentalexamcmpt.pdf>. Note that the *North Carolina Board of Dentistry* matter is currently in litigation; I did not participate in voting to authorize filing the complaint due to my previous position at the North Carolina Attorney General's office.

¹⁵ See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14–15 (1984), *abrogated on other grounds by* *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 574 U.S. 28 (2006).

¹⁶ See, e.g., U.S. Dep't of Justice & Federal Trade Comm'n, Joint Statement Before the Illinois Task Force on Health Care Planning Reform on Competition in Health Care and Certificates of Need 1–2 (Sept. 15, 2008) ("By their very nature, CON laws create barriers to entry and expansion to the detriment of health care competition and consumers."), available at <http://www.ftc.gov/os/2008/09/V080018illconlaws.pdf>.

stantiation standard for health or safety claims in food products. These claims must be supported by competent and reliable scientific evidence.¹⁷

Complying with substantiation requirements understandably can be burdensome for new entrants because in some cases performing the scientific studies necessary to substantiate some claims may require significant resources. Some potential entrants might therefore view substantiation requirements to be entry barriers. However, in the context of advertising health claims about food, entry through unsubstantiated claims is not considered legitimate entry. Thus, the need to comply with substantiation requirements trumps the competition objective of reducing barriers to entry.

The Commission's Endorsements and Testimonials Guides might be said to pose entry barriers as well.¹⁸ These Guides set forth important principles of truth-in-advertising. For example, an advertisement featuring a consumer conveying that her experience with a product is "typical," when that is not the case, should disclose, clearly and conspicuously, the typical consumer experience.¹⁹ Similarly, ads featuring statements by endorsers who have been paid to sing the praises of a product should disclose the payment.²⁰

The principles underlying the Endorsements and Testimonials Guides could constrain the very type of advertising required for new market entrants to gain market share. Indeed, the Guides apply to advertising through blogs and other social media, among the lowest cost forms of advertising available to new market entrants. The Guides therefore arguably make it harder for new entrants to gain market share through such inexpensive, on-line advertising. Yet the Commission has determined that consumer protection principles supporting full disclosure about testimonials and endorsements should trump these competition concerns.

The balance between consumer protection and competition concerns seems fairly easy in these examples. Unsubstantiated health claims and deceptive testimonials have obvious harmful effects on consumers. But in other situations, it can be more difficult to make the right call. In *California Dental*, for example, the potential for harm to competition was strong, but the consumer protection concerns were arguably strong as well. The fact that the Supreme Court was more influenced by the consumer protection aspects of the conduct than both the Commission and the Ninth Circuit shows that in some matters where the two principles pull in opposite directions, it is not easy to reach the right outcome.

Where Consumer Protection and Competition Concerns Harmonize Towards the Same Result

In other matters, consumer protection and competition principles converge and mutually support each other in the analysis of conduct harmful to consumers. One area that has received close attention for possible anticompetitive conduct involves high-tech markets where firms appear to

¹⁷ See, e.g., Agreement Containing Consent Order, Dannon Co., FTC File No. 082-3158 (Dec. 15, 2010) (requiring "competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true," and defining "competent and reliable scientific evidence" to mean "tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results"), available at <http://www.ftc.gov/os/caselist/0823158/101215dannonagree.pdf>; Order to Show Cause & Order Modifying Order, Kellogg Co., FTC Docket No. C-4262 (May 28, 2010) (same), available at <http://www.ftc.gov/os/caselist/0823145/100602kelloggorder.pdf>.

¹⁸ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2010).

¹⁹ *Id.* § 255.2(b).

²⁰ *Id.* § 255.5.

be attaining dominance. In this area, consumer protection problems can be intermixed with exclusionary conduct. The FTC's very recent *Intel* case is a good example.²¹ Another area where consumer protection and competition concerns converge involves privacy.

Intel. In December 2009, the Commission filed a complaint against Intel alleging that, since 1999, it had unlawfully maintained a monopoly in the market for central processing units (CPUs), and sought to acquire a second monopoly in graphics processing units (GPUs), using a variety of practices that violated the competition laws as well as both prongs of Section 5 of the FTC Act.²² The Complaint alleged that in 1999 and again in 2003, an Intel competitor, AMD, started to release products that were superior in performance and quality. With its monopoly threatened, Intel engaged in several practices that the Commission believed were designed to block or slow down the adoption of competitive products and allow Intel to maintain its monopoly, all to the detriment of consumers. Among the practices of concern were Intel's attempts to punish its own customers—computer manufacturers—for using AMD's products. For example, Intel allegedly used market share discounts to render competing products economically unfeasible to its customers.²³

Intel also used practices that the Commission alleged created the misimpression that competing products did not perform as well as they actually did.²⁴ In the GPU market, the Complaint alleged that Intel had become threatened by emerging competitors and had again found itself behind its competitors with respect to technological innovation. Specifically, technological advances had allowed GPUs to add more CPU functionality with each product generation, making CPUs less relevant. In response, Intel allegedly engaged in unfair methods of competition in the GPU market that were designed to maintain its monopoly in the CPU market, and to create a dangerous probability that Intel would acquire a monopoly in the GPU market.²⁵

The consumer protection aspects of the case involved Intel's compiler.²⁶ Intel introduced a new version of its compiler shortly before AMD released its technologically superior CPU. Intel's new compiler slowed the performance of software on AMD's CPU. To manufacturers, software vendors, and the unknowing public, the slower performance of computers using AMD's and other competitors' products when running certain software applications was mistakenly attributed to the performance of the competitors' products, and not to the undisclosed design of Intel's compiler. Intel failed to adequately disclose that the changes it had made to its compilers were the cause of the slower performance of AMD's CPUs.²⁷ The Commission believed that Intel intentionally misrepresented the cause of the performance differences and whether these differences could be solved, in an effort to portray its competitors' products as inferior.²⁸ In summary, the Complaint alleged that

²¹ Press Release, Fed. Trade Comm'n, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), <http://www.ftc.gov/opa/2010/08/intel.shtm>; Decision & Order, Intel Corp., FTC Docket No. 9341 (Oct. 29, 2010), available at <http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf>.

²² Section 5 of the FTC Act prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a) (1). The first part of the statutory language (unfair methods of competition) covers competition violations, and the second part (unfair or deceptive acts or practices) covers consumer protection violations.

²³ Complaint ¶¶ 4–7, Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf>.

²⁴ *Id.* ¶ 5.

²⁵ *Id.* ¶¶ 12–20.

²⁶ *Id.* ¶ 9. A compiler is a tool used by developers to write software. The compiler translates the "source code" of programs into "object code" that can be run as software on consumers' computers. *Id.* ¶ 57.

²⁷ *Id.* ¶¶ 58–59.

²⁸ *Id.* ¶ 60.

this course of conduct over the last decade had stalled the widespread adoption of non-Intel products and unlawfully maintained Intel's monopoly in the CPU market.²⁹

Intel settled the case in August 2010.³⁰ The Commission's Order puts Intel under important restrictions that will improve the competitive landscape for the CPU and GPU markets. Among other things, the Order prohibits Intel from providing benefits to computer manufacturers in exchange for their promise to buy processors from Intel exclusively or their promise to refuse to buy processors from others. It also prohibits Intel from retaliating against computer manufacturers that do business with non-Intel suppliers. For example, Intel is not permitted to withhold benefits from computer manufacturers that buy CPUs from Intel competitors.³¹ Importantly, the Order also contains consumer protection requirements, including corrective advertising about the compilers, and a program to reimburse software developers and vendors harmed by Intel's allegedly deceptive conduct.³²

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Thus, the combined competition and consumer protection violations in *Intel* were enforced in a harmonious manner to protect consumers. The Commission's ability to protect competition and consumer protection simultaneously in this case was facilitated by the fact that Intel aimed its allegedly anticompetitive and deceptive conduct at the same target: its competitors.

Privacy. Privacy is another area where competition and consumer protection principles may converge and mutually support each other in the analysis of conduct harmful to consumers. Privacy is a central element of the Commission's consumer protection mission. In recent years, advances in computer technology have made it possible for detailed information about consumers to be stored, sold, shared, aggregated, and used more easily and cheaply than ever, in ways not feasible, or even conceivable, before. These advances in technology have allowed online companies to engage in targeted advertising, a practice that has many important benefits. Consumers receive information about products and services in which they are more likely to be interested. Businesses can better target their advertising dollars to reach the right audience. Perhaps most importantly, this type of advertising supports a great deal of the Internet's free access to rich sources of information.

Yet serious privacy concerns arise when companies can easily collect, combine, and use so much information from consumers. The dramatic changes in technology have challenged the vitality of the Commission's traditional approach to privacy.

The Commission has been grappling with these issues over the past year. The FTC staff recently issued a report for policymakers like Congress, as well as for the technology industry itself, that proposes a framework for rethinking their approach to privacy.³³ As the report notes, it is hardly a surprise to discover that there are significant gaps in older privacy protection models. In the mid-1990s, the fair information practices model was prevalent, with its call for businesses to provide

²⁹ *Id.* ¶ 11.

³⁰ See Press Release, Fed. Trade Comm'n, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), <http://www.ftc.gov/opa/2010/08/intel.shtm>; Decision & Order, Intel Corp., FTC Docket No. 9341 (Oct. 29, 2010), available at <http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf>.

³¹ Decision & Order at 9–10, *Intel Corp.*

³² *Id.* at 14–17.

³³ FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS (2010) (preliminary FTC staff report) [hereinafter PRIVACY REPORT], available at <http://www.ftc.gov/os/2010/12/101201/privacyreport.pdf>.

consumers with notice and choice about how their personally identifiable information is used.³⁴ Then in the early 2000s, the Commission and others shifted to a harm-based model, under which the regulatory framework focused on data security, data breaches, and identity theft.³⁵

However, the “notice and choice” model, as it is being used today, places too great a burden on consumers, and simply is not practical when the notice is being delivered to mobile devices. Furthermore, a model that focuses on consumer “harms” may not sufficiently address the myriad harms that can result from insufficient privacy protections surrounding information about medical conditions, children, and sexual orientation, to name a few salient examples. The harm-based model is also fundamentally reactive: it addresses and corrects privacy and data security breaches after they have been discovered, rather than focusing on creating a climate in which privacy is part of the fundamental design of products and services being offered.³⁶ And both models focus on “personally identifiable” information, which may be out of touch with technological advances that allow previously non-identifiable data to be “re-identified” with a consumer. It is for these reasons that the FTC staff’s report proposes a new framework for thinking about privacy.

The proposed framework is designed to push both policymakers and the industry toward a more dynamic approach to addressing privacy in today’s technologically advanced landscape, such as in the area of online behavioral advertising. The main elements of the framework include the following:

³⁴ For example, Title V, Subtitle A, of the Gramm-Leach-Bliley (GLB) Act, 15 U.S.C. §§ 6801–6809, requires, among other things, that financial institutions provide their customers with annual notices explaining their privacy practices and their customers’ rights to limit some sharing of the customers’ information. For more detail, see Federal Trade Comm’n, Bureau of Consumer Protection Bus. Ctr., *In Brief: The Financial Privacy Requirements of the Gramm-Leach-Bliley Act*, <http://business.ftc.gov/documents/bus53-brief-financial-privacy-requirements-gramm-leach-bliley-act>.

³⁵ The FTC’s Safeguards Rule, for example, sets forth standards that certain financial institutions must use in developing, implementing, and maintaining reasonable safeguards to protect the security, confidentiality, and integrity of any nonpublic personal information pertaining to their customers. See 16 C.F.R. pt. 314 (2010) (implementing GLB Act §§ 501(b), 505(b)(2), 15 U.S.C. §§ 6801(b), 6805(b)(2)). In addition, numerous states have enacted breach notification laws. See, e.g., Samuelson Law, Tech. & Public Pol’y Clinic, Univ. of Cal.-Berkeley Sch. of Law, *Security Breach Notification Laws: Views from Chief Security Officers*, App. A, at 40–46 (Dec. 2007), available at http://www.law.berkeley.edu/files/cso_study.pdf.

Both the FTC and the states have brought numerous law enforcement actions in the data security context. See, e.g., Press Release, Fed. Trade Comm’n, *Twitter Settles Charges that It Failed to Protect Consumers’ Personal Information; Company Will Establish Independently Audited Information Security Program* (June 24, 2010), available at <http://www.ftc.gov/opa/2010/06/twitter.shtm>; Agreement Containing Consent Order, *Twitter, Inc.*, FTC File No. 092-3093 (June 24, 2010), available at <http://www.ftc.gov/os/caselist/0923093/100624twitteragree.pdf>; Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Defendants LifeLock and Davis, *FTC v. LifeLock, Inc.*, No. 2:10-CV-00530-NVW (D. Ariz. Mar. 15, 2010), ECF No. 9; Press Release, Office of the Atty. Gen., Cal. Dep’t of Justice, *Brown Stops LifeLock from Misleading Consumers about Identity Theft Protection Services* (Mar. 9, 2010) (announcing settlement entered into jointly with FTC and 34 other states), available at <http://ag.ca.gov/newsalerts/release.php?id=1869>; Assurance of Discontinuance, *State v. TJX Cos.*, No. 46S-6-09 WNCV (Vt. Super. Ct. June 23, 2009) (settlement entered into with 40 states and District of Columbia), available at <http://www.atg.state.vt.us/assets/files/TJX%20AOD.pdf>; Decision & Order, *TJX Cos.*, FTC Docket No. C-4227 (July 29, 2008) (consent order), available at <http://www.ftc.gov/os/caselist/0723055/080801tjxdo.pdf>; Press Release, Office of the Atty. Gen., State of Vt., *Attorney General Sorrell Reaches Agreement with Choicepoint* (May 31, 2007), <http://www.atg.state.vt.us/news/attorney-general-sorrell-reaches-agreement-with-choicepoint.php>; Stipulated Final Judgment and Order for Civil Penalties, Permanent Injunction and Other Equitable Relief, *United States v. ChoicePoint, Inc.*, No. 1:06-CV-0198-JTC (N.D. Ga. Feb. 15, 2006), ECF No. 5; Decision & Order, *BJ’s Wholesale Club, Inc.*, FTC Docket No. C-4148 (Sept. 20, 2005) (consent order), available at <http://www.ftc.gov/os/caselist/0423160/092305do0423160.pdf>; Stipulated Consent Agreement & Final Order, *FTC v. Toysmart.com, LLC*, No. 00-11341-RGS, 2000 WL 34016434 (D. Mass. July 21, 2000).

³⁶ Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1232–46 (2003).

*The proposed new**framework for privacy**would promote both**competition and**consumer protection**principles . . .*

- Companies should adopt a “privacy by design”³⁷ approach that involves building privacy protections into their everyday business practices, such as providing reasonable security for consumer data, collecting only the data needed for a specific business purpose, retaining data only as long as necessary to fulfill that purpose, safely disposing of data no longer in use, and implementing reasonable procedures to promote data accuracy.
- Companies should provide information to consumers about their data practices that includes simple, more streamlined choices than have been used in the past. Choices should be clearly and concisely described, and offered at a time and in a context in which the consumer is making a decision about his or her data.
- Companies should improve the transparency of their data practices, including improving their privacy notices so that consumer groups, regulators, and others can compare data practices and choices across companies.

The consumer protection concerns surrounding privacy issues are closely connected to competition concerns. Recently, several commentators have urged a world where firms compete based on how they collect, use, store, and dispose of consumers’ information—that is, competition based on privacy.³⁸ Our current privacy models do little to foster competition on privacy, and as a result there has been too little competition with respect to privacy in the marketplace.³⁹ Rethinking the way the Commission views privacy, and encouraging “privacy by design,” may present firms with greater incentives to compete on privacy, thereby increasing consumer choice and opportunities in this area.

In addition, the proposed new framework’s principles may move regulators and businesses away from a reactive model that focuses on privacy concerns after harm is done and towards a model where companies are encouraged to entice consumers to use their products and services based, in part, on their privacy practices.

The proposed new framework for privacy would promote both competition and consumer protection principles: both areas of law would be aligned to address demand side distortions of the marketplace. This harmonization of the two areas enhances the Commission’s ability to develop effective guidance with respect to privacy.

It is worth noting that the Commission previously expressed a strong belief that its competition policies should include efforts to promote competition on privacy. In the Google/DoubleClick merger investigation closing statement nearly three years ago,⁴⁰ the Commission emphasized that competition on non-price attributes like privacy is an important consideration for antitrust enforce-

³⁷ Privacy by Design is an approach that Ann Cavoukian, Ph.D., Information and Privacy Commissioner of Ontario, has advocated. See Ann Cavoukian, Ph.D., Ont. Info. & Privacy Comm’r, *PbD: Privacy by Design*, available at <http://www.ipc.on.ca/images/Resources/privacybydesign.pdf>.

³⁸ See Emily Gray, *FTC to Boost Competition in Privacy Protection*, GLOBAL COMPETITION REV., Sept. 23, 2010, <http://www.globalcompetitionreview.com/news/article/29065/ftc-boost-competition-privacy-protection-/>; Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769, 773–75, 792–97 (2010).

³⁹ There have been a few positive developments with respect to competition in the privacy realm. Some companies have taken positive steps to improve baseline security, including Microsoft, which has called for data security standards for cloud computing services, and Google, which recently announced that it would use encryption by default for its email service. See FED. TRADE COMM’N, PRIVACY REPORT, *supra* note 33, at 47–48 & n.122. In addition, major search engines have shortened their retention periods for search data. See *id.* at 47–48 & n.122. Several companies have also developed new tools that allow consumers to control their receipt of targeted advertisements and to see and manipulate the information companies collect about them for targeted advertising. See *id.* at 63 & n.149.

