SECTION OF ANTITRUST LAW

Prepared for the Members of the Sherman Act Section 1 Committee

Sherman Act Section 1 Newsletter

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Editor's Note

Eric Sacks, Chicago, IL

This spring's Newsletter reports on significant antitrust developments concerning section 1 issues throughout the world. Contributing editor Dan Dorfman has prepared summaries of the Supreme Court's recent decisions concerning lawful joint venture pricing in *Dagher* and the lack of presumptive market power arising out of tying patents in *Tool Works*. The Supreme Court also denied certiorari in *Santana Products*, which is reviewed by Robert Freitas. Developments in the United States Courts of Appeals and District Courts have been addressed by several contributing editors. Michael Keeley reports on *Twombly v. Bell Atlantic*, in which the Second Circuit addressed whether pleading "plus factors" is necessary to state claim for conspiracy arising out of parallel conduct. Matt Freimuth and Wesley Powell have written on the *Tamoxifen Citrate Antitrust Litigation* and the Second Circuit's treatment of the settlement of a patent case under section 1. David Lundsgaard has written on a boycott action by the DOJ against the National Association of Realtors in the Northern District of Illinois. Djordje Petkoski has written on an FTC case charging price fixing by the North Texas Specialty Physicians, an association of practicing physicians.

John Eklund has summarized the work of the Antitrust Modernization Commission.

There also has been significant activity on section 1 issues internationally. Chris Margison has done extensive work reporting on enforcement developments in Canada. Likewise, Mark Katz and Elisa Kearney have surveyed anti-cartel enforcement throughout the world.

With so many section 1 developments worldwide, it should be no surprise that the Sherman Act Section 1 Committee has several important presentations at the approaching American Bar Association's 54th Antitrust Law Spring Meeting. Matt Liebson has written a summary.

We hope that the articles here help you in your practice. If you have ideas for future pieces, please contact us.

In This Issue:

Recent Developments

The Sherman Act Section 1 Committee maintains a listserv to keep members informed of breaking developments in Sherman Act Section 1 law. You may join by going to the ABA's website, or go directly to ***www.abanet.org/scripts/listcommands.;sp?parm=subscribe /at-S1*** *and follow the instructions there.*

Chair's Report

Lynda Marshall, Washington, DC

The Sherman Act Section One Committee has had a productive year and we in the Committee leadership hope that all Committee members have benefited from our various offerings. As you likely are aware, our biggest offering this year came in the form of programs. Most notably, the Section One Committee co-sponsored a number of brown bag programs, including *Antitrust in the Supreme Court: The Illinois Tool Works v. Independent Ink Case*, *Antitrust Opt Out Litigation*, *IP Licensing & Antitrust Practical Advice on Real World Problems*, and *The NTSP Decision*. The Committee also co-sponsored a teleseminar entitled, *Private Antitrust Litigation in Major Jurisdictions Outside the U.S*. All of these programs were well-attended and well received.

Also on the program front, the Committee will have a strong showing at the 2006 Antitrust Section Spring Meeting, which will be held in Washington, D.C., March 29th through the 31st. There is a more fulsome description of the Committee's Spring Meeting contribution inside this edition of the newsletter, but to give you a preview, our Committee program, *Rule of Reason v. Per Se – Where are the Boundaries Now?* will tackle one of the most timely and interesting issues relating to section one law – what is the correct standard to apply in evaluating conduct under section one. In addition, the Committee will co-sponsor three General Session programs that deal with subjects equally as interesting and relevant to today's antitrust lawyer: *Gun jumping: Pitfalls, Uncertainties and Solutions, Dagher and Illinois Tool*

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RECENT DEVELOPMENTS

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I. Supreme Court Decisions

A Joint Venture's Pricing of Its Own Products Is Not Per Se Illegal

On February 28, 2006, in a concise, unanimous[1] opinion written by Justice Thomas, the United States Supreme Court held that it was not per se illegal under section 1 of the Sherman Act for a lawful, economically integrated joint venture to set a uniform price for products it sells.

From 1998-2002, Texaco and Shell Oil consolidated their gasoline refining, marketing and other operations in the western United States into a joint venture. Each shared the risks of and profits from the joint venture's activities. The venture sold its gasoline under separate Texaco and Shell brand names, but for the same price. Plaintiff service stations sued, claiming that the unitary pricing of the two brands constituted a per se violation of federal antitrust law. The trial court awarded summary judgment to Texaco and Shell Oil. It determined that the rule of reason, rather than per se rule or quick look analysis, governed the joint venture. By eschewing rule of reason analysis, plaintiffs had failed to raise a triable issue of fact. The Ninth Circuit, in a split decision, reversed, holding that the per se rule governed and that setting a uniform price for Texaco and Shell gasoline was not necessary to the legitimate procompetitive aims of the joint ventures. *See Dagher v. Saudi Ref., Inc.*, 369 F.3d 1108, 1113, 1121-22 (9th Cir. 2004).

The Supreme Court disagreed and reversed the Ninth Circuit. Texaco and Shell, the Court reasoned, operated in the relevant market jointly through their investments in the venture. Their agreement amounted to the pricing policy of a single economic entity and not a per se illegal pricing agreement between competitors. "As a single entity," the Court held, "a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price." *Texaco Inc. v. Dagher*, Nos. 04-805 and 04-814, 2006 U.S. LEXIS 2023, at *10 (Feb. 28, 2006). The Court also affirmed the continued authority of the "ancillary restraint" doctrine, which governs the validity of restrictions on nonventure activities by legitimate business collaborations between competitors, such as joint ventures. A restraint is valid, the Court explained, if it is "ancillary to the legitimate and competitive purposes" of the collaboration and unlawful if it is a "naked restraint on trade," presumably not reasonably necessary to making the joint venture work. *Id.* at *11. But the doctrine does not apply where the business practice being challenged involves the "core activity" of the joint venture itself – the pricing of the very goods produced and sold by the venture. *Id.* at *12.

Texaco Inc. v. Dagher, No. 04-805 and No. 04-815, 547 U.S. ___, slip op. (Feb. 28, 2006), available on Lexis as cited above and at http://a257.g.akamaitech.net/7/257/2422/28Feb20061050/www.supremecourtus.gov/opinions/05pdf/04-805.pdf.

[1] Justice Alito did not participate in the consideration or decision of the case.

Supreme Court Rejects Presumption of Market Power in Patent Tying Cases

On March 1, 2006, the United States Supreme Court ruled that a patent held in a tying product does not support a presumption of the patentee's market power as a matter of antitrust law. Rather, "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, No. 04-1329, 2006 U.S. LEXIS, at **6, 32 (March 1, 2006).

Trident, Inc. and its parent, Illinois Tool Works, Inc., conditioned sale of its patented ink-jet printhead and ink container to printing-equipment manufacturers on the purchase of its unpatented ink. *Illinois Tool Works*, 2006 U.S. LEXIS at **6-7. Independent Ink, a manufacturer of a comparable ink, complained that Trident's conduct constituted illegal tying under section 1 of the Sherman Act. The trial court rejected Independent Ink's position that Trident's patents necessarily gave it market power and granted Trident summary judgment on the ground of failure to prove a relevant market or market power. The Federal Circuit reversed, holding that a patent in the tying product carried with it the presumption of market power and rendered the tie per se illegal. *Id.* at *8.

The Supreme Court reversed the Federal Circuit, finding the presumption of market power in a patent tying case "a vestige of the Court's historical distrust of tying arrangements" and holding the presumption no longer valid. *Id.* at **17-18. The Court noted that its "strong disapproval of tying arrangements" had diminished over the years and its recent antitrust jurisprudence "required a showing of market power in the tying product." *Id*. at **12-17. Moreover, the market-power presumption had its origins in the patent misuse defense, yet in a 1988 amendment to the Patent Code, Congress expressly negated the presumption in that context. Thus, Trident's conduct would not constitute "patent misuse" under the Patent Code and "it would be anomalous to preserve the presumption in antitrust after Congress had eliminated its foundation" in patent law. *Id.* at **23-25. Accordingly, the Court concluded that tying arrangements involving patented products should be evaluated under the rule of reason and no presumption of market power could be drawn from the patent based on decisions such as *International Salt Co. v. United States*, 332 U.S. 392 (1947), and *United States v. Loew's Inc.*, 371 U.S. 38 (1962). Therefore, plaintiffs making patent-tying antitrust claims must prove the patentee's power in the relevant market for the tying product. *Id.* at *26.

The Court also rejected Independent Ink's alternative suggestion of a rebuttable presumption of market power in the case of a "requirements tie," *i.e.* when a patentee conditions purchase of a patented product on an agreement to buy unpatented goods exclusively from the patentee. Because a patent does not necessarily confer market power, "[m]any tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market." *Id.* at **30-31. The Court remanded the case to give Independent Ink the opportunity to introduce evidence on the relevant market and to prove Trident's power within that market.

Illinois Tool Works, Inc. v. Independent Ink, Inc., No. 04-1329, 547 U.S. ___, slip op. (March 1, 2006), available on Lexis as cited above and at http://a257.g.akamaitech.net/7/257/2422/01Mar20061050/www.supremecourtus.gov/opinions/05pdf/04-1329.pdf.

Chair's Report
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Works: The Supreme Court Steps In, and *Dealing with the Civil Damages Liability of a Corporate Amnesty Applicant and a Pleading Corporate Defendant in an International Cartel Investigation*.

Finally, it is with great pride that the Committee finishes up the Joint Venture Handbook. Hats off and heartfelt thanks to Jon Shepherd, who guided this project to a great conclusion.

As always, we encourage you to come forward with any ideas you may have for future programs, publications, or other activities. Also, the Committee is looking for new people to become involved in our activities. If you have an idea or want to get involved, please contact one of the Committee leaders listed in this newsletter. We look forward to hearing from you!

Supreme Court Denies Certiorari in Alleged Boycott Case

On November 28, 2005, the Supreme Court denied certiorari in a case in which the Third Circuit rejected a claim by a manufacturer of high density polyethylene (HDPE) toilet partitions that a group of competitors violated section 1 of the Sherman Act by attempting to persuade architects that the plaintiff's HDPE partitions did not satisfy fire safety standards.