⁴⁰ See Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

ment. And the recently revised Horizontal Merger Guidelines, issued jointly with the Department of Justice, reaffirm this point. A newly added section on innovation in the Guidelines stresses the importance of non-price competition, thus providing ample room to consider the impact of a transaction on privacy-based competition.⁴¹

The proposed new privacy framework nonetheless poses some complications for competition policy. For example, the new framework arguably could impact the ability of new firms to enter a market. Can new firms design the kinds of dynamic, just-in-time notices that should now be provided? Can they adequately address concerns about personally identifiable information, secondary uses of information, and use of so-called “legacy” data collected under prior privacy regimes? Or will these new recommendations create a barrier to entry in markets that have been the hallmark of dynamism in our economy?

Rather than viewing the proposed new privacy framework as imposing a barrier to market entry for new firms, the new framework might instead present market entrants with an *advantage*, by providing them with a guidepost for creating business models that address privacy concerns from the outset, rather than as an afterthought. Indeed, some data brokers and other information firms believe it is much easier for firms to design privacy protections into their new business models and new forms of consumer communications than it is to retrofit old systems to meet the realities of today’s privacy concerns. Thus, new firms may well have a “leg up” on existing players if they implement these recommendations at the start of their business endeavors.

And in cases where the industry implements the proposed framework under the auspices of self-regulation, the Commission will need to watch developments closely to ensure that such requirements, ostensibly aimed at protecting privacy, are not simply a means to keep out new entrants. As in other Commission actions involving self-regulatory regimes, there may be a tipping point at which self-regulation turns anticompetitive, particularly in cases where the framework is developed by industry players that have a dominant market position.

Conclusion

The Commission will undoubtedly continue to take a strong interest in matters that involve both consumer protection and competition issues. In today’s global economy, businesses are under great pressure to come up with new products and ideas rapidly, and such pressure can cause businesses to stray from competition and consumer protection laws that govern their practices. Moreover, the fast-paced, dynamic marketplace that typifies high technology industries—which regulators should strive to promote—presents special challenges at the intersection of competition and consumer protection law enforcement. In light of its unique and exclusive focus on both consumer protection and competition concerns, the Commission is well positioned to tackle these challenges at the intersection as they arise in future cases. ●

⁴¹ See U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 6.4, at 23–24 (2010), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

New Agency, New Authority: What You Need to Know About the Consumer Financial Protection Bureau

John E. Villafranco and Kristin A. McPartland

*A few weeks ago, President Obama asked me to get to work starting the new Consumer Financial Protection Bureau. He was clear about his goal: Level the playing field for American families and fix the broken consumer credit market—and do it as quickly and effectively as possible.*¹

—Elizabeth Warren, Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau, October 28, 2010.

The passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, with its creation of a new government agency, the Consumer Financial Protection Bureau (CFPB), represents a major reorganization in the regulation of consumer financial products and services. With controversy surrounding the new agency from its initial conceptualization to the September 2010 appointment of Professor Elizabeth Warren in a special advisory role, many questions remain unanswered about the practical effect that the new agency will have on existing practices, standards, and current regulation.

This list of questions grew longer in November 2010 with the Republicans' recapture of the U.S. House of Representatives. Republican leadership has targeted the Act and the CFPB in particular for aggressive oversight and potential rollback. The day after his party's electoral success, incoming Speaker of the House John Boehner (R-OH) made his party's position clear: "When it comes to the financial services bill and the 358 regulatory filings required under that bill . . . it's going to require a significant amount of oversight—so that not only will the Congress understand, but the American people will understand, just what this bill will do to our financial services industry."²

Despite the Republicans' promise to dig in, we should expect President Obama to push forward with the initiative. In recent weeks, Professor Warren has been on a publicity offensive, reaching out to consumers, as well as industry leaders and trade groups—many of whom spent much of the year fighting against the agency's creation—and outlining the CFPB's priorities in interviews and news show appearances. This article discusses those priorities, their prospects, and the expected intra-agency relationship with the Federal Trade Commission.

“Standing Up” the CFPB

While the CFPB will not become fully operational and assume its new statutory authority until July 2011, a nascent staff of fifty-four moved to new offices in late October and presently numbers more

■ **John E. Villafranco** is a partner at Kelley Drye & Warren LLP. He provides litigation and counseling services, with a focus on advertising and consumer protection law matters. **Kristin A. McPartland** is an associate at Kelley, Drye & Warren LLP and also practices in the advertising law and consumer protection group.

¹ Elizabeth Warren, *Standing Up the Consumer Financial Protection Bureau*, THE WHITE HOUSE BLOG (Oct. 28, 2010, 6:00 AM), <http://www.whitehouse.gov/blog/2010/10/28/standing-consumer-financial-protection-bureau>.

² David M. Herszenhorn, *The Road Ahead Turns Right*, N.Y. TIMES, Nov. 3, 2010, available at <http://www.nytimes.com/2010/11/04/business/04outlook.html>.

than seventy. The CFPB will eventually consolidate employees and responsibilities from several federal agencies, including the Federal Reserve, the FDIC, and the Department of Housing and Urban Development, among others, and is ultimately expected to have hundreds of employees and a budget up to \$500 million.³

In appointing Professor Warren to serve as Assistant to the President and Special Advisor to the Secretary of the Treasury on the CFPB, President Obama noted that she was “the architect behind the idea for a consumer watchdog, so it only makes sense that . . . she should be the architect working with Secretary of Treasury [Timothy] Geithner in standing up the agency.”⁴ Consumer groups had advocated for Warren, who previously served as Chair of the Congressional Oversight Panel of the Troubled Asset Relief Program, to be appointed the first Director of the agency.

Warren’s 2007 article, *Unsafe at Any Rate*,⁵ has been widely credited for making the case for a new agency intended to reduce the risk of financial products and ensure that consumers are provided clearer disclosures. Her appointment to serve in an advisory capacity rather than as Director represented a compromise by President Obama in the face of concerns expressed by Senator Chris Dodd (D-CT), Chairman of the Senate Committee on Banking, Housing and Urban Affairs Committee and chief author of the new law, and others over securing Senate confirmation for Warren. In selecting Warren for the interim position, President Obama highlighted the importance of her appointment by commenting that she will “play a pivotal role in helping me determine who the best choice is for director of the bureau.”⁶ Many Republicans have criticized the decision-making influence of individuals within the Administration who did not go through Senate confirmation. A Republican-controlled House will no doubt home in on this in its Congressional oversight efforts, and Warren’s position is a likely candidate for close examination.

The CFPB’s leadership structure, with its single director, has also come under scrutiny as it differs significantly from other regulatory agencies, which are generally directed by odd-numbered Commissioners. For example, both the FTC and the SEC are overseen by five Commissioners, appointed by the President with the advice and consent of the Senate, and no more than three Commissioners may be of the same political party. In contrast, the CFPB will be headed by a single Director, appointed by the President with the advice and consent of the Senate, for a five-year term. Senator Bob Corker (R-TN), a member of the Senate Banking Committee, wrote to President Obama just before Warren’s interim appointment and criticized the Director position as

unprecedented in the nature of its unfettered and unchecked authorities, which makes the confirmation process even more important to the interests of the American people. . . . The job is disproportionately reliant on the decisions of one individual with access to large sums of taxpayer monies to carry out the agency agenda.⁷

The CFPB will eventually consolidate employees and responsibilities from several federal agencies . . . and is ultimately expected to have hundreds of employees and a budget up to \$500 million.

³ The FTC is exempt from the personnel transfers affecting other agencies but the CFPB is likely to draw many of its new employees from the ranks of the FTC. Peggy Twohig, former Associate Director in the Division of Financial Practices, moved to the CFPB earlier this year, and she was recently joined by Alice Saker Hrdy, an Assistant Director in the FTC’s Division of Financial Practices, and on detail by Lucy Morris, a senior FTC attorney who has litigated notable predatory lending cases on the FTC’s behalf. For a list of people reported to have joined the new agency, see the accompanying chart entitled *Key Personnel in Starting Up the Consumer Financial Protection Bureau*, <http://www.abanet.org/antitrust/at-source/10/12/Dec10-CFPBChart12-21f.pdf> [under REFERENCES].

⁴ President Barack Obama, Statement by the President to the Press, The White House Office of the Press Secretary (Sept. 17, 2010), <http://www.whitehouse.gov/the-press-office/2010/09/17/statement-president-press>.

⁵ Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY: A JOURNAL OF IDEAS, Summer 2007, at 8, available at <http://www.democracyjournal.org/pdf/5/Warren.pdf>.

⁶ President Obama, Statement to the Press, *supra* note 4.

⁷ Andy Meek, *Corker to Obama: Don’t Circumvent Senate*, DAILY NEWS BLOG (Sept. 15, 2010), <http://blog.memphisdailynews.com/?s=Warren> (scroll down to the Sept. 15, 2010 posting).

Senator Corker's letter may have been one of the reasons President Obama appointed Warren to establish, but not lead, the CFPB.⁸

The CFPB will be funded through the Federal Reserve's earnings, and the transfer of money is not reviewable by Congressional Appropriations. This independent funding source—assuming it remains—could prove critical to the new agency's success. In addition to stepped-up oversight, Republicans generally considered to be hostile to the Act are eyeing tweaks to the new law—in lieu of full-scale repeal—and may attempt to weaken or reduce funding for key provisions via the Congressional Appropriations process. Representative Spencer Bachus (R-AL), currently the Ranking Member of the House Financial Services Committee and incoming chair of the Committee when Republicans assume control in January 2011,⁹ has dubbed the Dodd-Frank Act a “government takeover of the economy.”¹⁰ Bachus has recently indicated that he may attempt to make the CFPB subject to the appropriations process—likely one of many proposals to face resistance in the Democratic Party-controlled Senate. “Consumer protection is a bipartisan goal, [but] there needs to be accountability in the appropriations process,” Bachus has said.¹¹

In late November, Representative Bachus and Representative Judy Biggert (R-IL), currently the Ranking Member of the Subcommittee on Oversight and Investigations, began challenging the establishment of the CFPB by sending letters to the inspectors general of both the Treasury Department and the Federal Reserve, directing them to conduct investigations into the ongoing work related to the CFPB.¹² Bachus and Biggert requested the reports be submitted by January 10, 2011,¹³ and fellow Republican Darrell Issa (R-CA), the incoming chair of the House Oversight and Government Reform Committee is likely to join Bachus in initiating oversight hearings on the CFPB in early 2011.¹⁴ Warren had earlier expressed her concern that critics of the new agency were trying to dismantle it before it becomes fully operational: “Now, here we're coming out of—we hope coming out of another great recession—we've passed serious reform, and it's just a matter of months until people are talking about how to undercut this new consumer financial protection agency.”¹⁵

The CFPB's Priorities

President Obama, in signing the Act into law, described the CFPB as “a new consumer watchdog with just one job: looking out for people—not big banks, not lenders, not investment houses—look-

⁸ Andy Meek, *Corker: Don't Bypass Senate on Warren. Obama: Ok.*, DAILY NEWS BLOG (Sept. 17, 2010), <http://blog.memphisdailynews.com/?s=Warren> (scroll down to the Sept. 17, 2010 posting).

⁹ Phil Mattingly, *Bachus Selected by Republicans as Wall Street Overseer*, BLOOMBERG, Dec. 8, 2010, <http://www.bloomberg.com/news/2010-12-08/house-s-bachus-wins-key-vote-in-bid-to-be-wall-street-overseer.html>.

¹⁰ DealBook, *Wall Street Hopes to Gain as Democrats Lose House*, N.Y. TIMES, Nov. 3, 2010, <http://dealbook.blogs.nytimes.com/2010/11/03/wall-street-gains-as-democrats-lose-house/?scp=8&sq=dodd%20frank%20act&st=cse>.

¹¹ Steven Sloan, *Bachus Poised for Gavel as Rhetoric on New Financial Rules Toned Down*, CQ TODAY ONLINE NEWS, Nov. 3, 2010, <http://www.cq.com/doc/news-3758764?wr=UEhZTDhpeFBiKnI5cVliWipaSUdFUQ> (subscription required).

¹² Victoria McGrane & Deborah Solomon, *With New Power, GOP Takes on Consumer Agency*, WALL ST. J., Nov. 23, 2010, available at <http://online.wsj.com/article/SB10001424052748703559504575631082414598868.html>.

¹³ *Id.*

¹⁴ Stacy Kaper, *Bachus, Issa Confirmed as Committee Chairs*, AM. BANKER, Dec. 9, 2010, http://www.americanbanker.com/issues/175_235/bachus-issa-confirmed-1029675-1.html (subscription required).

¹⁵ Maya Jackson Randall, *Warren Shocked by Effort to Weaken US Consumer Bureau*, FOX BUS. NEWS, Nov. 9, 2010, <http://www.foxbusiness.com/markets/2010/11/09/warren-shocked-effort-weaken-consumer-bureau/>.

Under the Act, the CFPB is vested with broad-based authority to implement and enforce most existing federal consumer financial laws . . .

ing out for people as they interact with the financial system.”¹⁶ Under the Act, the CFPB is vested with broad-based authority to implement and enforce most existing federal consumer financial laws,¹⁷ including the Truth-in-Lending Act, the Fair Credit Reporting Act, and the Federal Debt Collection Practices Act.¹⁸ Additionally, the CFPB has specific authority to prevent unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service.¹⁹ “Consumer financial product or service” is broadly defined and includes extending credit or servicing loans, real estate settlement services, deposit-taking activities, stored payment card systems, check-cashing, collection or guaranty services, financial advisory services, consumer report information, and debt collection (with some exceptions).²⁰

In setting up the CFPB, Warren has focused on two initial areas. First, she has described the CFPB as the “first 21st century agency,”²¹ and has identified the use of technology as a means to prevent “capture” of the new agency by the regulated industries.²² Warren has stated that the agency will “use supervision and lawsuits to enforce the law” while employing technology to “supplement the cop on the beat by building a neighborhood watch.”²³ Her statements suggest that establishing the infrastructure to collect and analyze consumer complaints will be a top priority.

Second, in a September 21, 2010 forum on mortgage disclosures held by Treasury Secretary Timothy Geithner and Warren, Geithner stated that “[m]oving quickly to improve mortgage disclosures is one in a series of concrete steps we’re taking to implement the historic consumer protections included in the Dodd-Frank financial reform law. . . . Simplifying these forms is a prime example of where we can and will accelerate our efforts to deliver real benefits to consumers as soon as possible.”²⁴ Warren has echoed these statements often, including her desire for clear and short disclosures for credit cards and other financial products in an October 12, 2010 White House podcast.²⁵ Accordingly, consumers and industry can expect early action regarding financial product disclosures.

¹⁶ President Barack Obama, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act, The White House Office of the Press Secretary (July 21, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act>.

¹⁷ The complete list of laws now under the CFPB’s authority is as follows: Alternative Mortgage Transaction Parity Act of 1982; Consumer Leasing Act of 1976; Electronic Fund Transfer Act, with the exception of section 920; Equal Credit Opportunity Act; Fair Credit Billing Act; Fair Credit Reporting Act, with the exception of sections 615(e) and 628; Home Owners Protection Act of 1998; Fair Debt Collection Practices Act; subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act; Sections 502 through 509 of the Gramm-Leach-Bliley Act, with the exception of section 505 as it applies to section 501(b); Home Mortgage Disclosure Act of 1975; Home Ownership and Equity Protection Act of 1994; Real Estate Settlement Procedures Act of 1974; S.A.F.E. Mortgage Licensing Act of 2008; Truth in Lending Act; Truth in Savings Act; section 626 of the Omnibus Appropriations Act; and Interstate Land Sales Full Disclosure Act. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 [hereinafter Dodd-Frank Act], tit. X, § 1002(12), 124 Stat. 1376, 1957 (2010).

¹⁸ *Id.*

¹⁹ *Id.* tit. X, § 1031(a), 124 Stat. 1376, 2005.

²⁰ *Id.* tit. X, §§ 1002(5) & 1002(15), 124 Stat. 1376, 1956, 1957–60.

²¹ David Corn, *Elizabeth Warren: Too Bold to Fail?*, MOTHER JONES, Oct. 29, 2010, available at <http://motherjones.com/politics/2010/10/elizabeth-warren-consumer-financial-protection-bureau?page=2>.

²² Carter Dougherty, *Warren Says Technology Can Prevent “Capture” of Consumer Agency*, BLOOMBERG, Oct. 28, 2010, <http://www.bloomberg.com/news/2010-10-29/elizabeth-warren-says-technology-can-prevent-capture-of-consumer-agency.html>.

²³ *Id.*

²⁴ Press Release, U.S. Dep’t of Treasury, Treasury Convenes Mortgage Disclosure Forum (Sept. 21, 2010), <http://www.ustreas.gov/press/releases/tg864.htm>.

²⁵ Kori Schulman, *What You Missed: Tuesday Talk with Elizabeth Warren*, WHITE HOUSE BLOG (Oct. 12, 2010, 2:21 PM), <http://www.whitehouse.gov/blog/2010/10/13/what-you-missed-tuesday-talk-with-elizabeth-warren> (downloaded using iTunes).

Relationship Between the CFPB and the FTC

The CFPB will have broad authority over consumer financial products and services but the Act contains several exemptions from CFPB jurisdiction including, with some limitations, an exemption for merchants, retailers, and other sellers of non-financial goods or services if they provide credit directly to a consumer related to the purchase of the seller's goods.²⁶ In general, entities exempt from CFPB jurisdiction but currently subject to FTC jurisdiction will remain under the purview of the FTC.²⁷

The CFPB will acquire the FTC's authority to prescribe rules, issue guidelines, conduct studies, or issue reports that are currently mandated by any of the enumerated consumer laws.²⁸ The FTC, however, retains its general rulemaking authority under Section 18(a)(1)(B) of the FTC Act and the two agencies will negotiate an agreement to avoid duplication or conflict between their rules.²⁹ In addition, the exclusion for motor vehicle dealers in the Act grants the FTC new authority to write rules related to auto dealer financing,³⁰ and the FTC is expected to work closely with the CFPB to develop and enforce new restrictions.

Both agencies will have reciprocal authority to enforce rules promulgated by the other agency under their respective enforcement powers as long as the rules apply to a person within the enforcing agency's jurisdiction.³¹ Thus, the CFPB may enforce rules prescribed under the FTC Act and the FTC may enforce rules promulgated by the CFPB. To accommodate this overlapping authority, the CFPB and the FTC must negotiate an agreement to coordinate enforcement actions by each agency, which is to include procedures for notice to the other agency where feasible.³² Additionally, once one agency has initiated an action, the other agency may not institute another action but it may intervene in the pending action.³³

A model for these rulemaking and enforcement agreements may be seen in existing FTC agreements with other agencies. For example, the FTC and the FDA have a longstanding liaison agreement under which the FTC has primary jurisdiction to regulate the truth and falsity of all advertising of food, over-the-counter drugs, dietary supplements, medical devices, but the FDA has primary jurisdiction over the labeling of these products, as well as the truth and falsity of advertising for prescription drugs.³⁴ The CFPB and the FTC may follow this model and parcel out responsibility for different areas of consumer finance to prevent overlap.

FTC Commissioner Julie Brill, in a December 7, 2010 speech, pointed to one area of potential cooperation with the CFPB—the Fair Credit Reporting Act.³⁵ She noted that “[w]hen Congress cre-

²⁶ See Dodd-Frank Act, tit. X, § 1027(a)(2), 124 Stat. 1376, 1995.

²⁷ See, e.g., *id.* tit. X, §§ 1027(a)(2)(D) & 1029(d), 124 Stat. 1376, 1996, 2004–05. Exemptions exist, to varying degrees, for motor vehicle dealers, real estate brokers, manufactured home and modular home retailers, accountants and tax preparers, attorneys, persons regulated by state insurance regulators, employee benefit and compensation plans, persons regulated by a state securities commission, the SEC, the CFTC, or the Farm Credit Administration, activities relating to charitable contributions, and insurance.

²⁸ *Id.* tit. X, § 1061(b)(5)(B)(i), 124 Stat. 1376, 2037.

²⁹ *Id.* tit. X, § 1061(b)(5)(D), 124 Stat. 1376, 2037.

³⁰ *Id.* tit. X, § 1029(d), 124 Stat. 1376, 2004–05.

³¹ *Id.* tit. X, §§ 1061(b)(5)(B)(ii) and (b)(5)(C)(ii), 124 Stat. 1376, 2037.

³² *Id.* tit. X, § 1024(c)(3), 124 Stat. 1376, 1989.

³³ *Id.* tit. X, § 1024(c)(3)(B), 124 Stat. 1376, 1989.

³⁴ Federal Trade Comm'n & Food & Drug Admin., Memorandum of Understanding (1971), available at <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm115791.htm>.

³⁵ Julie Brill, Comm'r, Fed. Trade Comm'n, The FTC, the CFPB, and Consumer Privacy Protection (Dec. 7, 2010), available at <http://www.ftc.gov/speeches/brill/101207iapp.pdf>.

ated the Fair Credit Reporting Act, it created clear guidelines on how personal information can be used for credit, insurance and other financial services.”³⁶ In her view, the two agencies have shared responsibility for carrying out Congress’ mandate: “The Federal Trade Commission and the new Consumer Financial Protection Bureau need to make sure our current rules continue, in this technologically advanced age, to protect consumers’ rights under the FCRA—both to know the data that has been collected and used in making important financial decisions, and to correct that data when necessary.”³⁷

Given that, currently, the FTC primarily acts through its enforcement powers, the transfer of rule-making authority for the consumer financial practices laws may not greatly limit the FTC’s operations. One area to watch, however, is the FTC’s current rulemaking regarding mortgage lending practices. The FTC recently issued its Mortgage Assistance Relief Services (MARS) rule on loan modification and foreclosure rescue services, which FTC Chairman Jon Leibowitz described as “an enforcement tool with teeth: If the foreclosure rescue companies don’t play by the rules, the FTC has the authority to go after them with hefty fines.”³⁸ The FTC also issued a proposed rule under the Mortgage Acts and Practices (MAP) rulemaking regarding mortgage advertising in September 2010, for which the comment period ended on November 15, 2010. If rulemaking activities related to mortgage practices are still pending at the time of transfer, responsibility should move to the CFPB. Generally speaking, however, the FTC’s new authority to enforce CFPB rules may ultimately result in an expansion of the FTC’s enforcement activities and clearer focus on its priorities once the enforcement agreement between the agencies is negotiated and in place.

Generally speaking, however, the FTC’s new authority to enforce CFPB rules may ultimately result in an expansion of the FTC’s enforcement activities and clearer focus on its priorities . . .

The CFPB’s “Unfair, Deceptive, and Abusive Practices” Authority

The CFPB will have specific authority to prevent a covered person from committing or engaging in an unfair, deceptive, or abusive act or practice.³⁹ The scope of this regulatory authority is based on and expands the unfair and deceptive acts or practices (UDAP) doctrine in Section 5 of the FTC Act and numerous state statutes. Comparison of the Act’s definitions to the FTC Act and the FTC’s jurisprudence suggests that current standards are likely to remain consistent.

First, the term “unfair” is defined in the Act as:

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.⁴⁰

This definition is substantially similar to the FTC’s unfairness jurisprudence, which establishes that a practice is unfair by showing that: (1) it causes or is likely to cause substantial consumer injury, (2) which a consumer could not reasonably avoid, and (3) the injury is not outweighed by any benefit the practice provides to consumers or competition.⁴¹

³⁶ *Id.*

³⁷ *Id.*

³⁸ Jon Leibowitz, Chairman, Fed. Trade Comm’n, Fighting for the Middle Class: The FTC Tackles Mortgage Rescue Fraud (Nov. 19, 2010), available at <http://www.ftc.gov/speeches/leibowitz/101119mars.pdf>.

³⁹ Dodd-Frank Act, tit. X, § 1031(a), 124 Stat. 1376, 2005.

⁴⁰ *Id.* tit. X, § 1031(c), 124 Stat. 1376, 2006.

⁴¹ 15 U.S.C. § 45(n) (2006); see, e.g., Complaint, CVS Caremark Corp., FTC No. C-4259 (June 18, 2009) (alleging that failure to use reasonable and appropriate measure to prevent unauthorized access to personal information caused or was likely to cause substantial injury to consumers not offset by countervailing benefits to consumers or competition and thus was an unfair act or practice), available at <http://www.ftc.gov/os/caselist/0723119/090623cvscmpt.pdf>.

Second, the Act is silent on the definition of “deceptive,” thus providing the CFPB with discretion in developing a definition.⁴² It is well established under FTC jurisprudence, however, that a practice is deceptive if it: (1) “misleads the consumer acting reasonably in the circumstances,” (2) to the consumer’s detriment, and (3) will affect consumers in a material way, i.e., is likely to affect a consumer’s conduct or decision regarding the product.⁴³ The CFPB thus will probably look to FTC precedent on deception, at least as an initial starting point.

Finally, the Act defines the term “abusive” as an act or practice that:

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of—

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.⁴⁴

The term “abusive” is not defined in the FTC Act but FTC jurisprudence is likely to influence CFPB enforcement. For example, the FTC’s Telemarketing Sales Rule prohibits “abusive” telemarketing practices in addition to deceptive practices and such abusive practices are defined as calling during certain hours, disclosing or receiving a consumer’s unencrypted account information, and denying or interfering with a consumer’s right to be placed on the Do Not Call list.⁴⁵ Moreover, the FTC has recently publicized its efforts to stop “deceptive and abusive” practices against industries such as debt relief providers.⁴⁶ Given the rich, preexisting enforcement experience, the CFPB will probably take guidance from FTC jurisprudence in exercising its authority to prevent abusive practices.

Conclusion

While it would be hard to overstate the impact of a new major consumer protection agency, the CFPB clearly will be looking to make a major impact, at least in certain areas. New disclosure requirements and an up-to-date information and complaint collection system suggest that the CFPB will take an active and immediate role in monitoring industry developments and the impact of financial practices on consumers as soon as it is up and running in July 2011.

The CFPB’s shared authority with the FTC in enforcement and certain rulemaking areas and their overlapping authority to prevent unfair, deceptive, and abusive practices suggest, however, that there should be some consistency in consumer protection standards going forward. But with the recent mid-term election results and the expected push by Republicans—and pushback by Professor Warren and President Obama, the final shape of the CFPB remains unknown. Interested parties will need to pay close attention in the coming months. ●

⁴² A prior version of the bill included a definition of “deceptive” that would have adopted the FTC’s policy statement on deception, but this provision was dropped from the final bill, suggesting that the CFPB may have discretion in construing the term. See Jeff Govern, *Deception and the CFPB*, CL&P BLOG (Oct. 4, 2010, 7:11 PM), <http://pubcit.typepad.com/clpblog/2010/10/deception-and-the-cfpb.html>.

⁴³ *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175–76 (1984) (reprinting as appendix a letter dated Oct. 14 1983, from the FTC to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives).

⁴⁴ Dodd-Frank Act, tit. X, § 1031(d), 124 Stat. 1376, 2006.

⁴⁵ See 15 U.S.C. § 6102; 16 C.F.R. § 310.4 (2010), available at <http://www.ftc.gov/os/2010/07/R411001finalrule.pdf>.

⁴⁶ See Press Release, Federal Trade Comm’n, FTC Issues Final Rule to Protect Consumers in Credit Card Debt (July 29, 2010), <http://www.ftc.gov/opa/2010/07/tsr.shtm>.

The Crime Victims' Rights Act: Its Impact on Plea Negotiations with the Antitrust Division

John M. Majoras and Eric P. Enson

According to the Ninth Circuit, “The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims’ Rights Act sought to change this by making victims independent participants in the criminal justice process.”¹ The Crime Victims’ Rights Act,² or CVRA, signed into law in 2004, attempts to accomplish this goal by affording crime victims with notice of, access to, and a role in public criminal proceedings.

Not surprisingly, the CVRA has been invoked in the prosecution of violent crimes and crimes perpetrated by swindlers like Bernard Madoff to allow victims to present victim-impact testimony prior to sentencing or merely to vent frustrations with the criminal justice system. The CVRA has also been invoked in criminal antitrust matters as a justification for providing victims with notice of, and an opportunity to appear at, public hearings. But with increasing frequency, some civil antitrust plaintiffs have attempted to use the CVRA to push their participation beyond public proceedings and into private plea negotiations between the Antitrust Division of the Department of Justice and targets of the Division’s investigations. There are obvious questions regarding whether such efforts are a permissible—or advisable—use of the CVRA. There are also questions about whether this is a legitimate exercise of the CVRA or a mere litigation tactic geared towards obtaining an advantage in related civil litigation.

What rights does the CVRA confer on crime victims?

The CVRA provides crime victims with eight enumerated rights: (1) the right to be reasonably protected from the accused; (2) the right to notice of public court proceedings; (3) the right not to be excluded from any public court proceeding; (4) the right to be reasonably heard at any public court proceeding involving release, plea, sentencing, or parole; (5) the reasonable right to confer with government attorneys prosecuting the case; (6) the right to restitution as provided by law; (7) the right to proceedings free from unreasonable delay; and (8) the right to be treated with fairness and with respect.³ Crime victims most frequently assert the rights to notice of, to be reasonably heard at and not to be excluded from public hearings, as well as the right to confer with government attorneys.

Who is responsible for enforcing the CVRA?

The CVRA is clear: courts “shall ensure that the crime victim is afforded the rights” set forth in the statute.⁴ The CVRA also requires DOJ attorneys to employ their “best efforts to see that crime

■ **John M. Majoras and Eric P. Enson** are attorneys with the law firm of Jones Day. Both focus on the defense of criminal and civil antitrust matters. The views expressed herein do not necessarily reflect the views of Jones Day, its attorneys or its clients.

¹ Kenna v. U.S. Dist. Ct., 435 F.3d 1011, 1013 (9th Cir. 2006).

² 18 U.S.C. § 3771.

³ *Id.* § 3771(a).

⁴ *Id.* § 3771(b) (1).

victims are notified of, and accorded” the rights provided for in the statute.⁵ For this reason, the Antitrust Division’s Web site has a “Victims’ Rights” page with links describing the CVRA and listing upcoming public hearings in pending matters.⁶ The Division does note, however, that the manner in which victims are afforded their rights “will depend on the facts of the case, the need of the Government effectively to investigate and prosecute the crime, and the legal rights of the defendants.”⁷

Who is an antitrust “crime victim”?

Unlike robbery, assault, embezzlement, and many other crimes, identifying the “victims” of antitrust offenses is probably the most daunting procedural task in applying the CVRA to antitrust matters. The CVRA defines a “crime victim” as “a person directly and proximately harmed” by a federal offense or an offense in the District of Columbia.⁸ Thus, indirect purchasers of the goods or services affected by the antitrust violation are not crime victims under the terms of the CVRA. This interpretation squares nicely with the Supreme Court’s ruling in *Illinois Brick*, which prohibits indirect purchasers from recovering damages under the Sherman Act.⁹ But as of yet, no court has had occasion to rule on the specific issue of whether indirect purchasers are CVRA “crime victims.”¹⁰

Nor has a court ruled on whether alleged victims must show an actual injury from the antitrust violation before being afforded the rights provided in the CVRA. While the CVRA’s definition of a “crime victim” as someone “harmed” by a crime seems to require such a showing, the evidence and testimony necessary to prove such harm—as antitrust practitioners well know—would undoubtedly “complicate or prolong the proceedings,” a situation that the CVRA directs courts to avoid in applying the statute.¹¹ Another problem with requiring alleged victims to establish harm from the antitrust violation is that a ruling by a criminal court on issues such as harm and causation may have unintended collateral effects in related civil litigation.

How do courts and the Antitrust Division comply with the CVRA in antitrust cases that may involve large numbers of alleged victims?

The CVRA provides that where the number of crime victims makes it impracticable to accord all of them their rights under the Act, “the court shall fashion a reasonable procedure to give effect to [the CVRA] that does not unduly complicate or prolong the proceedings.”¹² With more and more frequency, the Division has sought court approval of a procedure for crime victim notification at the outset of the proceedings. For example, in connection with the hydrogen peroxide prosecutions, the Division submitted a motion to the court arguing “that the number of ‘crime victims’ directly and proximately harmed by the hydrogen peroxide conspiracy would make it impracticable for the government to provide to each victim individual notices about every public court pro-

⁵ *Id.* § 3771(c) (1).

⁶ U.S. Dep’t of Justice, Antitrust Div., Victims’ Rights Web page, <http://www.justice.gov/atr/victim/index.html>.

⁷ U.S. Dep’t of Justice, Antitrust Div., Victims’ Rights—Overview, <http://www.justice.gov/atr/victim/vroverview.htm>.

⁸ 18 U.S.C. § 3771(e).

⁹ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹⁰ The court in *United States v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1051 (N.D. Cal. 2005), came close to taking a position on this issue, stating that the victim of the alleged antitrust offense was the “public at large.” But the court noted that the civil plaintiffs suing the defendant were those members of the public at large “directly and proximately harmed as a result of the commission of the antitrust violation.”

¹¹ 18 U.S.C. § 3771(d) (2).

¹² *Id.*

[I]dentifying the “victims” of antitrust offenses is probably the most daunting procedural task in applying the CVRA to antitrust matters.

ceeding.”¹³ As such, the Division proposed providing “reasonable notice of the proceeding on the internet, at the publicly accessible web site for the Antitrust Division.”¹⁴ This approach has been adopted by courts and the Division on a number of occasions.

What does it mean for a crime victim to be “reasonably heard” at public proceedings?

The leading case on the CVRA right to be reasonably heard is the Ninth Circuit’s decision in *Kenna*. The *Kenna* court ruled that “[v]ictims now have an indefeasible right to speak, similar to that of the defendant.”¹⁵ In so holding, the court found that the district court violated the CVRA by limiting a victim to written submissions regarding the impact of the defendant’s conduct.¹⁶ To remedy this deficiency, the Ninth Circuit ordered the district court to consider a motion to reopen sentencing being “cognizant that the only way to give effect to [the alleged victim’s] right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing.”¹⁷ Given this ruling, it behooves defendants and prosecutors interested in sentencing finality and certainty to ensure that the court and government give alleged crime victims an opportunity to speak during sentencing proceedings, even if it prolongs the sentencing phase.

What is the “right not to be excluded” from public proceedings?

Although the right not to be excluded from public proceedings seems rather straightforward, it has been interpreted to also require the public disclosure of information in a criminal antitrust case. In *United States v. Crompton Corp.*, which related to the Antitrust Division’s investigation of the rubber chemicals industry, the defendant sought to redact the name of one of its employees “carved out” of the company’s plea agreement with the government.¹⁸ The defendant argued that if the employee’s name were made public, he would be exposed to liability in the pending civil matters against the company and the disclosure would negatively impact the company’s share price. Despite these concerns, the court ruled that redacting the employee’s name would violate the CVRA and abrogate crime victims’ “‘right not to be excluded’ from any public court proceedings.”¹⁹ In doing so, the court noted that, under the CVRA, it must be “particularly sensitive” to ensuring that crime victims “are given full access to the proceedings and the Plea Agreement.”²⁰

Does the “reasonable right to confer” with government attorneys give crime victims a seat at the table during plea negotiations?

No, but as a practical matter, the “reasonable right to confer” with prosecuting attorneys has given crime victims and their attorneys more access than they previously had. Based in part on the CVRA’s statement that it shall not be construed to impair “prosecutorial discretion,”²¹ several

¹³ Motion to Establish Procedure for Crime Victim Notification Pursuant to 18 U.S.C. § 3771, *United States v. Solvay S.A.*, No. CR 06-0159 MMC (N.D. Cal. Mar. 22, 2006), available at <http://www.justice.gov/atr/cases/f215400/215471.htm>.

¹⁴ *Id.*

¹⁵ *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1016 (9th Cir. 2006).

¹⁶ *Id.* at 1014–16.