Santana Products, Inc. alleged that Bobrick Washroom Equipment, Inc. and its representatives violated section 1 by conspiring with Formica Corporation, the largest manufacturer of the plastic laminate used in the manufacture of a competing type of toilet partition, and a group of its customers who were members of the Toilet Partitions Manufacturers Council (TPMC). Bobrick and the TPMC members were accused of spreading false information about the fire safety profile of Santana's products by, among other things, disseminating a videotape that falsely depicted the flammability of Santana's products and making false comparative advertising statements.

The trial court granted summary judgment in favor of all defendants, relying on the *Noerr Pennington* doctrine and concluding that Santana failed to demonstrate an unreasonable restraint of trade. The Third Circuit affirmed without considering the district court's *Noerr Pennington* rationale. The Court of Appeals rejected Santana's group boycott and restraint of trade arguments, finding no "restraint" and thus no "restraint of trade." Santana did not establish that by advocating a competing type of product or criticizing Santana's HDPE products, Bobrick and the TPMC members engaged in any coercive measures, and the fact that they may have engaged in fraud in their campaign against HDPE partitions was not sufficient to demonstrate a violation of the Sherman Act. The attempts to persuade the architects to specify non-HDPE products involved "classic competition on the merits of a product." Santana was not excluded from the market, and it remained free "to tout its product to the specifiers and . . . equally free to reassure them that its partitions are superior to Bobrick's partitions and to prove Bobrick wrong with respect to the flammability of HDPE partitions." The Third Circuit also rejected an argument based on *Allied Tube & Conduit* because the TPMC was not a standard setting body. The court perceived no "enforcement device that operates to restrain trade," noting that Bobrick and the TPMC members had simply interpreted standards set by an independent standard setting body to their advantage.

Santana Products, Inc. v. Bobrick Washroom Equipment, Inc., No. 05185 (Nov. 28, 2005).

II. Federal Courts of Appeals Decisions

Second Circuit Holds Plaintiffs Need Not Allege "Plus Factors" in Antitrust Conspiracy Complaints

The Second Circuit has ruled that an antitrust plaintiff's section 1 conspiracy complaint need not include allegations of so-called "plus factors" that tend to negate the possibility of unilateral conduct. The Court ruled that it is inappropriate to dismiss a complaint for failure to allege any plus factors because it is possible for a plaintiff to uncover direct evidence of a conspiracy through discovery – eliminating the need for corroborating plus factors at the summary judgment stage.[2]

In *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005), a putative class of purchasers of local telephone or high-speed internet services alleged that the defendant incumbent local telephone companies (called incumbent local exchange carriers or "ILECs") had conspired (a) to refrain from entering each others' markets; and (b) to prevent new competitors from entering their markets. *Id.* at 102. The conspiracy allegedly started around the time that the 1996 Telecommunications Act ("1996 Act") was passed. The 1996 Act requires ILECs to open their local telephone monopolies to competition from new entrants (called competitive local exchange carriers or "CLECs"), for example, by providing CLECs access to ILEC networks.

[2] The question whether a plaintiff must plead "plus factors" to state an antitrust conspiracy claim has also been addressed in other Circuits. *See, e.g.*, *Lum v. Bank of Am.*, 361 F.3d 217, 230 (3d Cir. 2004) (holding that a plaintiff need not allege plus factors to state an antitrust conspiracy claim); *N. Jackson Pharmacy, Inc. v. Express Scripts, Inc.*, 345 F. Supp. 2d 1279, 1286 (N.D. Ala. 2004) (same); *In re Urethane Antitrust Litig.*, No. 04-MD-1616, 2006 U.S. Dist. LEXIS 1661, at *31 n.4 (D. Kan. Jan. 18, 2006) (same). *But see Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989) (holding that a plaintiff who relies on parallel conduct to allege an antitrust conspiracy must establish that defendants acted against their self-interest); *In re Carbon Black Antitrust Litig.*, No. 03-10191, 2005 U.S. Dist. LEXIS 660, at *31 (D. Mass. Jan. 18, 2005) (same).

The complaint alleged that the failure of the defendant ILECs to enter as CLECs into each others' territories resulted from a conspiracy to refrain from that entry. *Id.* at 102-03. The plaintiffs alleged that the ILECs' parallel refusals to enter each others' markets was evidence of a conspiracy. They also alleged several facts that they claimed were plus factors.

Specifically, the plaintiffs alleged that the absence of ILEC entry into other ILEC territories was inconsistent with unilateral conduct by the ILECs because the defendant ILECs had publicly complained that the 1996 Act hurt their business by requiring them to offer network access to CLECs at below-cost rates. If that were true, the plaintiffs alleged, then the ILECs should have been eager to enter each others' territories as CLECs. *Id.* at 103. The plaintiffs also alleged that the defendants' failure to enter each others' territories was suspicious because some ILECs' territories directly surrounded the territory of another ILEC, which would make expansion into that territory very easy. *Id.*

To further support their conspiracy allegation, the plaintiffs also alleged that the defendant ILECs engaged in various unlawful tactics to drive existing CLECs out of business, such as interfering with the CLECs' customer relationships and refusing to provide CLECs access to ILEC networks. *Id.* at 104. In addition, the plaintiffs asserted that the defendant ILECs have a common motive to prevent successful entry by CLECs because CLEC entry in the territory of one ILEC will enable and encourage CLEC entry into the territories of other ILECs. *Id.*

The district court dismissed the complaint. The court concluded that the plaintiffs had failed to allege any acts by the ILECs that were truly inconsistent with unilateral conduct. *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 184, 188-89 (S.D.N.Y. 2003). Therefore, the court concluded that the plaintiffs had pled solely parallel conduct. *Id.* at 189. In dismissing the complaint, the court held that a plaintiff must allege at least one plus factor in addition to parallel conduct to state a section 1 conspiracy claim. *Id.* at 179. Simply alleging parallel conduct, "would be equivalent to a conclusory, bare bones allegation of conspiracy." *Id.* at 180 (internal quotations omitted). To allow such a claim to proceed into discovery would be unfair, the court concluded, because without the allegation of a plus factor it does not give defendants adequate notice of plaintiffs' conspiracy theory. *Id.* at 181.

A unanimous panel of the Second Circuit reversed, holding that an antitrust plaintiff is not required to allege any plus factors in a conspiracy complaint. *Twombly*, 425 F.3d at 114. The Second Circuit began by noting that there are no heightened pleading requirements for antitrust complaints, and that the factual allegations required to state an antitrust conspiracy claim are modest. *Id.* at 108, 112. Short of "bare bones" or "unlikely speculations," an antitrust complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 111.

The Second Circuit held that the district court erroneously applied a summary judgment standard in dismissing the complaint. *Id.* at 114. The Court explained that requiring a plaintiff to plead plus factors is inappropriate because through discovery the plaintiff may uncover direct evidence of a conspiracy – making it unnecessary to rely on parallel conduct and plus factors. *Id.* The Court acknowledged that the modest pleading requirements may allow burdensome discovery in what may turn out to be meritless cases, but deferred to Congress and the Supreme Court to address that problem. *Id.* at 116-17.

The Second Circuit concluded that the allegations in the complaint were sufficient to give the defendants fair notice of the plaintiffs' claim and its foundations. *Id.* at 118-19. The Second Circuit also disagreed with the district court's conclusion that the plaintiffs had not alleged a plus factor. *Id.* at 118 n.15.

It will be interesting to see under what circumstances, if any, district courts dismiss seemingly unsupported allegations of antitrust conspiracies. Apart from complaints that merely recite the language of section 1 without any factual allegations or those that allege a conspiracy that is completely implausible on its face, *Twombly* may be read to preclude dismissal on the grounds that some direct evidence of conspiracy may be found during discovery.

Update on Patent Settlement Cases

The Second Circuit recently held that the settlement of a Hatch-Waxman patent dispute between a brand-name drug manufacturer and a generic firm did not violate the Sherman Act. See *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370 (2d Cir. 2005). The Court upheld the settlement agreement despite the fact that it included a sizeable "reverse payment" from the brand-name company to the generic manufacturer, coupled with the generic firm's agreement to delay entry into the market for the branded drug. The Second Circuit's opinion, like last year's Eleventh Circuit decision in *Schering-Plough v. Federal Trade Comm'n* (reported in Spring 2005 Newsletter), dealt another apparent set-back to the FTC's efforts to block similar patent settlements.

AstraZeneca Pharmaceuticals first filed a patent infringement suit against Barr Laboratories in 1987 after Barr filed an Abbreviated New Drug Application ("ANDA") seeking FDA approval to market a generic version of tamoxifen, the most widely prescribed drug for the treatment of breast cancer. Zeneca held the patent on the drug and marketed tamoxifen under the trade name Nolvadex. Pursuant to the Hatch-Waxman Act, 21 U.S.C. 355, Barr's ANDA was amended to include a certification that Zeneca's patent was invalid ("Paragraph IV certification"). Zeneca subsequently sued Barr for patent infringement in the Southern District of New York.

On April 20, 1992, the district court declared Zeneca's tamoxifen patent invalid. Pending appeal of the ruling, the parties settled. The confidential settlement agreement required Zeneca to pay $21 million and to extend Barr a non-exclusive license to distribute Zeneca-manufactured tamoxifen under Barr's brand. Barr agreed that it would not market its own generic version of tamoxifen until Zeneca's patent expired in 2002.

Consumers, consumer groups, and third-party benefit providers filed lawsuits around the country against Zeneca and Barr challenging the validity of the settlement under the antitrust laws, all of which were consolidated in the Eastern District of New York. In the consolidated action, plaintiffs alleged that the settlement agreement unlawfully facilitated a continuing monopolization of the market for tamoxifen by restricting entry of a Barr generic notwithstanding the district court's invalidation of Zeneca's patent. Moreover, plaintiffs claimed the settlement agreement amounted to an unlawful division of monopoly profits between Zeneca and Barr, secured an artificially high price for tamoxifen, and foreclosed competition from other generic manufacturers. The district court granted defendants' motion to dismiss the complaint for failure to state a claim. The plaintiffs appealed. On November 2, 2005, the Second Circuit affirmed, holding, *inter alia*, that plaintiffs' allegations with respect to the $21 million "reverse payment" and Barr's agreement to hold back entry of its generic failed to state a viable Sherman Act claim.