¹⁷ *Id.* at 1017.

¹⁸ *United States v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1048 (N.D. Cal. 2005). In corporate plea agreements, the Antitrust Division has consistently identified “carve outs,” those employees not covered by the non-prosecution protections contained in the plea agreement.

¹⁹ *Id.* at 1051.

²⁰ *Id.*

²¹ 18 U.S.C. § 3771(d) (6).

courts have ruled that the CVRA does not create a right for crime victims to participate in plea negotiations. For example, one district court found that the CVRA “does not give the victims of crime veto power over any prosecutorial decision, strategy or tactic regarding bail, release, sentencing or parole.”²² The Second Circuit has taken a similar view: “Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.”²³ Likewise, courts have found that the CVRA does not give crime victims a right to access non-public documents, such as presentence reports.²⁴ These decisions are buttressed by the Federal Rules of Criminal Procedure and the Federal Rules of Evidence, both of which demand that grand jury proceedings and plea negotiations remain confidential.²⁵

Despite this, attorneys representing civil antitrust plaintiffs have used the CVRA’s “reasonable right to confer” with prosecuting attorneys as a basis for requesting meetings with the Antitrust Division to discuss the Division’s investigation and potential plea agreements. In what appears to be an abundance of caution, as well as a nod to the CVRA’s intent, the Antitrust Division has entertained many of these requests.²⁶

Going even further, some civil antitrust plaintiffs—self-declared as crime victims—have attempted to disrupt ongoing plea negotiations or block acceptance of plea agreements based on the Division’s alleged failure to abide by the CVRA, similar to the victims’ efforts in *Kenna*.²⁷

[T]he CVRA does not give crime victims “veto power” over sentencing decisions nor does it impair prosecutorial discretion.

Why would civil plaintiffs seek to disrupt a plea agreement between the Antitrust Division and a defendant?

Typically, a plea deal between the Division and one of its targets is quite welcome to antitrust plaintiffs because a guilty plea can be used as evidence of liability in related civil litigation. But some civil antitrust plaintiffs have taken the position that certain plea agreements are too limited with respect to the admitted conduct or the volume of affected commerce. If the scope of the prosecution is not to their liking, these plaintiffs move under the auspices of the CVRA to prevent the entry of the plea, asserting that the Division failed to take victims’ views into account in negotiating the language of the plea agreement and the recommended sentence.

Is this a permissible use of the CVRA?

No, for at least two reasons. First, the CVRA does not confer a right to interfere with plea negotiations or to block the acceptance of a guilty plea. As discussed above, the CVRA does not give crime victims “veto power” over sentencing decisions nor does it impair prosecutorial discretion. Second, in most cases, trying to block a plea agreement because it is not broad enough may be an obvious attempt to gain a tactical advantage in related civil litigation, rather than an exercise of legitimate rights under the CVRA. The fact that these efforts are orchestrated by lawyers who have filed civil claims regarding the same conduct makes the purpose of these efforts seeming-

²² *United States v. Rubin*, 558 F. Supp. 2d 411, 424 (E.D.N.Y. 2008).

²³ *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 564 (2d Cir. 2005). *But see In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (finding that the district court’s sealing of an *ex parte* order violated an identifiable victim group’s right to notice under the CVRA).

²⁴ *In re Siler*, 571 F.3d 604, 610 (6th Cir. 2009); *United States v. Coxton*, 598 F. Supp. 2d 739, 741 (W.D.N.C. 2009).

²⁵ FED. R. CRIM. PROC. 6(e), 11(f); FED. R. EVID. 410.

²⁶ Indeed, the Division Web site encourages alleged victims to contact the Division regarding ongoing investigations. U.S. Dep’t of Justice, Antitrust Division, Victims’ Rights—Contacts, <http://www.justice.gov/atr/victim/vrcontacts.htm>.

²⁷ *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1013 (9th Cir. 2006) (seeking an order vacating the district court’s sentence pursuant to a plea agreement).

ly clear. Generally speaking, scenarios where civil antitrust plaintiffs attempt to block negotiated plea agreements do not involve people and families injured by violent crimes or bankrupted by scam artists. Instead, they involve, for the most part, entities or individuals hand-selected by plaintiffs' counsel and who have a modest (if not miniscule) financial stake—and no personal stake—in the outcome of the criminal or civil proceedings.

Given these realities, it is difficult to see how these civil plaintiffs have a “right” to be a part of the criminal process, much less to disrupt or interfere with the scope or acceptance of a defendant's criminal plea. The pending civil litigation is specifically intended to be the means by which these plaintiffs' alleged injuries and rights can be fully redressed. As such, it is reasonable for courts to recognize the pendency of civil actions when determining whether and how to afford CVRA rights to civil plaintiffs.

Can district court decisions regarding the CVRA be appealed?

Yes. In fact, the CVRA provides for an expedited appeals process. If a district court in a criminal proceeding denies relief sought under the CVRA, “the movant may petition the court of appeals for a writ of mandamus.”²⁸ From there, the court of appeals “shall take up and decide such application forthwith within 72 hours after the petition has been filed.”²⁹

Can we expect to see more CVRA litigation involving antitrust violations?

The Ninth Circuit believes so: “As victim participation in the criminal justice system becomes more common, we expect CVRA claims to become more frequent.”³⁰ It remains to be seen whether this expectation will pan out with antitrust violations given the issues identified above. But it is clear that the Antitrust Division and antitrust defendants see the CVRA as a significant consideration in resolving criminal antitrust investigations. It is also clear that as long as plaintiffs' counsel view the CVRA as a tool for nudging criminal antitrust investigations in a direction that provides benefits in related civil litigation, these efforts will continue. ●

²⁸ 18 U.S.C. § 3771(d) (3).

²⁹ *Id.*

³⁰ *Kenna*, 435 F.3d at 1018.

Market Definition, Upward Pricing Pressure, and the Role of Courts: A Response to Carlton and Israel

Gopal Das Varma

In Dennis Carlton and Mark Israel's essay, *Will the New Guidelines Clarify or Obscure Antitrust Policy?* in the October 2010 issue of *The Antitrust Source*, the authors identify several elements of the recently released 2010 Horizontal Merger Guidelines¹ that they claim could make "antitrust analysis more opaque rather than more clear" to courts and foreign antitrust agencies.² Among other things, the authors express concern that a reduced emphasis on market definition and an "overemphasis" on particular analytical techniques, like Upward Pricing Pressure (UPP), will deprive courts and foreign antitrust agencies of an "easy to use tool" by replacing market definition with newer techniques that are "in vogue today" but which lack empirical support and "may fall out of favor tomorrow based on additional research."³ The authors "fear" that courts and foreign antitrust agencies lack the kind of formal training in economics that is needed to understand the limitations of these new techniques. Thus, foreign agencies may apply the newer techniques naively to challenge mergers that would have enhanced consumer welfare and courts may end up rendering arbitrary and highly discretionary rulings in litigated merger challenges.

The authors' objections misapprehend the actual environment in which courts operate, while at the same time overplay the burdens and risks of using UPP as a tool in merger evaluations.⁴

Alleged Adverse Effects of Downplaying the Use of Market Definition

Unlike its predecessor, the 2010 Guidelines do not recommend a rigid five-step analytical framework, the first step of which is market definition and measurement of market concentration.⁵ Nevertheless, market definition and measurement of market concentration remain important elements of analysis in the 2010 Guidelines.⁶ In particular, the analysis of coordinated effects remains

■ **Gopal Das Varma** is a Principal in the Washington, DC office of Charles River Associates. The views expressed in this article are the author's and do not represent the views of Charles River Associates or its clients.

¹ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) [hereinafter 2010 Guidelines], available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

² Dennis W. Carlton & Mark Israel, *Will the New Guidelines Clarify or Obscure Antitrust Policy?*, ANTITRUST SOURCE, Oct. 2010, <http://www.abanet.org/antitrust/at-source/10/10/Oct10-Carlton10-21f.pdf>.

³ *Id.* at 3.

⁴ I do not specifically address the authors' concerns with regard to the effect of the 2010 Guidelines on foreign antitrust agencies except to the extent that if the underlying reason for the authors' concern is that both of these audiences lack formal training in economics, then some of my comments would apply to the authors' concerns with regard to foreign antitrust agencies as well. In any case, it may be reasonable to believe that when revising the U.S. Guidelines, improving merger policy and merger enforcement in the United States was likely a higher priority than clarifying antitrust principles for foreign agencies.

⁵ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, rev. 1997) [hereinafter 1992 Guidelines], available at <http://www.justice.gov/atr/public/guidelines/hmg.pdf>.

⁶ 2010 Guidelines, *supra* note 1, §§ 4, 5.

firmly grounded in structural considerations.⁷ It is only with regard to analysis of unilateral price effects in mergers involving differentiated products that the 2010 Guidelines can be described as downplaying the use of market definition when it states, “[t]he Agencies rely much more on the value of diverted sales than on the level of HHI for diagnosing unilateral price effects in markets with differentiated products.”⁸

The Role of Courts in Defining Markets

Carlton and Israel claim that market definition is “easy to use. One does not need a Ph.D. in economics to understand how to use it *once it has been established*. This means that courts or competition authorities not staffed with lots of highly trained economists can have some grounding in making antitrust decisions.”⁹

Yet in merger cases that are litigated, the courts do not find themselves “using” market definition that has been “established” and agreed upon by the litigating parties; instead, the courts almost invariably find themselves having to evaluate the merits of two different market definitions proffered by the two litigating parties in order to decide which, if either, is appropriate for purposes of assessing a merger’s potential competitive effects. The structural paradigm in which market shares are used to determine whether or not a merger is presumptively anticompetitive gives the Agencies an incentive to define markets narrowly while it gives the merging parties an incentive to define markets broadly. Battles over market definition have been legion.¹⁰

A recent well-known example of a court having to choose between two different definitions of the relevant market, with drastically different market share implications, is the Federal Trade Commission’s challenge to the acquisition of Wild Oats by Whole Foods. In that case, the FTC claimed that the relevant market for evaluating competitive effects of the merger consisted of premium natural organic supermarkets (PNOS).¹¹ Under a PNOS market definition, the acquisition constituted a merger to monopoly in several distinct geographic markets around the country and a highly concentrating merger in some others.¹² Whole Foods, however, took the position that the appropriate relevant market included conventional supermarkets as well.¹³ The FTC and Whole Foods each offered the opinion of expert economists who sought to defend their respective market definitions. To determine which of these two market definitions was more appropriate, the courts had no choice but to evaluate the merits of each expert’s market definition approach.¹⁴

Since litigating parties rarely reach a consensus as to the definition of the relevant market—and, under the structural paradigm, they have no incentive to do so—courts have been doing more than

⁷ *Id.* § 7.1.

⁸ *Id.* § 6.1.

⁹ Carlton & Israel, *supra* note 2, at 2 (emphasis added).

¹⁰ Jonathan Baker notes: “Throughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue.” Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129 (2007). For examples of litigated merger cases in which the courts have had to evaluate the merits of conflicting market definitions advanced by the litigating parties, see *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1166–67 (N.D. Cal. 2004); *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 188 (D.D.C. 2001); and *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

¹¹ Complaint ¶¶ 34–35, *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007) (No. 07-01021-PLF), available at <http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf>.

¹² *Id.* ¶ 43.

¹³ *Whole Foods Market*, 502 F. Supp. 2d at 15.

¹⁴ *Id.* at 34–46.

just “using” market definition “once it has been established”; they have been playing a decisive role in establishing market definition. Thus, the de-emphasis of market definition in the 2010 Guidelines will not rob the courts of some universally agreed upon and “easy to use” black box.

Arbitrary and Discretionary Court Rulings. As to Carlton and Israel’s claim that, “[t]o eliminate Market Definition would likely lead to arbitrariness and discretionary havoc in courts,” the use of market definition itself does not have a history that is free from “arbitrary” judicial decisions.¹⁵ The authors concede that “[t]o identify rigorously the proper market definition requires applying sophisticated econometrics to data.”¹⁶ However, many courts—presided over by generalist judges—lack the economic sophistication that is required to evaluate the merits of competing econometric analyses of market definition that are submitted by opposing experts. It is, therefore, not inconceivable that courts might very well issue discretionary rulings based on subjective and arbitrary arguments.

[T]he de-emphasis of market definition in the 2010 Guidelines will not rob the courts of some universally agreed upon and “easy to use” black box.

Here, again, *Whole Foods* serves as an illustrative example. The court of appeals held that the lower court had erred by accepting the defendants’ expert opinion that the relevant market should be defined by the purchasing behavior of marginal customers of Whole Foods who cross-shop at conventional supermarkets.¹⁷ Instead, in the majority opinion of the court of appeals, “core customers” of Whole Foods—those who consider only another premium natural organic supermarket to be the next best alternative—were unlikely to shift their purchases to conventional supermarkets in response to a (hypothetical) price increase following the merger, and thus those core customers could likely constitute a relevant market.¹⁸

The authors do not explain why de-emphasizing market definition and instead emphasizing metrics that seek to measure actual effects (in particular, the value of diverted sales) would lead to any greater incidence of arbitrariness and discretionary rulings in courts.¹⁹

Alleged Overemphasis on Particular Analytical Techniques: UPP

Carlton and Israel acknowledge that the 2010 Guidelines do not refer explicitly to the specific UPP test that was proposed in an article by Joseph Farrell and Carl Shapiro, but they take issue with the mention in the 2010 Guidelines of the phrase “upward pricing pressure.”²⁰ The authors state that “[i]t therefore seems highly likely that courts, practitioners, and foreign antitrust agencies will see the discussion of unilateral effects as implicitly referencing and endorsing UPP as a method for the review of differentiated products mergers.”²¹ The authors then add: “Despite its simple

¹⁵ Carlton & Israel, *supra* note 2, at 2.

¹⁶ *Id.* at 1.

¹⁷ *Whole Foods Market*, 548 F.3d at 1037, 1041.

¹⁸ *Id.*

¹⁹ The value of diverted sales of a merging firm’s product measures the extent by which the merger increases the opportunity cost of selling the product, based on pre-merger margins. All else being equal, an increase in the opportunity cost of selling a product exerts upward pressure on its price.

²⁰ The specific UPP test proposed by Farrell and Shapiro consists of subtracting a standard efficiency credit from the value of diverted sales in order to calculate any net upward pricing pressure. See Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, B.E. J. THEORETICAL ECON., POLICIES & PERSPECTIVES, vol. 10, issue 1, art. 9 (2010), <http://www.bepress.com/bejte/vol10/iss1/art9>.

²¹ Carlton & Israel, *supra* note 2, at 3–4.

form, proper application of the UPP methodology raises issues that may create difficulties for all but the most sophisticated users.”²²

In the following, I first explain why employing the value of diverted sales as a metric is neither a big picture change in how mergers are evaluated, nor an over emphasis on any particular analytical technique relative to market definition. Thus, if courts have enough economic sophistication to understand market definition, they should have no difficulty in following an analysis based on the value of diverted sales. I then explain why the specific Farrell-Shapiro UPP test—which is not referenced in the 2010 Guidelines—is unlikely to become the principal basis on which courts may have to rule as to whether any given merger is anticompetitive. Thus, any inability on the part of courts to appreciate the subtler limitations of the specific Farrell-Shapiro UPP test is unlikely to be the reason for any “discretionary havoc” in litigated merger cases.

The 2010 Guidelines Do Not Change the Fundamental Balancing Act in Merger Analysis. At a fundamental level, the 1992 Guidelines recommended that merger analysis be undertaken in two broad steps. First, any potential incentives of the merging firms to increase prices following the merger should be assessed based on considerations of demand-side substitutability alone. Second, any such incentives should then be balanced against potential procompetitive supply-side considerations, i.e., merger-specific efficiencies, the potential for de novo entry, and the potential for product re-positioning by incumbent firms. The 2010 Guidelines have not changed this fundamental balancing act. Unlike the 1992 Guidelines, the 2010 Guidelines recommend that the first step—assessing the extent to which a merger might create incentives for the merging firms to increase prices based on considerations of demand-side substitutability alone—be undertaken not by using market definition and measurement of market concentration but by using a different metric, viz., the value of diverted sales.

To my knowledge, there is no known theoretical relationship between change in market concentration and incentives of merging firms to increase prices following a merger involving differentiated products.²³ On the other hand, using the value of diverted sales as a measure of incentives to raise prices following a differentiated products merger (before supply-side considerations have been taken into account) provides some conceptual foundation to the exercise by appealing directly to the theory of how a merger can change the merging firm’s pricing incentives.²⁴

Measuring Value of Diverted Sales Will Not Impose a Heavier Analytical Burden on Courts Relative to Defining Relevant Markets. Even though the Guidelines are not binding on them, courts have largely embraced the hypothetical monopolist paradigm enunciated in the Horizontal

²² *Id.* at 4.

²³ The authors state (presumably with reference to the way courts or foreign antitrust agencies, which lack “lots of highly trained economists,” approach merger analysis) that, “[f]requently, the initial step in a merger analysis is defining a market and then seeing whether the resulting increase in concentration post-merger would likely lead to an increase in price.” Carlton & Israel, *supra* note 2, at 1. The only well-known theoretical model that I am aware of in which the Herfindahl-Hirschman Index (HHI)—a commonly used measure of market concentration—bears a conceptual relationship to prices (to be precise, to the average variable margin) is the Cournot model, which is used to study imperfect competition in homogeneous goods markets. Even in the Cournot model, the merger induced change in HHI—which is measured by allocating to the merged firm the combined pre-merger market shares of the merging firms—bears no conceptual relationship to the change in price following the merger. See Joseph Farrell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, 80 AM. ECON. REV. 107 (1990).

²⁴ See *supra* note 19 for an explanation of how the value of diverted sales is related to merger induced change in pricing incentives.

*[T]reat[ing] the value
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analytical technique;
[it] is simply part of the
matrix of tools . . .*

Merger Guidelines as a way to define markets.²⁵ In any analytically sound undertaking of market definition, courts cannot begin to answer whether a hypothetical monopolist owning a group of products would find a price increase on one of its products profitable without measuring how much of any profits that it loses as a result of the price increase would likely be diverted/recaptured through additional sales of its other products. If Carlton and Israel believe that lay courts have sufficient sophistication to do that, then it is hard to see why courts are so wanting in economic sophistication that they cannot verify whether the value of diverted sales has been reasonably measured. The recommendation in the 2010 Guidelines that the Agencies treat the value of diverted sales rather than market concentration to be a more reliable predictor of unilateral effects does not overemphasize a particular analytical technique; the technique is simply part of the matrix of tools that are essential to undertake the proper definition of a relevant market.²⁶

Why Let the Perfect Be the Enemy of the Good? Carlton and Israel express that, somehow, use of the phrase “upward pricing pressure” in the 2010 Guidelines may cause “courts, practitioners, and foreign antitrust agencies” to embrace the specific UPP test that is described in Farrell and Shapiro’s paper.²⁷

As a specific concern with the UPP test, the authors point out that by looking at the pricing incentive of each of the merging firms’ products in isolation, the simplest version of the UPP test ignores feedback effects between the prices of these products and may, under some circumstances, overstate the price effects of a merger. The authors are correct that the simplest version of the UPP test does not account for full equilibrium price adjustments following a merger, be it for the merging firms’ products or those of non-merging firms. But I am not aware of any well-known, robust, and simple technique—something no more analytically complex than market definition—that could reliably predict the full equilibrium price effects of a merger.²⁸

Furthermore, Farrell and Shapiro clearly state in their paper that, “[i]n the pure form of the UPP test, a merger is *flagged for further scrutiny* if the net effect of the two forces creates upward pricing pressure.”²⁹ Thus, in their view, the UPP test is not meant to be used as the last word on

²⁵ Gregory J. Werden comments that “Courts have noted that they are not bound by the Merger Guidelines, but in many of the same opinions they proceeded to endorse or apply the Guidelines hypothetical monopolist paradigm. Moreover, no case has explicitly rejected the Guidelines’ approach, nor has any decision not subsequently reversed on appeal found a relevant market that the court specifically indicated could not be supported by the hypothetical monopolist test.” Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253, 263–64 (2003).

²⁶ The types of information needed to measure the value of diverted sales are no different from the types of information needed to properly define relevant markets. In describing unilateral effects that may arise in mergers involving differentiated products, the 2010 Guidelines state: “The Agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. . . . *The types of evidence relied on often overlap substantially with the types of evidence of customer substitution relevant to the hypothetical monopolist test.*” 2010 Guidelines, *supra* note 1, § 6.1 (emphasis added).

²⁷ Carlton & Israel, *supra* note 2, at 3–4.

²⁸ One way in which the full equilibrium price effects of a merger can be predicted is by use of a full-blown merger simulation model. The authors point out that “[t]here is only weak empirical evidence establishing the usefulness of merger simulation as a tool to predict anti-competitive mergers.” Carlton & Israel, *supra* note 2, at 4. I do not disagree with the authors’ claim. However, I fail to see why in this regard the 2010 Guidelines should be of concern to the authors. The 2010 Guidelines state: “The Agencies do not treat merger simulation evidence as *conclusive in itself*. . . .” 2010 Guidelines, *supra* note 1, § 6.1 (emphasis added). The 2010 Guidelines’ acknowledgement that merger simulation evidence is not conclusive in itself would appear to suggest that the Agencies will be unlikely to bring merger challenges in court based solely on the predictions of merger simulations. The presence of other corroborative evidence should reduce the risk that a court would render a wrong verdict in a merger case simply because it may lack the economic sophistication needed to stress test a merger simulation model.

²⁹ Farrell & Shapiro, *supra* note 20, at 2 (emphasis added).

whether a merger will likely have unilateral price effects; rather, it is a rough and ready screen that is meant to identify mergers for further scrutiny. It would appear to be highly unlikely for an Agency to bring a merger challenge in court based only on the results of a UPP calculation. Thus, a court would appear to be highly unlikely to find itself in the position of having to determine whether a merger is illegal based only on the value of a UPP statistic.

The claim that a court may find it difficult to discern the subtler limitations of the specific UPP test that was proposed by Farrell and Shapiro can then hardly be a reason to continue to base merger enforcement on market concentration—a metric that can have scant economic relevance to price effects in mergers involving differentiated products.³⁰ In this sense, the authors' misgivings about the use of the phrase "upward pricing pressure" in the 2010 Guidelines appear to be a case of allowing the perfect to be the enemy of the good.³¹

Conclusion

When the Agencies announced the Guidelines Review Project that led to the 2010 Guidelines, one of the declared goals was to "incorporate *learning* and *experience* gained since 1992."³² During this time, the DOJ and the FTC have seen that challenging mergers between firms that produce differentiated products using the old structural approach of market definition and measurement of market concentration can sometimes lead to arbitrary outcomes in court—in part, because of subjective and discretionary judgment used by some courts regarding how to define relevant markets. Relevant markets defined in such manner can turn out to be too broad for HHI measures to rise to the level that would enable a structural presumption of unilateral harm ("experiences"). At the same time, theoretical research in the economics of competition among firms that produce differentiated products has shown that the change in pricing incentives following a merger is directly related to cross-price elasticities (diversion ratios) between the merging firms' products and their relative margins.³³ Section § 6.1 of the 2010 Guidelines that is devoted to unilateral effects in mergers involving differentiated products is a natural reflection of these experiences and learning. ●

³⁰ Carl Shapiro notes: "if products 'in' the market are but distant substitutes for the merging products, their significance may be overstated by inclusion to the full extent that their market share would suggest; and if products 'out' of the market have significant cross-elasticity with the merging products, their competitive significance may well be understated by their exclusion." Carl Shapiro, *Mergers with Differentiated Products*, ANTITRUST, Spring 1996, at 23, 28.

³¹ As another example of overemphasis on analytical techniques, the authors claim that the new HHI thresholds lack empirical support, and that "the value of any such general HHI thresholds for merger review is extremely limited since we know the effect of industry concentration on price varies enormously across industries." Carlton & Israel, *supra* note 2, at 3. I do not disagree with the authors' claim. That said, I fail to understand why the authors nevertheless feel that the alleged de-emphasis on market definition may obscure antitrust policy, especially with respect to unilateral effects analysis of mergers involving differentiated products. The authors fail to state exactly what use of a relevant market they have in mind other than measuring HHI.

³² See Horizontal Merger Guidelines: Questions for Public Comment 1 (Sept. 22, 2009) (emphasis added), available at <http://www.ftc.gov/bc/workshops/hmg/hmg-questions.pdf>, at 1 (emphasis added).

³³ See, for example, the post-merger necessary conditions for equilibrium prices that are derived in Gregory J. Werden & Luke M. Froeb, *Unilateral Competitive Effects of Horizontal Mergers*, in THE HANDBOOK OF ANTITRUST ECONOMICS 51 (Paolo Buccirossi ed., 2008).

Response to Gopal Das Varma's *Market Definition, Upward Pricing Pressure, and the Role of Courts: A Response to Carlton and Israel*

Dennis W. Carlton and Mark Israel

In our article, *Will the New Guidelines Clarify or Obscure Antitrust Policy?*, published in the October 2010 issue of *The Antitrust Source*,¹ we praised the new Horizontal Merger Guidelines² as an excellent summary of how the government agencies currently analyze mergers, but also raised concerns about three ways in which the 2010 Guidelines may be unclear to courts and foreign antitrust agencies, which may lack economic sophistication. Those concerns are: de-emphasis of market definition as a tool in antitrust analysis, failure to emphasize sufficiently the role of non-price competition, and excessive focus on particular techniques (such as “upward pricing pressure”) rather than general principles for antitrust analysis.

In his reply to our article, Gopal Das Varma takes issue with our critique of the 2010 Guidelines. In particular, he argues that rigorous market definition can itself be a difficult technique for courts to implement or evaluate. He also argues that, for mergers involving differentiated products, it makes sense to shift away from market definition and toward “metrics that seek to measure actual effects,” particularly the “value of diverted sales,” an index that, according to the 2010 Guidelines (p. 21), “can serve as an indicator of the upward pricing pressure . . . resulting from the merger.”³

In our view, Das Varma fundamentally misinterprets our main points and thus fails to address our true concerns. In this response, we attempt to clarify our key concerns.⁴

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Dennis W. Carlton is the Katherine Dusak Miller Professor of Economics, Booth School of Business, University of Chicago; Senior Managing Director, Compass Lexecon; Research Associate, National Bureau of Economic Research.

Mark Israel is the Senior Vice President and Managing Director, Compass Lexecon, Washington D.C.

De-emphasis of Market Definition

Das Varma appears to interpret our concern over the de-emphasis of market definition as a call for agencies and courts to undertake a rigorous approach to market definition and then to compute market concentration as part of a “structural paradigm” that can determine whether a merger is “presumptively anticompetitive.”⁵ We are calling for no such thing. To the contrary, we believe

¹ Dennis Carlton & Mark Israel, *Will the New Guidelines Clarify or Obscure Antitrust Policy?*, ANTITRUST SOURCE, Oct. 2010, <http://www.abanet.org/antitrust/at-source/10/10/Oct10-Carlton10-21f.pdf>.

² 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> [hereinafter 2010 Guidelines].

³ Gopal Das Varma, *Market Definition and Upward Pricing Pressure: A Response to Carlton and Israel*, ANTITRUST SOURCE, Dec. 2010, at 3, <http://www.abanet.org/antitrust/at-source/10/12/Dec10-DasVarma12-21f.pdf>.

⁴ For a more complete statement of our views, see the comments that one of us filed on the 2010 Guidelines. Dennis W. Carlton, Comment on Department of Justice and Federal Trade Commission Proposed Horizontal Merger Guidelines (June 4, 2010), available at <http://www.ftc.gov/os/comments/hmgrevisedguides/548050-00034.pdf>.

⁵ Das Varma, *supra* note 3, at 2.

market definition is not typically the result of a rigorous or formulaic procedure.⁶ Instead, in our view, market definition is a crude first step in an antitrust analysis, one that should often be followed by the use of additional analyses. Any attempt to characterize our approach as calling for reliance only on the crude construct of market definition combined with the application of threshold concentration levels creates a straw man. Rather, our point is simply that market definition is often a highly useful first step—particularly for courts, foreign antitrust agencies, or others with limited antitrust experience.

Before describing our concerns with the treatment of market definition in the 2010 Guidelines, we should be clear that we agree with the 2010 Guidelines' statement that "[e]ven when the evidence necessary to perform the hypothetical monopolist test quantitatively is not available, the conceptual framework of the test provides a useful methodological tool for gathering and analyzing evidence" (Section 4.1.3). We also support the wide range of qualitative and quantitative evidence (e.g., buyer surveys, business documents, industry participants' pricing behavior) listed in this section as potentially useful in market definition.

However, as noted in footnote 10 of our October 2010 article, in addition to these sources of evidence, we believe that appropriate empirical tests should also be used to ask whether, using any candidate market definition, higher market shares and concentration (in particular areas or time periods) are in fact correlated with margins. In this way, government agencies and courts can confirm whether a particular market definition makes sense via an appropriate empirical test.⁷

In addition, we are concerned with the statement in Section 4.1.4 of the 2010 Guidelines (on differentiated products) that "[d]iagnosing unilateral price effects based on the value of diverted sales need not rely on market definition." This statement could be read—perhaps more broadly than the authors of the 2010 Guidelines intended—to suggest that in many cases, market definition can be skipped altogether. In our view, given the value that market definition can often have as a useful (though admittedly crude) first step, this would be a costly mistake.

Importantly, market definition can serve as a useful screen for frivolous antitrust investigations. If the quantitative and qualitative evidence laid out in the 2010 Guidelines points clearly toward a particular market definition, *and especially if* this definition can be confirmed with empirical tests, then it is appropriate to evaluate the merger based on the pre- and post-merger market shares using that market definition. If the share levels and changes are low, then this should end the antitrust analysis.⁸ In our view, the ability to screen out frivolous antitrust cases in this way is an enormous benefit that should not be lost by giving government agencies or courts more leeway to ignore market definition.

Of course, Das Varma is correct that in other cases—perhaps including Whole Foods' acquisition of Wild Oats—available evidence may not resolve the controversy about the proper definition of the market or, even if no such controversy exists, may not resolve whether the resulting pre-

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⁶ For more on this topic, see, for example, Dennis W. Carlton, *Market Definition: Use and Abuse*, COMPETITION POL'Y INT'L, Spring 2007, at 3.

⁷ For more on such empirical tests, see Dennis W. Carlton, *Use and Misuse of Empirical Methods in the Economics of Antitrust*, Keynote Address, Annual Conference of the Competition Law and Policy Institute of New Zealand (Aug. 2010).

⁸ As we noted in our October 2010 article, *supra* note 1, the standard for how low the shares need to be to end the investigation should not necessarily be based on uniform HHI cutoffs. Rather, if at all possible, the empirical tests described above—applied to the specific industry in question—should be used to identify the range of market shares/concentration levels for which changes in shares (on the order of those resulting from the merger) have not historically led to significant price increases. If such empirical evidence is not available, then it does seem reasonable to rely on the low threshold in the 2010 Guidelines, absent countervailing factors.

dicted change in market concentration should trigger concern. We agree that in such cases it is appropriate to consider additional evidence on the likely competitive effects of the transaction, rather than limiting debate to the appropriate market definition and its implications for threshold concentration levels. Market definition is a first step: it will not resolve the antitrust concerns in all cases, but that is hardly a reason to skip the step altogether and thus potentially lose the power of the screen where it does apply.

Finally, we note that the fact that market definition is controversial in many cases (and that analysis is often required beyond this first step) does not mean that evaluation of market definition is not useful to the remainder of the investigation. Quite the opposite is true: as we have already indicated, and as the 2010 Guidelines themselves note, market definition tees up the questions at the heart of all merger analyses: which firms constrain the prices of the merging parties and to what extent does the merger reduce the power of those constraints? In the Whole Foods matter, the market definition debate isolated a critical question regarding the extent to which Whole Foods and Wild Oats pricing was constrained by “conventional supermarkets.” And there is no sense in which market definition asked this question in the wrong way—to the contrary, to prove its case, the government would have needed to demonstrate that the merger of Whole Foods and Wild Oats would lead to a significant price increase, which is precisely the same thing as saying that the market is narrow and concentration is large under the 2010 Guidelines’ (hypothetical monopolist) approach to market definition. In our view, by setting this critical question up in a way that focuses on which firms are most relevant to constraining prices (rather than jumping right to cross-elasticities, diversion ratios, or other more complicated metrics), market definition often provides a more manageable framework for courts and others to grapple with available evidence.

Focus on Upward Pricing Pressure

Das Varma also takes issue with our concern about the emphasis in the 2010 Guidelines on the upward pricing pressure (UPP) method for evaluating mergers.⁹ Once again, he does not address our actual concerns. In particular, much of his response on this point consists of a defense of the use of cross-price elasticities, diversion ratios, and the UPP test (or its more sophisticated counterpart, merger simulation) as part of antitrust analyses.¹⁰ We agree that these techniques can be useful; indeed, we frequently use them ourselves (along with many other techniques) as part of a complete antitrust analysis. However, our concern is that specifically identifying the UPP technique in the Guidelines will elevate its use over that of other techniques and effectively guarantee that it will be used on a regular basis as evidence in antitrust cases. As a result, the use and development of other techniques may be discouraged.

⁹ Das Varma notes that “the 2010 Guidelines do not refer explicitly to the specific UPP test that was proposed in an article by Joseph Farrell and Carl Shapiro.” Das Varma, *supra* note 3, at 3. Though possibly merely a semantic observation, his statement seems to imply that we are wrong to say that the 2010 Guidelines are endorsing the UPP approach of Farrell and Shapiro. It is true that the 2010 Guidelines contain no explicit cite to Farrell and Shapiro’s paper on the topic. See Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, B.E. J. THEORETICAL ECON.: POLICIES & PERSPECTIVES, vol. 10, issue 1, art. 9 (2010), <http://www.bepress.com/bejte/vol10/iss1/art9>. However, as we noted in our October 2010 article, *supra* note 1, the 2010 Guidelines refer at some length to the specific computations outlined in Farrell and Shapiro’s paper. See 2010 Guidelines, *supra* note 2, at 21. In our experience, it appears now to be common practice to present these computations to the antitrust agencies as part of economic presentations on mergers. Hence, as we predicted, the effect of the 2010 Guidelines has been to emphasize this particular method for merger analysis.

¹⁰ Note that market definition is not divorced from the concepts of elasticities, cross-elasticities, diversion ratios, and merger simulation. For the connection, see, for example, Carlton, *supra* note 6.

Das Varma is correct that UPP indexes would not be the only evidence on which a court would be asked to evaluate a merger,¹¹ but they will surely be important evidence in many cases, with their use supported by citation to the discussion in the 2010 Guidelines. This raises at least two specific concerns.

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First, using the upward pricing pressure technique as an important source of evidence in merger cases could be a recipe for confusion in the courts or at foreign antitrust agencies that lack economic sophistication. On this point, Das Varma himself refers to the value of diverted sales (the metric that underlies the UPP technique) as a metric “that seek[s] to measure actual effects” of mergers on prices.¹² It is not. In fact, contrary to the view of many highly sophisticated individuals to whom we have spoken, the UPP technique does not seek to measure the magnitude of a merger’s expected effect on prices. Even if all of the assumptions underlying the UPP technique are correct, the technique reveals nothing about the magnitude of any price effects from a merger but at most reveals only the direction (up or down, after accounting for efficiencies) of “pricing pressure.”¹³ Moreover, the UPP index for a specific product cannot even reveal whether the pricing pressure on that product is positive or negative—at best, the UPP technique says only that if the UPP indexes (net of merger-induced efficiencies) are positive for *all* products involved in the merger, then (if all other assumptions underlying the technique hold), the price of all these products will rise (by some undefined positive amount) following the merger.