Plaintiffs, like the FTC in *Schering-Plough*, did not claim that reverse payments are per se unlawful; rather, plaintiffs argued that the size of Zeneca's payment, coupled with other terms, gave rise to an illegal restraint of trade. Nonetheless, the Second Circuit addressed the threshold question of whether a reverse payment in settlement of a patent suit violated the antitrust laws. In light of the public policy favoring settlement of litigation, particularly in patent cases where settlement may actually promote efficiencies by resolving disputes that otherwise could block or delay the market entry of valuable inventions, the Court declined to find reverse payments per se unlawful.

The Court found that reverse payments are an expected result in the drug-patent context because settlements are encouraged by the Hatch-Waxman regulatory environment. Patent holders like Zeneca typically sue an allegedly infringing generic provider upon notice of the filing of a Paragraph IV certification, which occurs before the generic firm has incurred the costs of manufacturing, marketing, and distributing its product. In this context, the generic firm has little to lose in litigating (beyond litigation costs) but has much to gain: entering the market ahead of the challenged patent's expiration. By contrast, the brand name manufacturer incurs substantial risk in the litigation: loss of its patent monopoly. "Under these circumstances," the Court reasoned, "we see no sound basis for categorically condemning reverse payments employed to lift the uncertainly surrounding the validity and scope of the holder's patent."

Having addressed the question of per se liability, the Court was left with the question of whether the size of Zeneca's payment to Barr, and the fact that it accompanied the preservation of a patent that had been declared invalid, rendered the settlement agreement unlawful. The

Court held those terms did not support an antitrust violation. As policy matter, the law's long-standing encouragement of settlement favored the terms of the Zeneca/Barr agreement, notwithstanding plaintiffs' claim that Zeneca's patent claim was weak. The Court found it inevitable that settlements in this context sometimes will preserve patent monopolies that are arguably undeserved, but the impact of this "troubling dynamic" is mitigated by the fact that the settlement does nothing to prevent other generic manufacturers from challenging a weak patent.

Beyond those policy considerations, the Court adopted the Eleventh Circuit's approach (in *Valley Drug v. Geneva Pharms., Inc*., 344 F. 3d. 1294, 1296-98 (11th Cir. 2003)) to evaluating whether a patent settlement is anti-competitive: "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing antitrust law, as long as competition is restrained only within the scope of the patent." Under this standard, the Court concluded that the Zeneca/Barr agreement did not unlawfully extend the reach of Zeneca's tamoxifen patent or otherwise limit competition beyond the scope of that patent.

First, the Court noted that the settlement agreement did not extend Zeneca's patent monopoly by restraining the entry of unrelated or non-infringing products. Second, the agreement opened the tamoxifen patent to immediate challenges by generic manufactures other than Barr. And, third, the agreement did not entirely foreclose competition in the tamoxifen market because it included a license from Zeneca to Barr permitting Barr to market Zeneca-branded tamoxifen, thereby creating competition with Zeneca. Under those circumstances, the Court found plaintiffs' allegations failed to state a viable antitrust claim.

Plaintiffs have petitioned for rehearing en banc in the Second Circuit, and the FTC has filed an amicus brief in support of the petition. The FTC argues that the Second Circuit disregarded the policies and incentives of Hatch-Waxman — namely, to encourage litigation challenging weak patent claims of brand name pharmaceutical companies in order to facilitate the entry of generic drugs into the market. The Commission contends that the decision gives branded and generic rivals freedom to avoid competition and share monopoly profits, even where patent claims are fatally weak, and, in doing so, undermines Hatch-Waxman's goal of encouraging generic entry into the drug market. The Court has not ruled on plaintiffs' rehearing petition.

The FTC has made substantially similar arguments in its recent petition for certiorari in *Schering-Plough*. The Supreme Court has requested amicus briefing from the Department of Justice, which may be an indication that the Court will grant the FTC's petition. No date has been set for the DOJ's expected filing.

III. Federal District <u>Court Cases</u>

The Antitrust Division Challenges the National Association of Realtors' Rules for Online Brokerages as an Unreasonable Horizontal Restraint of Trade

In *United States of America v. Nat'l Ass'n of Realtors ("NAR")*, the Antitrust Division filed suit in the Northern District of Illinois accusing members of the nation's largest association of real estate brokers with conspiring to stifle competition from online real estate brokers by discriminating against those brokers on local multiple listing services ("MLSs"). As it has with many other industries, the Internet has created a new competitive dynamic in real estate markets, and, in *NAR*, the Antitrust Division alleges that the industry response to this dynamic has stepped over the line into an illegal restraint of trade.

Traditionally, real estate brokers representing sellers provide their sales listings to a local MLS, which compiles the listing of all participating brokers and then makes the combined list available to brokers representing buyers. In the early 1990s, some brokers began establishing password-protected, online websites (in industry parlance, "virtual office websites" or "VOWs") at which their buyer customers could review listings from the MLS. In 2003, NAR adopted its first VOW policy. The policy recommended to local MLS boards that they institute an "opt-out" policy for the VOWs. Under this initial policy, each MLS broker member was presumed to have given its consent for VOWs to show all of the broker's sales listings, unless the broker opted to revoke that consent. The broker could choose to revoke its consent, and thereby exclude its sales listings, as to all VOWs ("blanket opt-out") or it could limit its opt-out to specific VOWs run by specific brokers ("selective opt-out"). A broker that ignored an opt-out and displayed another broker's listings in violation of the VOW policy could be exposed to financial penalties and/or termination of MLS privileges.

Shortly after NAR adopted this initial policy, but before its widespread adoption by local MLS boards, the Antitrust Division began an investigation as to whether the policy violated the antitrust laws. In light of the investigation, NAR rescinded the initial VOW policy and adopted a modified version. Under the new VOW policy, brokers could only prevent their listings from being included on the VOWs by barring their listings from use on *all* other VOWs and by refraining from showing other brokers' listings on their own websites. The opt-out had to be both comprehensive and reciprocal.

The Division was not persuaded that the new policy solved the antitrust problem and brought suit in September 2005, seeking injunctive relief against both the initial and modified VOW policies. The Division alleged that the VOW policies constituted a combination among competing real estate brokers that had the effect of unreasonably restraining competition from online brokers and thereby stifling the development of new and innovative means of competition.

On December 6, 2005, NAR moved to dismiss. It argued that (1) the District Court did not have subject matter jurisdiction over the challenge to the original VOW policy because that policy was dropped before the Division filed suit; (2) the government had failed to state a claim with respect to both opt-out policies because those policies, by their terms, simply permitted individual brokers to make their own unilateral decisions about who would or would not be permitted to show that broker's listings; and (3) with respect to the new policy, the government had failed to allege anticompetitive effects arising from that policy because all of the anticompetitive effects alleged arose out of the now-abandoned "selective opt-out" provision.

On February 6, 2006, the Division filed its response. It contended that (1) subject-matter jurisdiction over the first policy did exist because the Division had alleged that both policies were part of an ongoing conspiracy and course of conduct by the brokers; (2) the policies did constitute a restraint of trade because they were a collective agreement among a group of competitors with market power about how online brokers would be treated and the effect of that agreement was to stifle competition, even if the individual brokers were permitted to make their own decisions about whether to opt-out or not; and (3) the complaint alleged that the "blanket opt-out" provision was anticompetitive, and therefore necessarily alleged that the new policy, which included a "blanket opt-out," was anticompetitive.

NAR has not yet filed its reply.

United States of America v. Nat'l Ass'n of Realtors, No. 05 C 5140 (N.D. Ill. filed Sept. 8, 2005).

North Texas Specialty Physicians Summary

In the *North Texas Specialty Physicians* case, Federal Trade Commission staff brought a case against an "independent practice association" of practicing physicians. The independent practice association, North Texas Specialty Physicians ("NTSP"), negotiated fee-for-service contracts on behalf of its member physicians with payors such as insurance companies. In negotiating these contracts, NTSP polled members for acceptable minimum prices and used the poll results to establish minimum prices that it would accept, on behalf of members, from payors. NTSP refused to forward or "messenger" prices below the minimum to its physician members. It also encouraged its members to refuse to negotiate with payors directly.

An administrative law judge and the Federal Trade Commission each held that NTSP's conduct constituted horizontal price fixing. The Commission rejected NTSP's argument that its conduct should be upheld on the ground that NTSP lacked market power. The Commission found that NTSP's conduct was at best inherently suspect. The Commission held that a party challenging a per se illegal, or inherently suspect, horizontal price restraint need not show that the defendants possessed market power or that defendants' conduct had an actual anticompetitive effect. The Commission also rejected NTSP's argument that its conduct constituted unilateral action and could not therefore form the basis of a horizontal conspiracy. The Commission found that NTSP was designed to fix prices for the member physicians and that "if the association negotiates prices for services that the *members* will provide, the organization's conduct is considered to be that of a combination or conspiracy of its members, not unilateral action." The Commission also held that direct communication between the individual physicians was not a required element of the price fixing violation.

IV. Antitrust Modernization Commission

With the passage of the Antitrust Modernization Act of 2002, Congress created the Antitrust Modernization Commission to examine whether there is a need "to modernize the antitrust laws and to identify and study related issues." The Commission is charged with soliciting views "of all parties concerned with the operation of the antitrust laws...; to evaluate the advisability of proposals and current arrangements" and to report accordingly to Congress and the President.

Funding for the Commission was delayed until 2003. It began its work in earnest in early 2004. From April 2004 to the end of that year, the Commission established its operational framework and undertook an outreach process to identify, and make internal recommendations concerning, issues for the Commission to study. In January 2005, the Commission selected initial issues to study . These "Issues Selected for Study" include 29 particular issues grouped into eight general topics: a) Civil Procedure & Remedies; b) Criminal Procedure & Remedies; c) Immunities and Exemptions; d) Intellectual Property; e) International; f) Mergers, Acquisitions, and Joint Ventures; g) Regulated Industries; and h) Single-Firm Conduct.