In our experience, many individuals fall into the traps of viewing the UPP index for one particular product as predictive of the direction of the merger-induced price change for that product and/or viewing the magnitude of UPP indexes as predictive of the magnitude of price changes. Neither of these views is correct. Given that economists commit these errors, we are deeply concerned about what could happen in courts or at foreign antitrust agencies that lack economic sophistication.

Second, not only is there no theoretical basis to say the UPP index predicts the magnitude of merger-induced price changes, we know of no empirical evidence that the UPP index even serves as a useful guide. It could be that the UPP index is always a good predictor, that it is a good predictor only if certain conditions hold, or that it is rarely a good predictor. Based on the extant economic literature, we simply do not know.

We would have preferred that, rather than refer to specific analytical techniques, the 2010 Guidelines: (1) stressed general principles for antitrust analysis, (2) identified economic measures that are often useful in assessing merger effects (market shares, concentration levels, cross-price elasticities, diversion ratios), and (3) emphasized the need for empirical evidence to identify which specific economic measures and techniques are most predictive in particular industries. With this approach, the 2010 Guidelines could have noted that, in differentiated product markets, measures of cross-product substitution often provide information beyond that contained in concentration measures, with the ultimate question of which measures and techniques are most relevant for a given merger appropriately based on empirical evidence.¹⁴

¹¹ Das Varma, *supra* note 3, at 6.

¹² *Id.* at 3.

¹³ Farrell and Shapiro are themselves quite clear on this point. See Farrell & Shapiro, *supra* note 9, at 19.

¹⁴ As an example of the type of empirical evidence that would be useful, see Craig Peters, *Evaluating the Performance of Merger Simulation: Evidence from the U.S. Airline Industry*, 49 J.L. & Econ. 627 (2006). Peters examines previous airline mergers to ask whether merger simulations yield accurate predictions. He finds that simple regressions of price on measures of market concentration actually yield more accurate predictions, on average, than merger simulations, suggesting that in this industry, defining a market and computing concentration levels may yield useful evidence.

We stress that our comments indicate only what we view as the appropriate subject matter for merger guidelines. We, of course, value the development and refinement of new approaches and techniques for merger analysis and have often used these approaches and techniques before the antitrust authorities. However, in our view, the discussion of such techniques should be contained in periodic commentaries on the Guidelines (e.g., the 2006 Commentary),¹⁵ in which the antitrust agencies can provide timely updates on the techniques they currently find most useful, including a more fulsome discussion of the strengths and weaknesses of those techniques.

Conclusion

We appreciate the opportunity to engage in this dialogue with Das Varma. It is this type of discourse on the 2010 Guidelines that we hope will lead to more clarity on how the Guidelines should be used by courts, foreign antitrust agencies, and others. There are certainly many areas on which we agree with Das Varma, notably that market definition is a crude technique and that more sophisticated tests like upward pricing pressure or merger simulation can be useful. However, we do not believe that the limitations of market definition mean that it should be omitted from antitrust analysis, as we believe market definition provides a useful screen for frivolous antitrust investigation and a useful framework to help judges and foreign antitrust authorities avoid egregious errors. In contrast, we are concerned that reliance on the upward pricing pressure technique as a standard piece of evidence could *generate* errors. More generally, we disagree with the elevation of particular techniques over others in the Guidelines, particularly when the evidence supporting the superiority of such techniques is lacking. ●

¹⁵ U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006), available at <http://www.justice.gov/atr/public/guidelines/215247.htm>.

An Update on State RPM Laws Since *Leegin*

Michael A. Lindsay

Three years ago the U.S. Supreme Court's decision in *Leegin* overruled the long-standing federal per se rule against minimum resale price maintenance (RPM) agreements.¹ State laws on RPM agreements vary widely, and *Leegin* did not directly address the status of minimum RPM agreements under state law.² In 2007, *The Antitrust Source* published a chart providing relevant authorities for each of the fifty states. The chart was updated in October 2009,³ and it has remained available through *The Source's* home page since then.⁴

The Antitrust Source has updated the chart once again⁵ to reflect these significant 2010 developments:

California: The California Attorney General obtained a consent decree in *DermaQuest*.⁶ The complaint alleged a series of fairly clear RPM agreements. The "Distribution Agreement" provided that the distributor could not "resell Product in a price structure that yields a Product price at ultimate retail sale below Dermaquest's Suggested Retail Price"; the "Reseller Agreement" provided that resellers could not "resell Products in a price structure that yields a Product price at resale below DermaQuest's Suggested Retail Price."⁷ The consent judgment enjoined violations of the Cartwright Act, and it specifically required Dermaquest to inform its resellers that it was "immediately, unilaterally disavowing all parts of DermaQuest's distributor or resale agreement with you that purportedly obligated you to maintain certain resale prices for DermaQuest products."⁸

Kansas: The Kansas Supreme Court heard argument in *O'Brien v. Leegin* in September 2010. The lower court had held that under state law, the rule of reason applied to vertical minimum RPM agreements. The Kansas Attorney General filed an amicus brief urging per se treatment for RPM agreements.⁹ In the oral argument, the justices asked questions about whether the Kansas statu-

¹ *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).

² Michael A. Lindsay, *Resale Price Maintenance and the World After Leegin*, ANTITRUST, Fall 2007, at 1, 32 (2007), available at http://www.dorsey.com/files/upload/Antitrust_Lindsay_Fall07.pdf.

³ A short article accompanied the updated chart and described developments in the two years before the update. See Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, ANTITRUST SOURCE, Oct. 2009, <http://www.abanet.org/antitrust/at-source/09/10/Oct09-Lindsay10-23f.pdf>.

⁴ Michael A. Lindsay, *Overview of State RPM*, <http://www.antitrustsource.com> [under References].

⁵ The updated chart is appended to this article and also is also available at www.antitrustsource.com [under "References"].

⁶ Final Judgment Including Permanent Injunction (consent judgment), *People v. Dermaquest, Inc.*, Case No. RG 10497526 (Cal. Super. Ct. Alameda County Feb. 23, 2010).

⁷ Complaint ¶¶ 11, 12, *People v. DermaQuest, Inc.*, Case No. RG 10497526 (Cal. Super. Ct. Alameda County Feb. 23, 2010).

⁸ *Dermaquest* Final Judgment, *supra* note 6, ¶ 4(b). See also *id.* ¶ 3 ((enjoining violations of CAL. BUS. & PROF. CODE §§ 16720(a), 16720(d), and 16720(e)).

⁹ See Brief for the State of Kansas as Amicus Curiae, *O'Brien v. Leegin Creative Leather Products Inc.*, File No. 08-101000-S (Kan. filed Aug. 12, 2010).

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Michael A. Lindsay is a partner at Dorsey & Whitney LLP, where he chairs the firm's Antitrust Practice Group. He serves as an editor of *Antitrust* magazine.

tory term “arrangement” requires an agreement and whether a unilateral policy is actionable; whether the plaintiff was asserting a horizontal claim (and whether the state statute distinguishes between vertical and horizontal agreements); whether a class could properly be certified; whether Kansas has a “reasonableness” standard that differs from the “rule of reason” standard applied under the Sherman Act; why Leegin cares about maintaining minimum resale prices; and what role market power should play in the analysis.¹⁰ The Kansas Supreme Court had not issued its decision when this article went to press.

New York: The New York Attorney General brought suit against Tempur-Pedic, alleging that Tempur-Pedic’s Retail Partner Agreement included contractual prohibitions on discounting.¹¹ The case was brought under section 369-a of New York’s General Business Law, commonly known as the Donnelly Act, which provides that “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.”¹² Tempur-Pedic maintains that it has a unilateral RPM policy, not RPM agreements.¹³ Tempur-Pedic also argues that section 369-a merely makes RPM agreements unenforceable, not illegal (and actionable).¹⁴

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Other Post-Leegin Developments. The Eleventh Circuit also addressed the Tempur-Pedic policy in December 2010, and although its opinion does not deal with state law, it does discuss one of the *Leegin*-related issues dealt with in the article accompanying the original version of this chart: dual distribution.¹⁵ In *Jacobs v. Tempur-Pedic International, Inc.*,¹⁶ the court affirmed the district court’s dismissal of a consumer challenge to Tempur-Pedic’s practices under Section 1 of the Sherman Act for failure to state a claim on which relief can be granted. The complaint had raised both a vertical agreement (between the resellers and Tempur-Pedic as manufacturer) and a horizontal agreement (between the resellers and Tempur-Pedic as competing retail vendor). In a 2–1 decision, the Eleventh Circuit affirmed dismissal of the vertical claim for failure to adequately allege a product market and failure to allege actual or potential harm to competition.¹⁷

Because Tempur-Pedic also sold products directly to consumers through its Web site, the plaintiff had alleged that Tempur-Pedic’s practices were a horizontal agreement as well. The *Jacobs* court also affirmed dismissal of the horizontal claim. The court noted that both the Eleventh Circuit and other courts have tended to view dual-distribution agreements as vertical, rather than horizontal.¹⁸ The court did not have to firmly decide whether the RPM was horizontal or vertical, how-

¹⁰ See Recording of Oral Argument, *O’Brien v. Leegin Creative Leather Prods. Inc.*, File No. 08-101000-S (Kan. Sept. 17, 2000), available at <http://www.kscourts.org/kansas-courts/supreme-court/archive/archived-arguments-September-2010.asp>.

¹¹ Verified Petition, *People v. Tempur-Pedic International, Inc.*, 400837/10 (N.Y. Sup. Ct. N.Y. County filed Mar. 29, 2010).

¹² N.Y. GEN. BUS. LAW § 369-a (2009).

¹³ Respondents Memorandum of Law in Opposition to Verified Petition at 1–2 and Memorandum of Law in Support of Respondent’s Motion to Dismiss at 20–25, *People v. Tempur-Pedic International, Inc.*, 400837/10 (N.Y. Sup. Ct. N.Y. County filed Mar. 29, 2010).

¹⁴ Memorandum of Law in Support of Respondent’s Motion to Dismiss at 8–18, *People v. Tempur-Pedic International, Inc.*, 400837/10 (N.Y. Sup. Ct. N.Y. County filed Mar. 29, 2010).

¹⁵ Lindsay, *Resale Price Maintenance and the World After Leegin*, *supra* note 2, at 35.

¹⁶ File No. No. 08-12720 (11th Cir. 2010), available at <http://www.ca11.uscourts.gov/opinions/ops/200812720.pdf>.

¹⁷ *Id.*, slip op. at 18.

¹⁸ *Id.*, slip op. at 22 & n.15.

ever, because the court found that the plaintiff had failed to plead sufficient facts from which to infer agreement, rather than (at most) conscious parallelism.¹⁹

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The developments of 2010 demonstrate that state RPM law remains unsettled. The California Attorney General has signaled that it takes RPM seriously and will bring an enforcement action in appropriate circumstances, but *DermaQuest* is a consent judgment, not a precedent. The New York Attorney General has sent a similar signal but has a battle on its hands. We can look forward to the Kansas *O'Brien* decision for an indication of how a state appellate court will assess its own state law in light of *Leegin*. ●

¹⁹ *Id.*, slip op. at 27–28. *Jacobs* was decided by a divided panel, although the dissent focused on the *Twombly* pleading standard, rather than on the substantive law.

Overview of State RPM*

Michael A. Lindsay

STATE	LEGISLATION	LITIGATION
AL	<p>AT: ALA. CODE § 8-10-1 (2009) (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) (2009) (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: City of Tuscaloosa v. Harcros Chems., 158 F.3d 548, 555 n.8 (11th Cir. 1998) (finding that federal antitrust law “prescribes the terms of unlawful monopolies and restraints of trade” under Alabama law (citing <i>Ex parte Rice</i>, 67 So. 2d 825, 829 (Ala. 1953))).</p>
AK	<p>AT: ALASKA STAT. § 45.50.562 (2009) (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. § 45.50.577 (2009) (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. § 44-1402 (2009) (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. § 44-1412 (2009) (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</i>, 75 P.3d 99 (Ariz. 2003).</p>
AR	<p>AT: ARK. CODE ANN. § 4-75-309 (2009) (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) (2009) (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>

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.abanet.org/antitrust/at-source/09/10/Oct09-Lindsay10-23f.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
CA	<p>AT: CAL. BUS. & PROF. CODE § 16726 (2009) (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) (2009) (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 (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: <i>Clayworth v. Pfizer, Inc.</i>, 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”); <i>State of California ex rel. Van de Kamp v. Texaco, Inc.</i>, 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”); <i>Marin County Bd. of Realtors, Inc. v. Palsson</i>, 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”); <i>Freeman v. San Diego Assn. of Realtors</i>, 77 Cal.App.4th 171, 183, fn. 9 (1999) (federal precedent should be used “with caution”).</p> <p>PF: <i>Chavez v. Whirlpool Corp.</i>, 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</i>, 572 P.2d 1142, 1147-48 (Cal. 1978) (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”); <i>Harris v. Capitol Records Distrib. Corp.</i>, 413 P.2d 139, 145 (Cal. 1966) (finding that vendor’s resale price maintenance scheme violated the Cartwright Act and the Sherman Act); <i>People v. Dermaquest, Inc.</i>, 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”).</p>
CO	<p>AT: COLO. REV. STAT. § 6-4-104 (2002) (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. § 6-4-119 (2002) (instructing courts that they “shall” use “comparable” federal court decisions as guidance).</p> <p>IB: COLO. REV. STAT. § 6-4-111(2) (2002) (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: <i>See 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); <i>see also 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>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
CT	<p>AT: CONN. GEN. STAT. § 35-26 (2005) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of any part of trade or commerce”).</p> <p>PF: CONN. GEN. STAT. § 35-28(A) (2005) (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. § 35-44b (2005) (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”); <i>see also</i> <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 (2009) (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 (2009) (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 (WEST 2009) (“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 (WEST 2009) (“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 (WEST 2009) (“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, *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>
FL	<p>AT: FLA. STAT. § 542.18 (2009) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of trade or commerce”).</p> <p>H: FLA. STAT. § 542.32 (2009) (describing legislative intent that “due consideration and great weight” be given to federal antitrust case law when interpreting state antitrust statute).</p>	<p>H: <i>Duck Tours Seafari, Inc. v. Key West</i>, 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]’”); <i>see also</i> <i>Parts Depot Co., L.P. by & Through Parts Depot Co. v. Fla. Auto Supply</i>, 669 So. 2d 321, 324 (Fla. Dist. Ct. App. 1996) (recognizing that state courts “rely on comparable federal antitrust statutes” to construe state statute and recognizing Florida statute to cover horizontal and vertical restraints).</p>
GA	<p>AT: GA. CODE ANN. § 13-8-2(a)(2) (2009) (declaring unenforceable “contracts in general restraint of trade”).</p>	<p>H: <i>Calhoun v. N. Ga. Elec. Membership Corp.</i>, 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>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
HI	<p>AT: HAW. REV. STAT. § 480-4(a) (2009) (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) (2009) (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 (2009) (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) (2009) (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 <i>Ai v. Frank Huff Agency</i>, 607 P.2d 1304, 1309 n. 11 (Haw. 1980))); <i>see also Island Tobacco Co. v. R.J. Reynolds Tobacco Co.</i>, 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.</i>, 982 P.2d 853 (Haw. 1999).</p>
ID	<p>AT: IDAHO CODE ANN. § 48-104 (2009) (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) (2000) (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) (2000) (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 <i>Pope v. Intermountain Gas Co.</i>, 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 per se rule to apply).</p>
IL	<p>AT: 740 ILL. COMP. STAT. 10/3(2) (2009) (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. 10/3(1)(A) (2009) (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. 10/7 (2009) (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: People v. Crawford Distrib. Co., 291 N.E.2d 648, 652-53 (Ill. 1972) (declaring that federal antitrust precedent is a “useful guide to our court”).</p> <p>PF: People v. Keystone Auto. Plating Corp., 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 New York 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
IN	<p>AT: IND. CODE § 24-1-2-1 (2006) (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 § 24-1-2-1 (2006) (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: Deich-Keibler v. Bank One, No. 06-3802, 2007 U.S. App. LEXIS 15419, at *10 (7th Cir. 2007) (noting practice of construing IND. CODE § 24-1-2-1 in light of federal antitrust case law); Rumple v. Bloomington Hosp., 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: Ft. Wayne Cleaners & Dyers Ass’n. v. Price, 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 § 553.4 (1997) (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 § 553.2 (1997) (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: Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178, 181–182 (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., 646 N.W.2d 440, 446 (Iowa 2002)</i> (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>
KS	<p>AT/PF: KAN. STAT. ANN. § 50-101 (2009) (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 (2009) (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) (2009) (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: Bergstrom v. Noah, 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: Joslin v. Steffen Ice & Ice Cream Co., 54 P.2d 941, 943 (Kan. 1936) (holding that resale price maintenance scheme by ice cream wholesaler violated KAN. STAT. ANN. § 50-112); O’Brien v. Leegin Creative Leather Prods. Inc., No. 04 CV 1668, slip op. at 14 (8th Judicial Dist., Sedgwick County Kan. July 9, 2008), appeal pending (applying rule of reason to vertical minimum RPM claim) (“Whether competition is regulated by a contract dictating who can provide a service in a given territory (as in <i>Okerberg v. Crable, 341 P.2d 966 (1959)</i>) or by all agreement to set retail prices for manufactured goods (as is claimed in this case), the impact to the consumer is not sufficiently dissimilar to justify differing legal analyses.”).</p> <p><small>* <i>O’Brien v. Leegin</i> was transferred from the Kansas Court of Appeals to the Kansas Supreme Court. The case was argued on September 17, 2010, but no decision has been issued. The Kansas Attorney General filed an amicus brief urging per se treatment for RPM agreements. See Brief for the State of Kansas as Amicus Curiae, <i>O’Brien v. Leegin Creative leather Products Inc.</i>, File No. 08-101000-S (Kan. filed Aug. 12, 2010).</small></p>
KY	<p>AT: KY. REV. STAT. ANN. § 367.175 (WEST 2009) (declaring unlawful “[e]very contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce”).</p>	<p>H: Mendell v. Golden-Farley of Hopkinsville, Inc., 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>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
LA	<p>AT: LA. REV. STAT. ANN. § 51:122 (2009) (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) (finding state antitrust statute was fashioned after federal statute and noting in dicta that vertical price restrictions are per se illegal, relying on federal law).</p>
ME	<p>AT: ME. REV. STAT. ANN. TIT. 10, § 1101 (2009) (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) (2009) (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>
MD	<p>AT: MD. CODE ANN., COM. LAW § 11-204(a)(1) (WEST 2009) (prohibiting any “contract, combination, or conspiracy” that unreasonably restrains trade).</p> <p>PF: MD. CODE ANN., COM. LAW § 11-204(b) (WEST 2009) (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 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”).</p> <p>IB: MD. CODE ANN., COM. LAW § 11-209(b)(ii) (WEST 2009) (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 CH. 93, § 4 (2009) (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 CH. 93, § 1 (2009) (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>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
MI	<p>AT: MICH. COMP. LAWS § 445.772 (2009) (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 § 445.784(2) (2009) (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 § 445.778 (2009) (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: Little Caesar Enters. v. Smith, 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: New York v. Herman Miller, Inc., 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>
MN	<p>AT: MINN. STAT. § 325D.51 (2009) (declaring unlawful every “contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce”).</p> <p>PF: MINN. STAT. § 325D.53, SUBDIV. 1(1)(a) (2009) (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. § 325D.57 (2009) (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: Lorix v. Crompton Corp., 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. Humphrey v. Road Constructors</i>, 1996 Minn. App. LEXIS 597 at *5 (Minn. Ct. App. 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.</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: State v. Alpine Air Prod., Inc., 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) (2009) (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) (2009) (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 (2009) (providing a right of action for any person injured by a trust or combine, “or by its effects direct or indirect”).</p>	<p>H: Futurevision Cable Sys., Inc. v. Multivision Cable TV Corp., 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 Mississippi</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>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
MO	<p>AT: Mo. REV. STAT. § 416.031 (2009) (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. REV. STAT. § 416.141 (2009) (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); <i>see also</i> <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>
MT	<p>PF: MONT. CODE ANN. § 30-14-205 (2007) (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 (2009) (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 (2009) (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 (2009) (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 Nebraska 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 2009) (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 2009) (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 2009) (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 2009) (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>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
NH	<p>AT: N.H. REV. STAT. ANN. § 356:2 (2009) (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 (2009) (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. 1994) (relying on federal case law to apply rule of reason to nonprice vertical restraints under N.H. REV. STAT. ANN. § 356:14).</p>
NJ	<p>AT: N.J. STAT. ANN. § 56:9-3 (WEST 2009) (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 2009) (“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 2009) (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); <i>see also 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 2009) (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 2009) (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 2009) (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>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”); <i>see also Romero v. Philip Morris, Inc.</i>, 203 P.3d 873, 880 (N.M. Ct. App. 2008) (statute directs court to construe New Mexico statutes “in harmony with judicial interpretations of the federal antitrust laws”).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
NY	<p>AT: N.Y. GEN. BUS. LAW § 340 (2009) (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 (2009) (“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 (2009) (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: Sperry v. Crompton Corp., 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: Anheuser-Busch, Inc. v. Abrams, 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>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>New York 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); <i>People v. Tempur-Pedic International, Inc.</i>, Verified Petition, Case No. 400837/10 (N.Y. Sup. Ct. filed Mar. 29, 2010) (alleging violation of N.Y. GEN. BUS. LAW § 369-a (2009); seeking injunction against, and restitution and disgorgement for, “the unlawful practice of prohibiting the discounting of its products by resellers”).</p> <p>* The New York County Supreme Court heard argument on September 28, 2010, but no decision has yet been issued.</p>
NC	<p>AT: N.C. GEN. STAT. § 75-1 (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p>	<p>H: Madison Cablevision, Inc. v. Morganton, 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)); see also <i>North Carolina Steel, Inc. v. Nat’l Council on Comp. Ins.</i>, 472 S.E.2d 578, 582–83 (N.C. 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: North Carolina v. McLeod Oil Co., 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 § 51-08.1-02 (2009) (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 § 51-08.1-08 (2009) (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>	<p>No cases on point—statute only.</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
OH	<p>AT: OHIO REV. CODE ANN. § 1331.01(B)(1) (WEST 2009) (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 2009) (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.</p> <p>(WEST 2009) (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, 794–795 (Ohio 2005) (recognizing that “Ohio has long followed federal law in interpreting the Valentine Act” because the state statute is patterned after the Sherman Act).</p> <p>PF: <i>McCall Co. v. O’Neil</i>, 1914 WL 1669, *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. TIT. 79 § 203 (2002) (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. TIT. 79 § 212 (2002) (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>
OR	<p>AT: OR. REV. STAT. § 646.725 (2009) (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) (2009) (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) (2009 Update) (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-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.</i>, 185 F.3d 957, 963 n.4 (9th Cir. 1999)), <i>cert. denied</i> 528 U.S. 1075 (2000); <i>see also</i> <i>Willamette Dental Group, P.C. v. Oregon 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>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
RI	<p>AT: R.I. GEN. LAWS § 6-36-4 (2009) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of, or to monopolize, trade or commerce”).</p> <p>H: R.I. GEN. LAWS § 6-36-2(b) (2009) (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 § 6-36-12(g) (2009) (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: UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp., 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: Auburn News Co. v. Providence Journal Co., 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), <i>rev’d on other grounds</i>, 659 F.2d 273 (1st Cir. 1981), <i>cert. denied</i>, 455 U.S. 921 (1982).</p>
SC	<p>AT: S.C. CODE ANN. § 39-3-10 (2008) (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 (2008) (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: Drs. Steuer & Latham, P.A. v. Nat’l Med. Enters., 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), <i>aff’d</i>, 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: Walter Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 55 S.E. 973, 975–76 (1906) (analyzing vertical restraint under rule of reason analysis).</p>
SD	<p>AT: S.D. CODIFIED LAWS § 37-1-3.1 (2009) (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 (2009) (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 (2009) (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: Byre v. City of Chamberlain, 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: Assam Drug Co. v. Miller Brewing Co., 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>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
TN	<p>AT: TENN. CODE ANN. § 47-25-101 (2009) (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 (2009) (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: Spahr v. Leegin Creative Leather Products, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), appeal dismissed, 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); Freeman Indus. LLC v. Eastman Chem. Co., 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: Spahr v. Leegin Creative Leather Products, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), appeal dismissed, 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) (2002) (making unlawful “[e]very contract, combination, or conspiracy in restraint of trade or commerce”).</p> <p>H: TEX. BUS. & COM. CODE ANN. § 15.04 (2002) (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: Star Tobacco, Inc. v. Darilek, 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 Abbot Labs, Inc. v. Segura, 907 S.W.2d 503, 511 (Tex. 1995) (Gonzalez, J., concurring)); see also Gonzalez v. San Jacinto Methodist Hosp., 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”); Puentes v. Spohn Health Network, 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>
UT	<p>AT: UTAH CODE ANN. § 76-10-914(1) (2009) (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 (2009) (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) (2009) (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, § 453(b) (2009) (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) (2009) (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>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
VA	<p>AT: VA. CODE ANN. § 59.1-9.5 (2009) (declaring unlawful “[e]very contract, combination or conspiracy in restraint of trade or commerce”).</p> <p>H: VA. CODE ANN. § 59.1-9.17 (2009) (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 § 19.86.030 (2009) (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 § 19.86.920 (2009) (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>
WV	<p>AT: W. VA. CODE § 47-18-3(a) (2009) (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 § 47-18-3(b)(1) (2009) (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 § 47-18-16 (2009) (declaring legislative intent that statute “shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</p>	<p>PF: Kessel v. Monongalia County Gen. Hosp. Co., No. 33096, 2007 W. Va. LEXIS 52, at *27–*44 (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. § 133.03 (2009) (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. § 133.18(1)(a) (2009) (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 Grams v. Boss, 294 N.W.2d 473, 480 (Wis. 1980)); <i>but cf. Olistad v. Microsoft Corp., 700 N.W.2d 139, 144, 154–55 (Wis. 2005)</i> (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: Słowiak 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>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
WY	AT: WYO. STAT. ANN. § 40-4-101(a)(i) (2009) (prohibiting “any plan, agreement, consolidation or combination of any kind whatsoever to prevent competition or to control or influence production or prices thereof”).	PF: <i>Bulova Watch Co. v. Zale Jewelry Co.</i>, 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”).

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: Editor John Woodbury comments on lead DOJ economist Carl Shapiro's nearly encyclopedic article on the "whys" and "hows" of the 2010 Merger Guidelines. Send suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 ANTITRUST L.J. 49 (forthcoming 2010)

<http://www.justice.gov/atr/public/articles/263528.pdf>

The past decade saw numerous antitrust "events" that helped shape antitrust law and enforcement. These include *Twombly*, *Trinko*, *American Needle*, *Leegin*, *Whole Foods*, *LePage's*, *Oracle*, and (of course) the various *Microsoft* decisions and settlement. And just in time for the end of the decade, the adoption of the 2010 Horizontal Merger Guidelines.¹

On display in the last issue of the *The Antitrust Source* were a number of concerns raised by practitioners about the revisions to the 1992 Guidelines, including the role of market definition, the "new" test for likely unilateral effects (the "value of diverted sales"), and the weight attached to innovation in the 2010 Guidelines.² Carl Shapiro, one of the architects of the 2010 Guidelines and currently the Antitrust Division's lead economist, has authored an "apologia" for the 2010 Guidelines, addressing many but not all of these concerns and (already) extending the Guidelines to encompass a unilateral-effects safe harbor as well as identifying the linkages between the unilateral effects analysis and the market definition exercise.

This paper is a must-read for serious antitrust practitioners. Shapiro's nearly encyclopedic review of the "whys" and "hows" of the 2010 Guidelines will help practitioners in considering how best to address the competitive effects of a merger before the DOJ or the FTC, including what kind of analysis best fits the facts and how best to implement that analysis. There is much more direction here than in the 2010 Guidelines, and one might reasonably wonder whether this "dicta" will carry over to a new front office.

In this note, I focus on Shapiro's discussion of unilateral effects and market definition, given their central importance in identifying mergers falling into safe harbors (and so identifying mergers that may require more scrutiny) and in assessing a merger's competitive effects. Equally important for practitioners, Shapiro's analysis (with assists from other Shapiro efforts) identifies with greater precision the methods for implementing the hypothetical monopolist test (HMT) for

¹ U.S. Dep't of Justice & Fed. Trade Comm. Horizontal Merger Guidelines (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

² *Symposium on the 2010 Merger Guidelines*, ANTITRUST SOURCE, Oct. 2010, available at <http://www.antitrustsource.com> [in Archive].

market definition, the analysis of the value of diverted sales and the tight conceptual link between the two. But there is much more food for thought beyond my more focused observations.

For example, the paper begins with a carefully crafted history of the evolution of the Guidelines, as they moved from “hedgehog” guidelines—beginning with the 1968 Guidelines and its concentration-centric focus—to the “fox” guidelines embodied in the 2010 Guidelines that emphasize the variety of analytic and empirical/evidentiary approaches to the antitrust assessment of mergers that has been used by the Agencies and practitioners for some time.

As the paper progresses, it addresses the application of the unilateral effects test to auctions and bargaining as well as to the potential adverse effects of a merger on innovation and product variety. A significant concern here might be that Shapiro, like the 2010 Guidelines, devotes far too little space in discussing what evidence would support claims that a merger will increase innovation and product variety. Indeed, the 2010 Guidelines discourage such claims, noting that they “are potentially substantial but are generally less susceptible to verification.” (Section 10) Given the potential importance of these efficiencies to mergers in high-tech and other industries, some guidance from Shapiro on what evidence could serve to verify these claims would have been helpful.

There are a number of other key Guidelines topics that are not addressed in Shapiro’s paper. For example, Shapiro does not address coordinated effects in the 2010 Guidelines except in passing.³ Entry and repositioning also are discussed only in passing, although in the unilateral effects discussion, Shapiro stresses that any inferences from a test based on the value of diverted sales (discussed below) must be made against the backdrop of possible repositioning and entry. Yet, in the case of differentiated products, Shapiro (pp. 65–66) cites the 2006 *Commentary*, which asserted that repositioning in a differentiated product industry would rarely be timely, likely or sufficient.⁴

One particular surprise is the lack of any discussion by Shapiro of the role of exclusionary conduct in the antitrust assessment of mergers, which is now for the first time included in a set of *horizontal* merger guidelines (Sections 1, 2.2.3, and 6 of the 2010 Guidelines). The assessment of a merger’s effect on the anticompetitive incentive and ability to exclude or otherwise diminish the competitive significance of rivals is now a standard issue addressed by the Agencies (where relevant) in the ordinary course of the Agencies’ merger review. For example, even a casual reading of the press surrounding the now-consummated Live Nation-Ticketmaster merger or (at this writing) the continuing review of the proposed Comcast-NBC Universal merger illustrates the Agencies’ concern with the vertical effects of these deals. Thus, the introduction of the exclusionary considerations falls within the transparency objective of the 2010 Guidelines. While it would have been informative had Shapiro addressed the assessment of exclusion in the Agencies’ merger review, I imagine that would require a separate paper.

Unilateral Effects, GUPPIs, and GUPPI Safe Harbors

Shapiro begins the discussion of unilateral effects in the 2010 Guidelines by acknowledging the analytic advances embodied in the 1992 Guidelines and highlighting the further advances in our understanding and application of the unilateral effects methodology to mergers since 1992, including the increasing reliance on diversion ratios. As most practitioners know, a key input into

³ There is a discussion of accommodating behavior by rivals in a coordinated effects context in a recent Shapiro speech. See Carl Shapiro, Dep. Ass’t Att’y Gen. for Economics, Antitrust Div., U.S. Dep’t of Justice, Update from the Antitrust Division 26–29 (Nov. 18, 2010) [hereinafter Shapiro speech], available at <http://www.justice.gov/atr/public/speeches/264295.pdf>.

⁴ For a contrary view, see Peter Boberg & John Woodbury, *Repositioning and the Revision of the Horizontal Merger Guidelines*, ANTITRUST SOURCE, Dec. 2009, available at <http://www.abanet.org/antitrust/at-source/09/12/Dec09-Boberg12-17f.pdf>.

an assessment of the unilateral competitive effects of a merger where product differentiation is important is the diversion ratio: If Firm 1 raises its price for Product 1, the diversion ratio is the fraction of output lost by Firm 1 that is re-captured by (diverted to) its merger partner. *Ceteris paribus*, the higher the diversion ratio, the greater the increase in the post-merger incentive to raise the price of Product 1.

At the outset of his discussion, Shapiro describes the 1992 Guidelines' discussion of unilateral effects as presenting "a conundrum: how could this [diversion-based] approach be reconciled with the emphasis on market shares found in the case law and perpetuated in the 1992 Guidelines?" (p. 62) Indeed, market shares (and hence market definition) may be completely irrelevant in implementing a unilateral effects analysis.⁵ Yet under the current legal framework, the Agencies must define a market when challenging a merger.⁶

Shapiro notes that one resolution of the conundrum was offered by a former DOJ lead economist and an architect of the 1992 Guidelines, Robert Willig. If market shares could be used as a proxy for the first and second choices of consumers, then diversion from the offerings of one prospective merger partner to that of the other merging partner would be proportional to market share. In that case, defining a market would or could provide a basis for evaluating the unilateral effects of the deal by allowing the Agency (or practitioner) to estimate diversions using market shares.⁷

But Shapiro, like Willig, notes that proportional diversion is a very restrictive assumption, one that is not likely to be satisfied in most real-world mergers. And as Shapiro notes, if diversions are proportional to share, even Willig was unable to find a way to link those diversions to the HHI.⁸

⁵ Nowhere is this tension between a unilateral effects analysis and traditional reliance on market shares for inferring competitive effects more clearly described than in Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition* 16 (Nov. 25, 2008) (working paper), available at <http://escholarship.org/uc/item/35c5f846#page-1>.

⁶ If there were no legal mandate to proffer a market definition in a merger being challenged in court by the Agencies on the grounds that the merged firm would unilaterally increase price, then there would obviously be no enforcement tension. The Agencies (and the parties) would each put on their "best" unilateral effects analysis as described in Section 6 of the 2010 Guidelines. If the Agencies sought a preliminary injunction to stop the merger, the Agencies and the parties would continue the unilateral effects debate before a judge—without ever having to define a market. So, the key reason to define a market in a unilateral effects context is to satisfy the legal requirement in a merger challenge, which means there is the necessity of hammering a somewhat square peg into a round hole. This view is generally consistent with Farrell and Shapiro, *supra* note 5.

⁷ Even if diversion is proportional to market share, it's not obvious why adhering to the hypothetical monopolist paradigm is the right way to define a "market" with differentiated products from which share-based diversion estimates may be inferred. Indeed, the previously cited Farrell and Shapiro working paper observed, "Diversion ratios might also be based on market shares, not necessarily in a 'relevant antitrust market.'" Farrell & Shapiro, *supra* note 5, at 16. The key criteria in this informal "market definition" effort would be to identify "the different products in the market [that] are about equally close substitutes for Product 1 [being offered by one of the merging firms]" and then "one can estimate an aggregate diversion ratio [for products in the market]." *Id.* The authors further note that "these criteria . . . are quite different from the usual criteria for antitrust market definition." *Id.* Let me note that this discussion does not appear in the published version of this paper, Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON., vol. 10, issue 1, art. 9 (2010), <http://www.bepress.com/bejte/vol10/iss1/art9>. It's possible that Farrell and Shapiro have altered their views on this more informal approach to market definition for reasons unknown to me. I certainly don't find any fault with their "unpublished" view, although the unpublished paper does not describe in any principled way how to identify these substitutes.