By spring 2005, the Commission's information gathering function was in full swing. Since, the Commission has followed an ambitious and intense process which has created a forum for lively debate and public exposition of many antitrust issues. Through December 2005, the Commission held hearings on 13 substantive topics. Four of them dealt with Remedies (indirect purchaser, civil, criminal, government civil). Two addressed Immunities and Exemptions (state action, statutory), and two covered Enforcement Institutions (state, federal). The other hearings have concerned the Robinson-Patman Act, Exclusionary Conduct, New Economy issues, Merger Enforcement, and Regulated Industries.

On January 19, 2006, the Commission held an Economists' Roundtable on Merger Enforcement. And, on February 15, the Commission held a hearing on International Antitrust issues. A general public hearing is set for March 21, 2006.

The balance of 2006 will find the Commission and its staff drafting findings and recommendations which will be vetted during Commission meetings this spring. The Commission anticipates creating a draft report and recommendations that would be finalized and presented to Congress and the President by April 2007.

Though the Commission has untaken an extensive effort, it remains unclear whether the fundamental jurisprudence and statutory framework of section 1 of the Sherman Act will change as a result of the Commission's work. The "Issues Selected for Study" and the subtopics within them address the context in which section 1 analysis or litigation occurs, but none of them addresses the most fundamental parts of section 1 analysis -- the bedrock issues that drive counseling on and litigation under section 1. These include: Have the courts been properly applying the holdings of *Sharp* and *Matsushita*? Is there (or should there be) room under section 1 to condemn oligopolistic behavior absent evidence of direct communications between parties? What of Judge Posner's (some might say) provocative statements about the nature of antitrust conspiracies in *In re High Fructose Corn Syrup*? 295 F.2d 651, 654 (7th Cir. 2002) (language of section 1 "is broad enough...to encompass a purely tacit agreement to fix prices, that is, an agreement made without any actual communication among the parties to the agreement"). What is the proper scope of an expert's testimony on the existence or non-existence of a conspiracy?

Perhaps the Commission chose not to address those issues because they are really just questions concerning how courts are applying the statute, rather than fundamental antitrust dogma, and therefore unsuitable for the work of the Commission. But several of the issues that were chosen for study would seem to fit the same mold. For example, the Commission is studying (albeit under the category of "Single-Firm Conduct") whether "the substantive standards for determining whether conduct is exclusionary or anticompetitive under either section 1 or section 2 of the Sherman Act [should] be revisited?" Likewise, *Parker* and *Noerr-Pennington* immunity, antitrust treatment of technologically innovative industries, the role of efficiencies in merger analysis (to name a few), all of which are to be part of the Commission's work, involve what up to now basically has been a function of how courts applied the Sherman Act. In the end, it is unclear why the Commission chose to consider those matters but not the fundamental section 1 issues already mentioned.

The fact that the Commission has omitted analysis of several central section 1 issues may herald a final report that has very little bearing on future section 1 jurisprudence, whatever its other merits.

V. <u>Canadian Developments</u>

Consultation on Immunity Program

On February 7, 2006, the Canadian Competition Bureau (the "Bureau") issued a consultation paper on its Immunity Program under the *Competition Act* (the "Act"). The consultation paper addresses a number of issues concerning the Immunity Program that have arisen over the past five years, including (1) confidentiality, (2) the oral application process, (3) the immunity applicant's role in the offense, (4) coverage of directors, officers and employees, (5) "penalty plus", (6) restitution, (7) revocation of immunity, (8) the creation of a formal leniency program and (9) pro-active immunity.

The Bureau's current approach to each of these issues is discussed in the consultation paper. In an effort to benchmark the Bureau's Immunity Program and provide possible options for consideration, the consultation paper also summarizes (where applicable) the approaches to these issues employed by the U.S. Department of Justice Antitrust Division, the European Commission, the United Kingdom Office of Fair Trading, and the Australian Corporate and Consumer Commission. In this regard, the consultation paper provides, among other things, that "the Bureau seeks to ensure the [Immunity] Program is generally in step with the approaches taken by competition authorities in other jurisdictions, while bearing in mind the differences in legal systems. Policy convergence will assist applicants seeking immunity in multiple jurisdictions and facilitate co-operation and coordination among competition authorities. It is particularly relevant in respect of the United States … given geographic proximity and market integration."

The goal of the consultation process "is to ensure the [Immunity] Program's optimum contribution to the detection, investigation and prosecution of criminal offenses under the Act". Responses to the consultation paper can be submitted to the Bureau by e-mail, fax or regular mail on or before May 10, 2006.

Reference: Competition Bureau, Information Notice, "Competition Bureau Consults on its Immunity Program" (7 February 2006); Competition Bureau, "Immunity Program Review Consultation Paper" (7 February 2006).

Bureau Revises Responses to Frequently Asked Questions

On October 17, 2005, the Bureau issued a revised series of responses to frequently asked questions about the its Immunity Program (the "Revised Responses"). The Revised Responses replace responses to the frequently asked questions that were issued in 2003 (the "Original Responses") and provide a step-by-step guide for potential applicants on how the Bureau will handle an immunity application.

The most significant change to the frequently asked questions relates to timelines. Specifically, whereas the Original Responses were silent as to expected timelines, the Revised Responses indicate that an immunity applicant will, following confirmation that it is the first party to approach the Bureau, have "a limited period of time, usually 30 days, to provide the Bureau with a detailed statement describing the illegal activity, its effects in Canada and the supporting evidence." Such a proffer can be provided orally or in writing and is usually made on a hypothetical basis through the immunity applicant's legal representative. While the Bureau does not require exhaustive evidence at this stage, it will not accept a bare outline of the conduct or speculation as to an immunity applicant's role.

If the immunity applicant "fails to provide a proffer within 30 days, the marker can be revoked and another party may be permitted to place its marker, unless the Bureau and the first [immunity] applicant have agreed on an extended deadline." A marker may also be revoked if an immunity applicant fails to meet any of the other requirements for immunity set out in the Bureau's Immunity Bulletin. The Bureau's decision to revoke a marker will, however, only be made after serious consideration of all factors and after notifying the immunity applicant.

In the event that:

"an [immunity] applicant does not believe it can produce its proffer within 30 days, this must be communicated to the Bureau as soon as possible after the marker call, together with reasons for the delay. The Bureau will decide whether the delay is reasonable and, where appropriate, establish a schedule for delivery of the proffer. A delay may be warranted in complex cases particularly where multiple jurisdictions are involved or, for example, where a key witness is ill or otherwise unavailable. Parties should alert the Bureau to anticipated delays as early in the process as possible to avoid harm to other steps in the Bureau's investigation."

An immunity applicant is required to cooperate fully, continuously, and expeditiously with the Bureau's investigation. This requires, among other things, that an immunity applicant make documents and witnesses available to the Bureau as quickly as possible. In this regard, the Revised Responses provide that "[r]elevant documents ... should be provided to the Bureau at least two weeks before an interview". They also provide that "a schedule for post-proffer production should [typically] be established early in the process and production of information completed within a six-month period. The Bureau will not accept lengthy delays or the non-availability of witnesses based on other commitments, including commitments that arise from immunity applications in other jurisdictions."

Reference: Competition Bureau, Information Notice, "Competition Bureau Revises Responses to Frequently Asked Questions on Immunity Program" (17 October 2005); Competition Bureau, "Immunity Program: Responses to Frequently Asked Questions" (17 October 2005).

Competition Bureau Seeks Public Comment on Its Regulated Conduct Bulletin

On November 1, 2005, the Bureau issued for public comment its draft *Technical Bulletin on "Regulated" Conduct* (the "Draft Bulletin"). The Draft Bulletin is intended to replace the *Information Bulletin on the Regulated Conduct Defense*, which was withdrawn on June 20, 2005 following extensive criticism that it, among other things, "[ignored] the very jurisprudence which forms the [regulated conduct defense ("RCD")] and [reflected] a view that is at odds with that jurisprudence."

In summary, the Draft Bulletin outlines the Bureau's approach to enforcement of the Act in situations where conduct is regulated by another federal, provincial or municipal law or legislative regime. According to the Draft Bulletin, "[t]he Bureau's starting point is that the Act generally applies to all conduct covered under a plain reading of the relevant provision(s) of the Act." In this regard, "[t]he Bureau believes that, in the vast majority of cases, both the Act and any other law said to regulate … impugned conduct will be able to coexist, without conflict, and that the Act will apply as written."

Significantly, the Draft Bulletin provides that the Bureau "will not necessarily approach conduct regulated by provincial laws in the same manner as conduct regulated by federal laws" and "will not necessarily approach the application of the reviewable practice provisions of the Act to conduct regulated by another law in the same manner as it will approach the application of the criminal provisions of the Act to such conduct."

With respect to federal laws, the Draft Bulletin states that:

"the Bureau will apply the Act as it reads unless it can confidently determine that Parliament intended that the other federal law prevail, either by clear language in the Act or by the other federal law authorizing or requiring the particular conduct or, more generally, providing an exhaustive statement of the law concerning a matter. Parliament's intention in the other federal law may be express, for example, by express authorization or by express reference to the Act. Parliament's intention in the other federal law may also be implied, in which case the Bureau will generally conclude that a specific law is intended to take precedence over a general law."

The Draft Bulletin appears to recognize that, in the context of conflicting federal laws, the RCD is applicable to both the criminal provisions and the reviewable practice provisions included in the Act.

The Bureau's approach to conduct authorized by provincial laws is more restrictive and uncertain. In this regard, the Draft Bulletin provides that:

"[t]he Bureau will always consider whether the RCD applies to conduct that may be regulated by provincial law, focusing on the question of whether a validly enacted provincial law authorizes (expressly or impliedly) or requires the impugned conduct. Where this occurs, the Bureau will apply the RCD and refrain from pursuing a case under [the conspiracy provisions] of the Act. With respect to the other [criminal] provisions ... the Bureau will strive to determine whether Parliament intended that the particular provision(s) of the Act apply to the impugned conduct and may not pursue the case by application of the RCD."

The Draft Bulletin questions the applicability of the RCD to the reviewable practice provisions when they conflict with provincial statutes, given that these provisions do not contain language that unequivocally allows for the application of the RCD. While the Draft Bulletin does not go so far as to reject the applicability of the RCD to reviewable practices, it states that the Bureau's approach "will be informed, but not governed, by the RCD caselaw."

The Draft Bulletin notes that the RCD may be invoked by those who regulate ("regulators") or those they regulate ("regulatees"). Although no Canadian court has expressly indicated that the application of the RCD differs as between regulators and regulatees, regulatees have not typically benefited from an application of the RCD by Canadian courts. Therefore, while the Bureau's basic RCD analysis will remain the same, the activities of regulatees may, according to the Draft Bulletin, "be subject to greater scrutiny by the Bureau than the activities of regulators in recognition of this caselaw."

Finally, the Draft Bulletin acknowledges that "the status of regulated conduct under the Act requires greater clarity. As such, the Bureau will seek to benefit from caselaw that will clarify the status of regulated conduct and will explore the potential for a legislative resolution of this longstanding issue."

Reference: Competition Bureau, Information Notice, "Competition Bureau Seeks Public Comment on its Regulated Conduct Bulletin" (1 November 2005); Competition Bureau, "Draft Technical Bulletin on 'Regulated' Conduct" (1 November 2005).

Agreement to Assign Patents Subject to Canadian Competition Act

On November 2, 2005, the Federal Court of Appeal (the "FCA") issued its decision in *Apotex Inc.* v. *Eli Lilly and Co*., in which it held that the assignment of a patent can constitute an agreement or arrangement to lessen competition unduly if the assignment results in an increase to the assignee's market power greater than that inherent in the patent assigned.

In June 1997, Eli Lilly and Company and Eli Lilly Canada Inc. (collectively, "Lilly") filed a statement of claim alleging that Apotex Inc. ("Apotex") had infringed several of its patents, including four patents that had previously been assigned to it by Shionogi & Co. Ltd. ("Shionogi") (the "Shionogi Patents"). Each of the Shionogi Patents described and claimed processes suitable for making intermediates, which could be converted to the antibiotic cefaclor using other non-infringing processes.

In 2001, Apotex amended its statement of defense and counterclaim to argue that the assignment of the Shionogi Patents to Lilly violated section 45 of the Act, which prohibits agreements that prevent or lessen competition unduly. Following this amendment, a series of motions for summary judgment were brought by Lilly and Shionogi regarding the potential application of section 45 of the Act. These motions wound their way through the Federal Court and then the FCA through various appeals. Throughout these proceedings, Lilly and Shionogi argued that section 45 could not apply as a matter of law to an assignment of patent rights because the *Patent Act* specifically authorizes holders of patents to assign the rights. In making this argument, Lilly and Shionogi relied on the earlier decision of the FCA in *Molnlycke AB* v. *Kimberly-Clark of Canada Ltd.* (1991), 36 C.P.R. (3d) 493, in which the FCA struck out allegations of anticompetitive activity on the basis that the assignment of a patent involves nothing more than the legitimate exercise of the patentee's monopoly.

Initially, a Prothonotary concluded that *Molnlycke* was distinguishable from the present case and allowed Apotex's claim to proceed. The Federal Court disagreed with the Prothonotary's reasons for distinguishing *Molnlycke* and found that the earlier decision was binding. Following *Molnlycke*, the Federal Court concluded that the "allegation that Shionogi and Lilly entered into the agreement to assign the Shionogi Patents … for the purpose and with the effect of allowing Lilly to continue to have a monopoly of the Canadian market for cefaclor is simply not … an allegation of illegal conduct. Everyone who obtains a patent, whether by issue or by assignment, does so for the purpose of obtaining a monopoly which, by definition, is a lessening of competition. That monopoly is one that is legally sanctioned and simply cannot, as a matter of law, result in the lessening of competition being 'undue' during the life of the patent."

On appeal, the FCA reversed the Federal Court's decision. In the course of its decision, the FCA pointed out that its earlier decision in *Molnlycke* was distinguishable from the present case. Specifically, "[i]n the case of *Molnlycke*, there was a single supplier lawfully entitled to sell the subject of the patent prior to the patent being assigned. The assignment merely transferred the patent to another company. The only effect of the assignment was that a different company could sue the defendant for infringement. There was no change in the number of patent-holders before and after the assignment." By contrast, before the assignment of the Shionogi Patents, there were two companies with commercially viable processes for making cefaclor, namely Shionogi and Lilly. After the assignment, there was only one such company.

The FCA also pointed out that in *Molnlycke* it had found "that, in order to provide scope for the statutory monopolies granted by the *Patent Act* to operate, Parliament must have intended that 'undue impairment of competition cannot be inferred from evidence of the exercise of [patent] rights alone'. Where, however, there is evidence of something more than the mere exercise of patent rights that may affect competition in the relevant market, *Molnlycke* does not purport to completely preclude application of the [Act]."

The FCA remanded the matter to the Federal Court for further consideration. After further consideration, the Federal Court found that the assignment in question did not involve something more than the mere exercise of intellectual property rights. Specifically, the Federal Court found that "[t]he agreement which constitutes the conspiracy alleged by Apotex … is solely and exclusively the assignment of the Shionogi [P]atents and there is no other agreement alleged or shown by the evidence which could be the basis of a section 45 offence."

On appeal, the FCA concluded that the Federal Court had erred in law and that Apotex's counterclaim should proceed. Specifically, the FCA held that the *Patent Act* does not immunize an agreement to assign a patent from section 45 of the Act when the assignment increases the assignee's market power in excess of that inherent in the patent rights assigned. The FCA once again distinguished *Molnlycke* from the case at bar on the basis that it was the combination of the assignment of the Shionogi Patents, together with Lilly's already existing ownership of patents for the other commercially viable methods of production for cefaclor, which led to a lessening of competition and potentially invoked the application of section 45 of the Act.

In reaching its decision, the FCA noted that "this interpretation of … the *Patent Act* enables it and section 45 of the [Act] to operate harmoniously in accordance with the ordinary meaning of the statutory language of the provisions". The FCA also noted that "an interpretation of [the *Patent Act*] which does not immunize the assignment of patents from section 45 when it lessens competition is consistent with the purpose of the [Act]", which, as stated in section 1.1, is to "maintain and encourage" competition. Finally, the FCA noted that this interpretation of the *Patent Act* is consistent with the enforcement approach set out in the Bureau's Intellectual Property Enforcement Guidelines.

Reference: *Apotex Inc.* v. *Eli Lilly and Co.*, (2 November 2005) No. A-579-04 (F.C.A.).

Labatt Pleads Guilty to Price Maintenance

On November 23, 2005, the Bureau announced that Labatt Brewing Company ("Labatt") pleaded guilty and was fined Cdn.$250,000 for attempting to influence the prices that nine independent convenience/grocery retailers in Sherbrooke and elsewhere in Québec charged for discount beer contrary to the price maintenance provisions contained in the *Competition Act*. These provisions make it a criminal offense for any person engaged in producing or supplying a product to, among other things, "attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada."

According to its press release, the Bureau commenced an inquiry into the Québec beer industry in October 2004. Following this inquiry, the Bureau concluded that, between March 2004 and April 2005, Labatt, through some of its sales representatives, attempted to influence upward, or discourage the reduction of, the price at which nine independent convenience/grocery retailers supplied or offered to supply their discount beer, including discount beer sold by Labatt's competitors. Labatt's attempts, when successful, apparently affected the price of discount beer sold by these retailers.

The fine imposed against Labatt is equal to the largest fine previously imposed by a Canadian court under the price maintenance provisions.

The court also issued a prohibition order against Labatt. Pursuant to that order, Labatt is required to inform all of its independent convenience/grocery retailers in Québec that it cannot attempt to influence upward, or discourage the reduction of, the price of alcoholic beverages.

In the press release announcing the fine, Denyse MacKenzie, the Senior Deputy Commissioner of Competition, stated that "Labatt's actions, through some of its sales representatives, resulted in some discount beer consumers in Sherbrooke and elsewhere in the province being offered discount beer at a higher price, while Labatt's competitors were unable to provide independent retailers and consumers with better prices. In order to safeguard the competitive process and ensure that consumers benefit from the lowest possible prices for goods and services, the . . . Bureau will continue to fully enforce the price maintenance provision of the *Competition Act*."

Reference: Competition Bureau, Press Release, "Labatt Pleads Guilty and Pays $250,000 Fine following a Competition Bureau Investigation" (23 November 2005).

Nippon Pleads Guilty to Aiding and Abetting Graphite Electrodes Cartel

On December 8, 2005, the Bureau announced that Nippon Carbon Co. Ltd. ("Nippon"), a Tokyo-based company, pleaded guilty and was fined Cdn.$100,000 for aiding and abetting an international conspiracy to fix the prices of and allocate the market for high-power graphite electrodes. High-power graphite electrodes are used primarily in the production of steel and, to a lesser extent, in the foundry and abrasive industries.

According to the Statement of Admissions filed with the Federal Court of Canada, Nippon, UCAR International Inc. ("UCAR U.S."), SGL Carbon Aktiengesellschaft ("SGL AG") and a number of other graphite electrode producers entered into an anti-competitive agreement in or about May 1992 pursuant to which they agreed to, among other things, fix prices, restrict production capacity, divide world markets and allocate the approximate volume of graphite electrodes to be sold by each participant or group of participants (the "Agreement"). Specifically, the Statement of Admissions states that "[s]ome participants reduced or eliminated exports to and/or capacity to sell and supply their electrodes in competitors' home markets except in accordance with the Agreement. In each market, one participant was designated to fix the price that other participants supplying that market would follow." UCAR U.S. was apparently the designated price leader in North America.