⁸ Of course, for most mergers, the Agencies don't have to define markets when the issue is unilateral effects because so many mergers are cleared or abandoned before ever going to a court. In these instances, if the antitrust concern is adverse unilateral effects, the Agencies (and the parties) need not define a market.

There are at least two obvious caveats to my assertion. First, the Agencies in reviewing a merger may choose to engage in the market definition exercise to evaluate the strength of their litigation position if the deal were to be challenged. Second, the 2010 Guidelines' formal market definition exercise may be useful as a principled way to identify the other firms that provide "close" substitutes for the products of the merging firms even if the market shares don't inform the unilateral analysis.

Indeed, as practice evolved, the Agencies relied on evidence other than market shares (including inferring diversions via the estimation of complete demand systems) to judge the degree to which the diversion ratios between the products of the merging firms were “high” or “low” and so raise unilateral effects concerns (given the relevant margins). Given the restrictive nature of the proportional diversion assumption, i.e., that in most cases, proportional diversion does not explain substitution patterns of consumers, “the 1992 Guidelines became less helpful to achieve transparent and accurate merger enforcement using a unilateral-effects theory.” (p. 64) Hence, the 2010 Guidelines identified alternative methods that the Agencies and the parties can use and have used to infer diversions not based on market shares, underscoring the 2010 Guidelines’ de-emphasis of using market shares in unilateral effects analysis.

A key “innovation” in unilateral effects analysis in the 2010 Guidelines is the use of an estimate of the “value of diverted sales” between the merging parties to infer the likelihood of post-merger price increases (other things equal). If merger partner Firm 1 raises the price of its Product 1 (holding the prices of all other providers constant), how much of the profits lost by Firm 1 will be recaptured by (diverted to) its merger partner, Firm 2? The greater is the value of diverted sales, the greater is the post-merger incentive to raise the price of Product 1.

In this paper, Shapiro spells out in detail the arithmetic required for the value-of-diverted-sales calculation that is suggested in the 2010 Guidelines.⁹ Suppose Firm 1 (the sole producer of Product 1) and Firm 2 (the sole producer of Product 2) contemplate a merger. Using some simple arithmetic and scaling the value of diverted sales to Firm 2 by the revenues lost by Firm 1, Shapiro defines the Gross Upward Pricing Pressure Index (GUPPI) for Firm 1 as

$$D_{12}M_2(P_2/P_1)$$

where D_{12} is the diversion ratio from Product 1 to Product 2, M_2 is the percentage mark-up (variable margin) for Product 2, and P_2/P_1 is the ratio of the price of Product 2 to Product 1.¹⁰ For any given price ratio, the higher the diversion ratio and the higher the margin, the greater will be the GUPPI.

The GUPPI is calculated before accounting for any efficiencies (or repositioning and entry). As a result, the GUPPI will always indicate upward pricing pressure as long as margins and diversions are positive.¹¹

So, is there a safe-harbor value of the GUPPI, given that it will almost always be positive? The 2010 Guidelines suggest one possibility: the value of diverted sales should be measured against the lost revenues of (referring to the example above) Firm 1 when Firm 1 raises price. If the value of diverted sales relative to the lost revenues of Firm 1 is “small, [then] significant unilateral price effects are unlikely.” (Section 6.1) This is equivalent to saying that the GUPPI is “small.”

⁹ Note 11 of the 2010 Guidelines describes in words how to measure the value of diverted sales, but Shapiro’s discussion both clarifies that measurement and makes that effort understandable and intuitive to practitioners.

¹⁰ Shapiro had suggested a similar metric in *Mergers with Differentiated Products*, ANTITRUST, Spring 1996, at 23. More recently, the notion (and name) of the GUPPI was developed and discussed by two of my CRA colleagues, Steven C. Salop & Serge Moresi, *Updating the Merger Guidelines: Comments* (Nov. 9, 2009), available at <http://www.ftc.gov/os/comments/horizontalmergerguides/545095-00032.pdf>; Serge Moresi, *Upward Pricing Pressure Indices in Merger Analysis*, ANTITRUST SOURCE, Feb. 2010, <http://www.abanet.org/antitrust/atsource/10/02/Feb10-Moresi2-25f.pdf>.

¹¹ Shapiro cautions that the GUPPI value does not indicate the extent to which prices could rise post merger, only the heightened incentive of the merged firm to raise the price of (in this case) Product 1. In order to predict how the GUPPI translates into a price increase requires more structure (i.e., assumptions) about demand in particular.

While in this paper, Shapiro refers to a “small” GUPPI as a quasi-safe harbor, he, like the 2010 Guidelines, never defines “small.” But Shapiro does so in another forum. In the text of a recent speech, Shapiro asserts that “unilateral price effects for a given product are unlikely if the [GUPPI] for that product is less than 5%”—one of the historically mystical percentages in the Guidelines.¹² Shapiro observes that “Current Division practice is to treat the value of diverted sales as proportionately small if it is not more than 5% of lost revenues . . . [A] small amount of upward pricing pressure is unlikely, at the end of the day, to correspond to any actual post-merger price increase.”¹³

By way of perspective, if consumer demand were linear, then a 5% GUPPI would translate into a 2.5% price increase for Product 1, *ceteris paribus*. That is, the predicted price increase is one-half of the calculated GUPPI.

Since this “quasi-safe harbor” is not in the 2010 Guidelines, it’s not clear whether or not this threshold will become a standard safe harbor, a possibility suggested by Shapiro’s reference in his speech to “current Division practice.” Agency practice may change with greater experience with the application of the GUPPI.

Let me also note that Appendix B of the Shapiro paper addresses an oft-heard concern that the “value of diverted sales” test (and so the GUPPI test) is biased against mergers in (for example) the pharmaceutical and software industries because these are industries where the margins tend to be substantial. While this concern is discussed at various points in the text, the focus on that issue in Appendix B is helpful. Shapiro in effect argues that this view of a high-margin bias fails to grasp the underlying economics of unilateral effects. For mergers in these industries, the Agencies would not be attacking the high margin. Instead, given the high margin, it would be using that margin in combination with the diversion ratio to assess the increase in the incentive of one merger partner to unilaterally raise post-merger prices. This is nothing more than the basic economics of unilateral effects analyses. Still, the failure of the 2010 Guidelines and Shapiro’s discussion in this paper to suggest the kinds of evidence that could serve to verify the likelihood that the merger will increase innovation and product variety makes it more difficult for the merging parties to establish an efficiency offset to high GUPPIs being driven by high margins.

As an aside, any concern that the 2010 Guidelines has introduced a new, untested metric—the value of diverted sales—for assessing the likelihood of adverse unilateral effects is misplaced. Shapiro stresses that the “new guidelines have been primarily an exercise in transparency, reflecting ongoing changes in Agency enforcement practice and advances in economic learning.” (p. 52) Merger simulations have been part of the antitrust toolbox for many years. The introduction of the “value of diverted sales” is or should be for many practitioners a more intuitive and less complex substitute for a full-blown merger simulation. Like a simulation, it relies on the margins and diversions of the merging parties—critical inputs into the unilateral effects analysis. The key simplification is that it does not include the feedback from other rivals to any post-merger change in prices by the merged firm (and so may understate the post-merger incentive “pressure” to raise prices). Nor does it impose any structure on demand.

Some practitioners may not be completely sold on unilateral effects analysis, but the more developed parent of the new metric—merger simulation—reflects Agency practice and so is in line with the transparency objective of the 2010 Guidelines. The 2010 Guidelines take the Agency practice as it has evolved since 1992 and simply (with some simplification) memorialize that practice.

¹² Shapiro speech, *supra* note 3, at 24–25.

¹³ *Id.* Shapiro does not indicate whether this is current FTC practice as well.

Market Definition, the Hypothetical Monopolist Test, GUPPIs Again, and HHI Safe Harbors

Shapiro then goes on to discuss market definition and in particular the implementation of the hypothetical monopolist test (HMT), allowing the Agencies to identify mergers that fall within the HHI safe harbors. Shapiro emphasizes that “the 2010 Guidelines recognize the importance of these HHI thresholds to help identify mergers that are ‘unlikely to have adverse competitive effects and ordinarily require no further analysis.’” (pp. 68–69) In his recent speech, Shapiro describes as a “misperception” the concern that “the revised Guidelines have abandoned the HHI ‘safe harbors’ in cases involving unilateral effects.”¹⁴

Shapiro notes that “the hypothetical monopolist’s incentive to raise price on any one product under its control depends on the recapture percentage associated with that product and on the margins it receives on the sales recaptured by the other products [the hypothetical monopolist] owns.” (p. 91) Suppose we are considering whether Products 1 and 2 are a relevant antitrust market. The hypothetical monopolist would have a greater incentive to raise the price of (say) Product 1 the greater the extent to which the lost sales of Product 1 are “recaptured” by (diverted to) Product 2, which is also under the control of the hypothetical monopolist. That is, the recaptured sales are lost to Product 1 but not to the hypothetical monopolist. That, in turn, creates incentives for the hypothetical monopolist to raise the price of Product 1 now that it also owns Product 2. This price-raising incentive increases with the recapture ratio, *ceteris paribus*. And for any given recapture ratio, the higher is the profitability of (the greater the incremental margin earned on) the recaptured sales, the greater will be the incentive for the hypothetical monopolist to increase price.

Shapiro notes that “This is the same basic economic logic [used] in the evaluation of unilateral price effects.” (p. 91) Indeed, Shapiro states the central question in unilateral effects analysis as the following: “Taking as given all other products and their prices, is the profit-maximizing price for Product 1 significantly higher for a firm that owns both Product 1 and Product 2 than it was for Firm 1, which owns just Product 1’ . . . [T]his is *precisely* the same question posed by the hypothetical monopolist test to see if Products 1 and 2 form a relevant market.” (p. 71) Thus, it’s not a surprise that the conceptual implementation of the HMT has a strong kinship with the GUPPI test, particularly when using the HMT suggested by Shapiro and Michael Katz.¹⁵

In the case of linear demand and two symmetric Products 1 and 2 (so that the margin for each product is the same and the diversions between the two are the same), Shapiro shows that the hypothetical monopolist of the two products will have an incentive to raise prices by a SSNIP (small but significant and non-transitory increase in price) of S , if

$$D \geq 2S/(M + 2S)$$

where D is the diversion ratio between the two products and M is the variable margin. (p. 100) With some arithmetic, Shapiro demonstrates that this condition for the two products to be an antitrust market can be rewritten as

$$\text{GUPPI} \geq 2S.¹⁶$$

¹⁴ *Id.* at 17. Yet, as Shapiro noted, there is no relationship between the diversion ratios and the HHI.

¹⁵ Michael Katz & Carl Shapiro, *Critical Loss: Let’s Tell the Whole Story*, ANTITRUST, Spring 2003, at 49. In this paper, Shapiro also highlights (as does the 2010 Guidelines) the (im)proper use of critical loss analysis as an alternative method for implementing the HMT.

¹⁶ Appendix A of Shapiro’s paper addresses in greater detail the GUPPI calculations and its relationship to the HMT. While there is inevitably more “math” in this Appendix, it’s really just arithmetic, very accessible, and very informative in that it serves as the basis for use of the GUPPI (and its relationship to the market definition exercise).

So, if the SSNIP is 5% and the GUPPI is at least 10%, then the two products comprise a relevant antitrust market.¹⁷ If merger partner Firm 1 is the only firm producing Product 1 (and only Product 1) and merger partner Firm 2 is producing Product 2 (and only Product 2), then the two firms alone comprise a relevant antitrust market when the GUPPI is at least 10%.

The use of the GUPPI for the HMT in this way does seem to collide with Shapiro's view that a $GUPPI \geq 5\%$ may require more Agency scrutiny. In particular, there will be cases—perhaps many cases—where a merger will pass the HHI screen even though the GUPPI is greater than 5%.

As an example, suppose the diversion ratio D is 0.2 (i.e., 20%) between the two products of the merging firms. Also assume that the margin M is 35%. Then, the GUPPI is 7% (i.e., D times M) and since the products are symmetric, the prices of 1 and 2 are the same). Since the GUPPI is less than 10%, the market must be broadened.

Suppose that as a result of broadening the market, the market share of each of the merging parties is 7%. Then under the 2010 Guidelines, this deal passes the new HHI screen—"Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis." (Section 5.3) As a result, the Agencies are unlikely to take a second look at this deal because the increase in the HHI is less than 100 ($2 \times 7 \times 7$). This is true notwithstanding the fact that the GUPPI of the combined firm exceeds 7%, and so the merger falls outside of Shapiro's unilateral safe harbor.¹⁸ Clearly, the market has been broadened to include a product whose revenues are far more substantial than those of the two merging parties. But this is not as in Example 4 in the 2010 Guidelines (Section 4) where the sale of motorcycles is part of a market that erroneously includes automobile sales. The example here satisfies the HMT using an appropriate methodology. And indeed (by assumption), it satisfies the "smallest market" principle.¹⁹ What might be particularly troubling about this outcome is that my initial conditions—diversion ratios of 20% and margins of 35%—don't seem to be obvious outliers in my experience with unilateral effects analyses. Again, this tension between the HHI and GUPPI safe harbors arises because market share is not necessarily or even typically a good proxy for diversion between the merging parties.

One "out" would be to require that both the HHI safe harbor and the GUPPI safe harbor must be satisfied before the parties are entitled to presume that the merger is "unlikely to have adverse competitive effects and ordinarily require[s] no further [Agency] analysis." (Section 5.3 of the 2010 Guidelines) But that is not a test in the newly-minted 2010 Guidelines. As noted at the beginning of this section, the merger screen is the HHI screen. Consequently, application of the HHI safe harbors could generate more "false negatives," i.e., some mergers that might otherwise generate unilateral effects concerns using the Shapiro GUPPI threshold will slip through the HHI screen. While the fact of false negatives is one that is inherent in the use of a screen, it is not clear whether this

¹⁷ Recall that with linear demand, the predicted price increase is one-half of the calculated GUPPI.

¹⁸ Similarly, one could easily develop examples where the merger does not fall into the delta HHI safe harbor, but yet generates a GUPPI of less than 5%. That circumstance poses less of an issue in that this merger would be further scrutinized by the Agency and that further analysis could conclude that the GUPPI indicates no unilateral effects concerns.

Note that I could have increased the market shares of the merging parties significantly if instead I use another HHI safe harbor—an HHI below 1500. As one example, if each of the merging firms has a 15% share and the remaining 70% is evenly divided among 10 firms, then the post-merger HHI would be 1390 and so the merger would fall into the "unconcentrated" HHI category, thus seemingly escaping scrutiny despite what could be viewed as a troubling GUPPI.

¹⁹ Of course, the 2010 Guidelines relax the "smallest market principle" to acknowledge Agency practice not to adhere to that definition if it would exclude products for which there would in fact be significant post-merger concerns with price increases. But in my example, broadening the market would not resolve these issues.

particular avenue for generating a false negative was a factor in setting the level of the safe harbor thresholds. That is because the HHI thresholds were designed to reflect Agency practice, not conflicts between safe harbors. To be sure, the 2010 Guidelines note that the screen will not be applied in a “rigid” way, but the context of this discussion is quite obviously referring to the consideration of other relevant and offsetting factors for those mergers that fall outside of the HHI safe harbors. (Section 5.3 of the 2010 Guidelines.)

Another “out” is suggested in the previously-cited unpublished version of the Farrell and Shapiro paper: “In cases where there is [upward pricing pressure] but the market shares of the merging firms in the broad market are too low to establish any structural presumption [of a post-merger price increase], the government would need to explain how the merger would lead to the loss of important, localized competition between the two merging firms Many of these ideas relating to localized competition could be expressed in market-definition language using the concept of a ‘submarket.’”²⁰

Concluding Note

As Shapiro observed, economists have thus far been unable to link diversion ratios to HHIs. And market shares based on the application of the HMT may often or even typically be irrelevant for diversions and so for unilateral effects analysis. I don’t think this means that the market definition exercise is irrelevant for setting up the unilateral effects analysis. First, the Katz-Shapiro HMT would allow practitioners to identify participants who provide closer substitutes for the products of the merging firms. That is certainly relevant for consideration of the offsetting effects of post-merger repositioning, even if the shares in the defined market are irrelevant for diversions. (Recall that implementation of the HMT is based on the same kind of diversions that are a key to the unilateral effects analysis.)

Second, market shares may be the only available data for the calculation of diversion ratios (i.e., using proportional diversion for GUPPI calculations). The application of the HMT is one way to develop those share data. But as I noted above, the HMT may not be the only way to identify those firms that provide close substitutes for the products of the merging parties (and the shares of those firms). However, currently, it is the only principled way of identifying those substitutes.

Nonetheless, the use of market-share based safe harbors (i.e., the HHI or the delta HHI safe harbors) may sometimes or perhaps even often allow mergers that would have been more closely scrutinized for adverse unilateral effects to slip through the Agencies’ grasp.

Notwithstanding these tensions, Shapiro’s paper should be, as I stated at the outset, a must-read for practitioners. Shapiro’s discussion is both thoughtful and helpful for practitioners considering how to apply the 2010 Guidelines to specific mergers. This is true as well for the other sections of the 2010 Guidelines addressed in the paper. Going forward, I would expect that the Agencies’ front offices will elaborate on some of the topics not addressed by Shapiro, including the discussion of how to assess the effect of the merger on the incentives to exclude—and perhaps even an explicit “test” for the likelihood of such post-merger conduct. ●

—JRW

²⁰ Farrell & Shapiro, *supra* note 5, at 26. It may well be that Farrell and Shapiro have changed their views on this approach. I still find merit to that approach.