The Statement of Admissions also states that the participants met on at least twenty occasions during the relevant period for the purposes of implementing, confirming, adjusting and maintaining the Agreement. These meetings apparently "included 'working' discussions at which the participants would resolve specific price, marketing, supply or production issues." In addition, the participants "monitored and enforced the Agreement through the exchange of sales and customer information" and also "employed … efforts to conceal the Agreement."

While "Nippon … plays an important role in the production, manufacture, distribution, sale and supply of graphite electrodes throughout the world," it did not have any sales of graphite electrodes in Canada during the period May 1992 to June 1997 (the "relevant period"). In this regard, Nippon had apparently stopped selling graphite electrodes in Canada in 1986 "because of unfavorable business conditions including the anti-dumping proceedings taken by the Government of Canada before the Canadian International Trade Tribunal and its predecessor and the significant appreciation of the Japanese Yen against the Canadian dollar." Instead, the "only two suppliers [of high-power graphite electrodes] of any significance to the Canadian market" during the relevant period were UCAR Inc. and SGL Canada Inc., which were the Canadian subsidiaries of UCAR U.S. and SGL AG. UCAR U.S. and SGL AG, together with their subsidiaries ("UCAR" and "SGL," respectively), were two of the largest suppliers of graphite electrodes in the world.

As indicated in the Statement of Admissions, "[i]t was the understanding of UCAR and SGL that Nippon would not resume the sale of graphite electrodes in Canada during the [relevant period] and to do so would be inconsistent with the Agreement. By supporting and maintaining the Agreement, Nippon assisted in the implementation of the Agreement by UCAR and SGL … in their Canadian home market, which the latter accomplished by giving directions consistent with the Agreement to their respective Canadian subsidiaries."

Nippon is the seventh party to be convicted in Canada for participating in the graphite electrodes cartel. Previously, UCAR Inc., SGL AG, Tokai Carbon Co., Mitsubishi Corp. and two former UCAR executives, Robert Krass and Robert Hart, were fined a total of nearly Cdn.$25 million for their roles in the international conspiracy.

In the press release announcing the fine, Denyse MacKenzie stated that "the … Bureau will continue to pursue individuals and businesses involved in price-fixing cartels as a top enforcement priority."

References: Competition Bureau, Press Release, "Nippon Carbon Pleads Guilty to Participating in International Graphite Electrodes Cartel" (8 December 2005); *R.* v. *Nippon Carbon Co. Ltd.*, No. T-604-05, Statement of Admissions, April 6, 2005 (F.C.T.D.).

VI. A Survey of Recent International Developments in Anti-Cartel Enforcement

The prosecution of cartels continues to be an enforcement priority for competition authorities internationally. This shared commitment has manifested itself in several ways in the time frame covered by this article (June 2005 to date). These include the imposition of record fines and the adoption of legislative and institutional measures to improve the ability of authorities to detect, investigate and prosecute cartel conduct. A principal feature of these efforts has been the establishment or refinement by several jurisdictions of amnesty/ leniency programs designed to encourage cartel participants to disclose their anti-competitive conduct. There also has been a continued emphasis on inter-agency cooperation and international convergence.

Key developments in this regard are summarized below.

Aggressive Anti-Cartel Enforcement

Competition authorities around the world have continued to crackdown hard on domestic and international cartels. In several jurisdictions, record penalties were levied; in other cases, amnesty programs proved to be an important contributing factor in the initiation (and resolution) of proceedings. An increasingly common element has been the focus by authorities on bringing proceedings against individuals.

Record Penalties

Record penalties have been imposed for cartel activity in several jurisdictions:

Argentina – In August 2005, Argentina's antitrust authority fined six cement companies a total of US$107 million for price-fixing. This is the largest fine ever imposed by Argentina's antitrust authority. The authority found that between 1991 and 1999, the participants in the cement cartel colluded on prices and artificially divided up Argentina's cement market.[3]

France – In December 2005, France's competition council imposed record fines totaling EUR€534 million on three wireless telephone providers. Between 1997 and 2003, these companies exchanged detailed information on sign-up and

[3] See "Argentina punishes cement conspirators", *Global Competition Review* (August 10, 2005), at http://www.globalcompetitionreview.com.

cancellation rates and endeavored to stabilize their market shares.[4]

Taiwan – Also in December 2005, Taiwan's Fair Trade Commission imposed the largest administrative fine in its history, totaling US$6.3 million, against 21 cement companies. According to the Fair Trade Commission, the cement manufacturers in question agreed to prevent international cement companies from establishing domestic marketing channels, negotiated the retreat of some companies from the market, and reached an agreement with importers to facilitate the joint increase of cement prices.[5]

Canada – In January 2006, three paper distribution companies pleaded guilty in the Ontario Superior Court of Justice to two counts of conspiring to lessen competition unduly contrary to section 45 of Canada's *Competition Act* for their part in a conspiracy involving carbonless sheets. The companies were each fined CDN$12.5 million, the highest fines ever for a domestic conspiracy of this nature. Previously, the record fine for a domestic conspiracy was CDN$2.5 million.[6]

Impact of Leniency Programs

Two recent cartel proceedings are notable for the significant role played by leniency programs in facilitating the detection of the anti-competitive conduct at issue:

On December 21, 2005, the European Commission fined four companies (Flexsys, Crompton (now Chemtura), Bear and General Quimica) EUR€75.86 million for operating a cartel in the EEA and worldwide rubber chemicals markets. The investigation into this cartel began following an application for conditional immunity by Flexsys in April 2002. Following inspections by the European Commission on their premises, Crompton, Bear and General Quimica also applied to the Commission for leniency, in that order. In accordance with the Commission's Leniency Notice, Flexsys was granted full immunity from penalty, Crompton's fine was reduced by 50%, Bear's fine was reduced by 20% and General Quimica's fine was reduced by 10%.[7]

On the same date, the Australian Competition and Consumer Commission ("ACCC") instituted proceedings against the Visy Group and some of its senior officers for price-fixing and market sharing.[8] The ACCC alleged that, between 2000 and late 2004, Visy entered into and gave effect to anti-competitive arrangements with its principal competitor in the supply of corrugated fiber board containers, Amcor Limited. The cartel was uncovered when Amcor applied to the ACCC for leniency after it had obtained evidence of anti-competitive conduct in the context of unrelated litigation against five former employees. Amcor and its former senior executives were granted conditional immunity under the terms of the ACCC's leniency policy.

Sanctions Against Individuals

As illustrated by the above-mentioned proceedings against senior executives of the Visy Group, it is no longer unusual for individuals to face sanctions for their involvement in cartel conduct. Indeed, in its "Third Report on Hard Core Cartels" published in December 2005, the OECD recommended that competition authorities consider introducing and imposing sanctions against individuals, including criminal sanctions.[9]

As a possible sign of things to come, on March 2, 2006, an individual in Ireland was charged with price-fixing and fined EUR€3,500. This is the first criminal conviction for a competition offense in

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[4] See http://www.conseil-concurrence.fr/user/standard.php?id_rub=160&id_article=502.

[5] See Taiwan Fair Trade Commission Press Release, "The Taiwan FTC Imposes Heavy Fine on Cement Cartel" (December 15, 2005), http://www.ftc.gov.tw/EnglishWeb/ShowNewsEnglish.asp?ID=1.

[6] See Competition Bureau Press Release, "Competition Bureau Investigation Leads to Record Fine in Domestic Conspiracy" (January 9, 2006), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2018&lg=e.

[7] See European Commission Press Release, "Commission fines four firms €75.86 million for rubber chemical cartel" (December 21, 2005), http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1656&format=HTML&aged=0&language=EN&guiLanguage=en.

[8] See Australian Competition and Consumer Commission Press Release, "Proceedings instituted against Visy group, senior executives for alleged cartel in the corrugated fiberboard container market" (December 21, 2005), http://www.accc.gov.au/content/index.phtml/itemId/719891.

[9] OECD Competition Committee, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation* (December 15, 2005), www.oecd.org/competition.

Europe.[10] Another first that occurred in the past year was the decision in June 2005 by a magistrates' court in the United Kingdom that the former chief executive of Morgan Crucible Co. should be extradited to stand trial in the United States for allegedly fixing prices of components used to power trains. The U.K. Home Secretary approved the decision and ordered Mr. Norris' extradition in September 2005. Mr. Norris has challenged this order and the matter continues to be litigated.

While Mr. Norris' case is the first one in which the United States has sought extradition for an antitrust offense, it is not the first time that foreign nationals have faced the prospect of jail time in the United States for participating in cartel offenses. According to an official of the United States Department of Justice, twenty foreign nationals have pleaded guilty and been imprisoned in the United States on these grounds since 1999.[11] Most recently, on March 1, 2006, four Korean executives of Hynix Semiconductor Inc. agreed to plead guilty and serve jail time in the United States for their involvement in a global conspiracy to fix the prices of DRAM sold to certain computer and server manufacturers.[12]

Leniency Programs Adopted/Revised

As noted in the preceding section, leniency programs (also called immunity/ amnesty programs) are one of the most effective tools available to competition authorities in detecting and prosecuting cartels. For that reason, several competition authorities have adopted their own such programs in recent months, most notably in Japan. Other authorities (in Australia, Canada, the European Commission and United Kingdom) have sought to improve their existing programs by introducing revisions or initiating reviews. Although there are differences between these various programs, there is a clear trend towards convergence in policies and procedures, in recognition of the value of having largely consistent programs in place across jurisdictional boundaries.

Leniency Programs Adopted

Japan – As part of major revisions to Japan's *Antimonopoly Act*, the Japan Fair Trade Commission (the "JFTC") has introduced a leniency program which became effective in January 2006.[13] As in most jurisdictions, the Japanese leniency program offers cartel participants an incentive to come forward by holding out the prospect of reductions in potential penalties. Thus, parties who are the "first in" to report their anti-competitive conduct will be entitled to complete immunity from the administrative surcharges which the JFTC is empowered to impose. Similarly, the second and third companies to report will be entitled to receive reductions of 50% and 30%, respectively, but only if they provide information to the JFTC before the start of its investigation. If the information is provided after the start of the JFTC investigation, only a 30% reduction will be available (for up to three applicants). Applicants will be disqualified from receiving leniency where: (i) a report containing false information was submitted; (ii) the applicant did not submit additional information as requested; or (iii) where the applicant forced others to engage in the cartel or tried to block others from ceasing participation in the cartel.

Although the Japanese leniency program does not incorporate a formal "marker" concept, anonymous calls can be placed to the JFTC before an application is made to determine if leniency is available. The initial immunity application must be made to the JFTC in writing by fax; however, the JFTC may be prepared to receive more detailed information orally in subsequent stages if it is satisfied that there is a risk of discovery in civil proceedings in other jurisdictions.

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[10] See "First criminal conviction in Europe", *Global Competition Review* (March 8, 2006), http://www.globalcompetitionreview.com.

[11] See Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, "Charting New Waters in International Cartel Prosecutions", The Twentieth Annual National Institute on White Collar Crime (March 2, 2006).

[12] See U.S. Department of Justice Press Release, "Four Korean Executives Agree to Plead Guilty, Serve Jail Time in the U.S., for Participating in DRAM Price-Fixing Conspiracy" (March 1, 2006), http://www.usdoj.gov.

[13] See Japan Fair Trade Commission Press Release dated April 20, 2005, http://www.jftc.go.jp/e-page/pressreleases/index05.html.

In its original draft form, the JFTC leniency program was based entirely on a system of written reports. The JFTC backed away from this position as a result of criticism raised during the public consultation process. Although the initial application form now required is abbreviated, it still obliges immunity applicants to disclose the product(s) at issue, the act(s) for which leniency is sought and the duration of the conduct at issue.

It also should be noted that the Japanese program only covers the administrative sanctions which the JFTC can impose. The leniency program does not formally extend to criminal prosecutions, which remain under the exclusive authority of Japan's public prosecutors. That said, the Japanese Ministry of Justice has stated that it will pay full regard to the JFTC's decision to provide immunity to the first leniency applicant and, under ordinary circumstances, will not prosecute such parties. Second and third applicants, however, will not necessarily obtain the benefit of this treatment and may be subject to criminal prosecution.

Other Jurisdictions

Leniency programs also have been introduced in several other jurisdictions in recent months:[14]

Austria – Austria's Federal Cartel Authority introduced its leniency program effective January 1, 2006.[15] Complete immunity is available to the first party to report cartel conduct of which the Authority is not aware. Where the Authority is already aware of the cartel, the first party may nonetheless obtain a 30% to 50% reduction in penalty. Subsequent parties to report may obtain reductions of 20% to 30%.

Mexico – Mexico's Federal Competition Commission announced the introduction of a leniency program in January 2006. Complete immunity will be granted to the first company or individual that comes forward with relevant and convincing evidence before the initiation of an investigation. Complete immunity will not be available if an investigation has already been initiated. However, a substantial reduction in the applicable fine will be available as long as no charges have yet been laid. The second corporation or individual to request leniency may be given a 30% reduction in the applicable fine and a 20% reduction in the applicable fine may be available to any subsequent leniency applicant. There is also the possibility of a further penalty reduction if information is provided on other anti-competitive practices. Of note, a leniency applicant will not be disqualified if it was the ringleader of the cartel.[16]

Leniency Programs Revised/Under Review

Australia –The ACCC has issued a revised Immunity Policy for Cartel Conduct, effective September 2005.[17] Key aspects of this revised policy include the following:

automatic full immunity from prosecution and penalty will be provided to the first eligible participant to report its involvement in a cartel up until the point where the ACCC has sufficient evidence (under the former policy, full immunity was only available if the ACCC was unaware of the cartel when the participant self-reported);

immunity will not be available to cartel ringleaders or cartel members that have coerced others into taking part in the cartel;

a marker system will be established to allow potential applicants to secure their place in the immunity queue while they complete internal investigations;

immunity applications will no longer be required to be made in writing;

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[14] Although not yet adopted, the Danish Prime Minister announced in October 2005 that Denmark intends to institute an anti-cartel leniency program in 2006 as part of that country's intensified efforts against cartels. See "Denmark aims at leniency in 2006", *Global Competition Review* (October 12, 2005), http://www.globalcompetitionreview.com.

[15] The Austrian Federal Cartel Authority also has published a handbook outlining the aspects of its program. See "Austria publishes leniency handbook", *Global Competition Review* (December 22, 2005), http://www.globalcompetitionreview.com.

[16] See "Mexico gets Leniency", *Global Competition Review* (March 8, 2006**),** http://www.globalcompetitionreview.com.

[17] The ACCC has issued guidelines with respect to its revised Immunity Policy, which are available at http://www.accc.gov.au/content/index.phtml/itemId/708758. In February 2006, the ACCC also issued a publication entitled *Cartels – What Small Businesses Need to Know*, which is a guide to assist small businesses in identifying and avoiding involvement in, or being a victim of, cartel behavior.

corporate immunity will also encompass all current and former employees;

if the first immunity applicant is unable or unwilling to meet all of the ACCC's requirements, subsequent applicants may still qualify for immunity; and

the ACCC may, in appropriate cases, approach individual cartel participants about the availability of immunity as part of its efforts to destabilize cartels.

Canada –The Canadian Competition Bureau issued two documents recently in connection with the review of, and possible changes to, its Immunity Program.

In October 2005, the Bureau released a revised set of "Frequently Asked Questions" to describe in greater detail certain aspects of its Immunity Program (the "Immunity FAQs. The Immunity FAQs set out the Bureau's policies with respect to various steps in the immunity application process.

The Bureau followed the Immunity FAQs with the release in February 2006 of a consultation paper on its Immunity Program, soliciting responses from stakeholders on a series of issues that have arisen since the Immunity Program was introduced in its current form in 2000. These two documents are discussed in greater detail in the preceding article on Canadian developments.

European Commission

In April 2005, Commissioner Kroes stated that a revised Leniency Notice would be published in late 2005.[18] Some of the deficiencies Commissioner Kroes identified in the European Commission's existing Leniency Notice included the need for a one-stop shop for European leniency applications, a process for the simplified handling of European cartel cases and greater clarity on issues of concern to parties such as oral applications and disclosure of corporate statements. In February 2006, somewhat later than anticipated, the European Commission published draft amendments to its 2002 Leniency Notice. However, these amendments only deal with the issue of disclosure of corporate statements and do not cover the range of issues identified by Commissioner Kroes in her speech. The draft amendments propose to add an annex to the Leniency Notice containing a special procedure for the protection of corporate statements made to the European Commission in the context of its leniency program. The draft amendments are intended to respond to concerns that corporate statements made to the Commission will be discoverable in civil damage proceedings in foreign jurisdictions. Key features of the proposed amendments include: a clear policy statement that requiring corporate statements to be disclosed in civil proceedings could undermine the Commission's anti-cartel enforcement and that the Commission is prepared to intervene in civil proceedings to prevent this from occurring; a procedure for making oral statements; a prohibition against access to the Commission's file for any purpose other than for proceedings under Article 81 of the EC Treaty; and sanctions against any party which abuses its right of access to the file.[19]

United Kingdom –In June 2005, the UK Office of Fair Trading ("OFT") introduced an interim policy document to supplement and elaborate on the procedures set out in its existing leniency policies.[20] The OFT's goal in adopting this interim policy document is to make it even "more attractive" for parties to apply for immunity or leniency in the United Kingdom. Among the changes introduced by the interim policy are: allowing hypothetical inquiries about the availability of leniency; a marker system; and an oral application process.

The interim policy document also sets a high "bar" on when an undertaking or individual will be found to be a "coercer" and therefore ineligible for immunity. The OFT states that there must be evidence that the "coercer" took "clear and positive" steps to compel an unwilling participant to take part in the cartel, for example where such strong economic

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[18] See Neelie Kroes, "The First Hundred Days", (Brussels) 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law, http://www.europa.eu.int/comm/competition/speeches/index_2005.html.

[19] See European Commission Press Release, "Public consultation of intended amendment to the Commission's 2002 Leniency Notice" (February 22, 2006), http://www.europa.eu.int/comm/competition/index_en.html.

[20] See "Leniency and no-action: OFT's interim note on the handling of applications" (July 2005), http://www.oft.gov.uk/Business/Cartels/default.htm. The OFT continues to welcome any comments on its interim policy but intends to test the proposals for about a year before publishing final guidance.

pressure was exerted on other cartel participants as to make market exit a real risk if they did not join. The OFT notes that it has never refused corporate immunity on "coercer" grounds and does not believe that this factor will lead to a significant number of refusals in the future.

Competition Authorities Seek Enhanced Powers and Resources

As part of the international campaign against cartel conduct, competition authorities in a variety of jurisdictions have taken steps recently to enhance their enforcement capabilities.

For example, a number of jurisdictions have allocated more budgetary and manpower resources to this effort. In November 2005, Ireland increased the annual budget of its competition authority by 15% in order to provide more staff for its cartel division and pay for increased investigative field work.[21] This followed a decision by the European Commission in June 2005 to create a directorate with 60 staff dedicated exclusively to cartels.[22]

Other jurisdictions have implemented, or are proposing to implement, legislative changes in this regard. In Japan, for instance, the recent revisions to the *Antimonopoly Act* included an increase in administrative fines for cartel conduct to 10% of a company's annual turnover. These amendments also authorize the JFTC to obtain search warrants to assist in its investigations.[23]

Turkey is another jurisdiction looking to improve its enforcement capabilities in this area. The Turkish Competition Board has said that it does not have sufficient investigative powers to properly pursue cartel conduct. Accordingly, it has asked for the authority to engage in e-mail supervision, secret camera use, house and body searches and wiretaps. These proposals have the support of Turkey's industry and trade minister, although amendments to Turkey's *Law on the Protection of Competition* have not yet been proposed.[24]

The Canadian Competition Bureau also continues to consider possible amendments to the *Competition Act*'s cartel (conspiracy) provisions. In the fall of 2005, an external working group of expert lawyers and economists was struck to help the Bureau evaluate various models that could be used when applying the conspiracy provisions, including whether the adoption of a per se offense is appropriate (currently, Canadian conspiracy law requires that a negative ("undue") impact on competition be demonstrated). Committee members have agreed on criteria for evaluating the potential models and have commenced their analysis of a number of case scenarios, all with a view to determining, among other things, what behavior the conspiracy provisions should cover and whether they should ultimately be criminal in nature (as is currently the case) or provide for civil proceedings. Public technical roundtables are expected in the late summer or fall of 2006.[25]

Separately, the Bureau also proposed in the fall of 2005 to increase the maximum fines under the *Competition Act*'s conspiracy provisions from the current CDN$10 million per count to CDN$25 million per count. As part of the same legislative package, the Bureau proposed to introduce a new "market studies" power, which would have allowed it to launch investigations into the state of competition in any sector of the economy without the need to demonstrate a belief that anti-competitive conduct had occurred. These proposals "died on the Order Paper" when the Canadian parliament was prorogued in November 2005 in advance of general elections. It is not clear if the new minority government will seek to re-introduce these proposed amendments at some stage during its term.

Finally, the Australian Government announced in September 2005 proposed changes to the *Trade Practices Act* that would create a criminal offense for

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[21] See Competition Authority Press Release (November 17, 2005), http://www.tca.ie/.

[22] See European Commission Press Release, "Commission Acting Against Cartels – Questions and Answers" (December 5, 2005), http://www/europe.eu.int/comm/competition/index_e.html.

[23] See Japan Fair Trade Commission Press Release (April 20, 2005), *supra*.

[24] See "Turkey asks for more power", *Global Competition Review* (January 18, 2006), http://www.globalcompetitionreview.com.

[25] See Commissioner of Competition, "Competition Bureau Progress and Priorities", speech to the Canadian Bar Association Annual Conference on Competition Law (November 3, 2005), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1994&lg=e.

cartels, in addition to the existing civil cartel provisions.[26] Potential criminal penalties would involve fines (corporate and criminal) and imprisonment for individuals up to a five year maximum. The ACCC would also be authorized to seek warrants to conduct search and seizures. In addition, individuals could be disqualified from managing corporations and corporations would not be able to indemnify officers against civil liability to pay a pecuniary penalty and for legal costs incurred in resisting enforcement proceedings.

International Co-operation

An important and developing element of anti-cartel enforcement is the growing cooperation between competition authorities in different jurisdictions. This reflects a recognition that cartels often have a cross-border impact and that inter-agency cooperation is increasingly necessary to effectively counter such behavior. This trend has been recognized by the OECD, which states in its December 2005 report on hard core cartels that "cooperation among competition authorities in investigation of cartels has reached unprecedented levels and exchanges of cartel enforcement know-how have intensified".[27]

A very recent and well-publicized example of inter-agency cooperation took place in February 2006 when the European Commission and the Antitrust Division of the U.S. Department of Justice coordinated searches of the cargo operations of certain airlines in Europe and the United States. Canada's Competition Bureau and Korea's Fair Trade Commission are also reported to be participating in this investigation, which is apparently examining surcharges on fuel, security and war-risk insurance.

Inter-agency cooperation can be based on both formal and informal arrangements. A recent example of a formal cooperation agreement is the one entered into by the governments of Japan and Canada, which came into effect on October 6, 2005. This agreement is designed to improve cooperation and coordination between the two countries in their competition enforcement efforts, including with respect to international cartels.[28]

One of the issues that has often bedeviled inter-agency cooperation is to what extent may competition authorities exchange information in the pursuit of cartel enforcement. In an attempt to provide some helpful guidance on this issue, the OECD released in October 2005 its *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard-Core Cartel Investigations* ("Best Practices").[29] While recognizing the importance of information exchanges in dealing with international cartels, the OECD acknowledges that the prospect of information exchanges should not undermine cartel investigations, including the effectiveness of leniency programs, by acting as a disincentive to cooperation by cartel participants who have come forward.

Some of the "best practices" recommended by the OECD in this regard include:

(a) the requesting jurisdiction should explain in detail how the request for information concerns the investigation of a hard-core cartel;

(b) the requesting jurisdiction should identify its domestic confidentiality laws and related practices and confirm that it will maintain the confidentiality of the exchanged information and oppose the disclosure of information to third parties for the use of such information in private civil litigation;

(c) the requested jurisdiction should have discretion not to provide the requested information where: (i) the requesting jurisdiction's investigation relates to conduct that would not be deemed hard-core

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[26] See Joint Media Statement of the Treasurer and the Minister for Small Business and Tourism, "Government Progressing Trade Practices Act Reforms to Benefit Consumers and Business" (September 2, 2005), http://www.treasurer.gov.au/tsr/content/pressreleases/2005/013.asp.

[27] OECD Competition Committee, *Hard Core Cartels*, *supra*. See also Neelie Kroes, "The First Hundred Days", *supra* and Scott Hammond, "Charting New Waters in International Cartel Prosecutions", *supra*.

[28] See Competition Bureau Press Release, "Canada and Japan Sign Competition Agreement on Competition Law Enforcement" (September 7, 2005), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1943&lg=e.

[29] See OECD, *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations* (October 2005), http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html.

cartel conduct by the requested jurisdiction; (ii) honoring the request would be unduly burdensome or might undermine an ongoing investigation; (iii) confidential information may not be sufficiently safeguarded in the requesting jurisdiction; (iv) the execution of the request would not be authorized by its domestic law; or (v) honoring the request would be contrary to the public interest;

(d) the exchanged information should be used or disclosed by the requesting jurisdiction solely for purposes of the investigation of a hard-core cartel unless the laws of the requested jurisdiction provide the power to approve the use or disclosure of the exchanged information in other matters related to public law enforcement, and the requested jurisdiction has granted such approval in accordance with its domestic law requirements; and

(e) the requested jurisdiction should not give prior notice of the exchange to the source of the information, unless such notice is required under its domestic laws or an international agreement.

It may be noted, however, that given the importance of leniency programs, certain authorities have decided that they will not provide information to other agencies without the applicant's consent (e.g., the Canadian Competition Bureau).

VII. Spring Meeting Programs

The Sherman Act Section 1 Committee will present a program on the current status of rule of reason analysis at the Spring Meeting in Washington, D.C. on Friday, March 31. Entitled "*Rule of Reason vs. Per Se: Where are the Boundaries Now?*," the program is scheduled for 8:15-9:45 a.m. The program will explore the line of demarcation between the per se and rule of reason tests under section 1, and whether that line has disappeared in favor of "continuum" analysis, as described by Judge Ginsberg in *PolyGram Holding*, 416 F.3d 29 (D.C. Cir. 2005). The panel will also examine the current state of the rule of reason and recent judicial application of quick look analysis. Panelists include Robert T. Joseph of Sonnenschein Nath & Rosenthal LLP, Mark W. Ryan of Mayer Brown Rowe & Maw LLP, and Gregory J. Werden from the Antitrust Division of the U.S. Department of Justice. Our Committee chair, Lynda K. Marshall from Hogan & Hartson LLP, will act as moderator.

Additionally, the Committee is co-sponsoring general session programs on Wednesday, March 29, and Thursday, March 30. The Wednesday program, "*Gun-Jumping: Pitfalls, Uncertainties and Solutions*," co-sponsored with the Mergers & Acquisitions Committee, is scheduled for 3:45-5:15 p.m. Moderator William R. Vigdor of Vinson & Elkins LLP will lead a discussion of pre-closing coordination, which is among the most difficult issues faced by private counsel in any merger. "Gun-jumping" can lead to significant legal risk and complicate a merger investigation, but there have been few enforcement actions and only limited other guidance as to gun-jumping restrictions. The program will examine issues of concern to inside and outside counsel and will discuss possible resolutions. Speakers include James W. Lowe of Wilmer Cutler Pickering Hale & Dorr LLP, William T. Garcia, Bernard A. Nigro, Jr. of Willkie Farr & Gallagher LLP, and Maribeth Petrizzi from the U.S. Department of Justice.

The first of two Thursday programs, "Dagher and Illinois Tool Works: The Supreme Court Steps In," is co-sponsored with the Intellectual Property and Sherman Act Section 2 Committees. The program, held from 1:30-3:00 p.m., will be moderated by Susan A. Creighton and include Thomas P. Brown of Visa U.S.A., Inc., Roy T. Englert, Jr. of Robbins Russell Englert Orseck & Untereiner, Kevin D. McDonald of Jones Day, and Stephen F. Ross of the University of Illinois College of Law. The panel will discuss Sherman Act cases in which the Supreme Court will address recurring issues regarding joint venture analysis and intellectual property.

The second Thursday program, from 3:15-5:00 p.m., will be moderated by M.J. Moltenbrey of Freshfields Bruckhaus Deringer LLP. Entitled "*Dealing with the Civil Damage Liability of a Corporate Amnesty Applicant and a Pleading Corporate Defendant in an International Cartel Investigation*," the program, co-sponsored with the Criminal Practice and Procedure Committee, will feature Michael D. Hausfeld of Cohen Milstein Hausfeld & Toll PLLC, John R. Pendergrast of Degussa Corporation, Gary R. Spratling of Gibson Dunn & Crutcher LLP, and Kevin R. Sullivan of King & Spalding LLP. The panel will discuss civil defense options and strategies faced by corporate defendants that have obtained amnesty or pled guilty to criminal charges and the impact of the 2004 "de-trebling" legislation on plaintiffs' and defendants' strategies.

All the programs promise to be informative and useful. We hope you will attend.

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American Bar Association Section of Antitrust Law

Continuing Legal Education Calendar

2006

Antitrust Law 2006 Spring Meeting
March 29, 2006 - March 31, 2006
JW Marriott Hotel
Washington, DC
Format: Live/In-Person

April 2006 Consumer Protection Update
May 1, 2006 - May 1, 2006
Location: N/A
Format: Teleconference

Managing Antitrust Matters in the Modern Corporate Governance Era
May 11, 2006 - May 12, 2006
New York NY
New York, NY
Format: Live/In-Person

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For more information on the programs listed, please contact the Section of Antitrust Law at 312.988.5609 or the home page at www.abanet.org/antitrust.

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