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Restraint of Trade

Featured Article

Canadian Competition Law Undergoes Substantial Overhaul

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On March 12, 2009, the Canadian Parliament passed legislation (Bill C-10) incorporating the most significant amendments to Canada's *Competition Act* since the statute was first enacted in 1986. These amendments include:

- Amending the current merger notification process to mirror the U.S. Hart-Scott-Rodino Antitrust Improvements Act[1] process and increasing the current merger notification thresholds.
- Replacing the existing conspiracy provisions in the Competition Act with a per se criminal offense for cartel-like agreements between competitors and a civil offense to deal with other types of agreements between competitors that substantially lessen or prevent competition.
- Expanding the scope of offenses or increasing/ creating new penalties, including granting the Competition Tribunal the power to order significant fines for contravention of the Competition Act's abuse of dominance provisions.
- Repealing the price discrimination, promotional allowances and predatory pricing offenses and de-criminalizing the price maintenance offense.

While several of the amendments are welcome (for example, repeal of the pricing offenses), others are more controversial. In particular, there are serious concerns about the new merger review process and the new per se cartel offense. Both changes threaten to increase costs and uncertainty for businesses seeking to make acquisitions or operate in Canada.

Background

The *Competition Act* amendments formed part of an extensive legislative package tabled by the minority Conservative government in February of this year to implement its 2009 budget and a series of measures designed to stimulate the Canadian economy.

There are several curious aspects to this. For one, until recently, the Conservatives had not demonstrated any particular interest in amending the *Competition Act*. Indeed, when the Conservatives formed their first minority government in 2006, the Industry Minister at the time stated publicly that the *Competition Act* was not a priority and that the government had no plans to amend the legislation.

That attitude gradually shifted as the Conservatives concluded that they could position *Competition Act* amendments in a way that might bolster their pro-consumer credentials while still offering changes that could appeal to their traditional allies in the business community.

The Conservative government demonstrated the seriousness of its intention to pursue competition reform when it established a special panel (the Panel) in July 2007 to assess the impact of competition regulation on Canada's economic performance and international competitiveness. The Panel reported back in June 2008 with a series of recommended amendments to the *Competition Act* that it said was part of a "sweeping national Competitiveness Agenda based on the proposition that Canada's standard of living and economic performance will be raised through more competition in Canada and from abroad." The Conservatives adopted many of the Panel's recommendations as part of their campaign platform in the fall 2008 federal election, and followed up on these promises by incorporating them in the package of amendments contained in the just-enacted Bill C-10.

By including the amendments in Bill C-10, the Conservatives also avoided the extensive consultation that has been typical of past efforts to amend the *Competition Act*. This meant that concerns about various aspects of the Bill (discussed in more detail below) were not permitted to be aired in any concerted fashion. The Canadian Bar Association objected to the way consultations were short-circuited, and a last ditch effort was made to persuade the Canadian Senate to separate the *Competition Act* amendments from the rest of Bill C-10, but these efforts were for naught. As a result, the amendments to the *Competition Act* were enacted notwithstanding the concerns raised by many in the Canadian business and legal communities.

The Competition Act Amendments

(1) Amendments to the Pre-Merger Notification Process

Under the *Competition Act*'s former merger review process, transactions that exceeded certain financial thresholds and, in the case of share acquisitions, that exceeded an additional voting interest threshold, could not be completed before the expiration of a statutory waiting period of either 14 or 42 days following the filing of a notification containing certain prescribed information. The duration of the statutory waiting period depended on whether the acquirer elected to make a short form filing (14-day waiting period) or a long form filing (42-day waiting period). The Bureau's substantive review of transactions ran on a different (but simultaneous) non-statutory timetable, based on the complexity of the transaction. These non-binding "service standard periods" ranged between 2 weeks (for the least complicated transactions) to over 5 months (for the most complex).

The former merger review process was criticized on a number of grounds, including that the process created uncertainty for merging parties at various levels. For one, parties had to elect whether to file a short form or long form notification, assuming the risk that if they filed a short form notification the Bureau might require them to resubmit a long form, thereby stopping the waiting period until the long form filing was made. In addition, because the statutory waiting periods and the Bureau's "service standard" review periods were not correlated, merging parties often found themselves in a position where the waiting period had expired (legally entitling them to close) without the Bureau having completed its substantive review. Parties then had to decide whether to wait until the Bureau was done or proceed to closing subject to the risk that the Bureau might seek an injunction to stop them or challenge the transaction within three years of its closing. A related problem was that the Bureau's "service standard" periods were non-binding, meaning that there was effectively no deadline within which the Bureau had to complete its merger reviews.

The Bill C-10 amendments replace the *Competition Act*'s former merger review process with a new "U.S.-style" regime. The short form/long form dichotomy has been scrapped in favor of a single filing form (although the form's contents are yet to be promulgated). The 14-day/42-day waiting periods are also gone; now, a notifiable transaction may not be completed until the expiration (or early termination) of a 30-day waiting period following notification. Before that 30-day period expires, the Bureau may advise the parties that it does not intend to challenge the transaction. Alternatively, if issues remain that it wishes to investigate, the Bureau may send a "supplementary request" for information, in which case the proposed transaction may not be completed until 30 days after the Bureau receives the requested information from the parties.

Given the prevalence of cross-border mergers involving both Canada and the United States, there is some merit in more closely correlating the Canadian review process with that in the U.S. However, the newly enacted system has a number of problems. Foremost among these problems is the adoption of a U.S.-style "supplementary request" process. The analogous U.S. "second request" process has been widely criticized for imposing excessive and expensive production burdens on merging parties. For example, studies suggest that production costs for a "second request" in the U.S. can range from US $3.3 million (on average) up to US $20 or 25 million (for the most complex cases) and that "second request" investigations can take six or seven months to complete, on average. These studies also indicate that, despite the lengthy and expensive investigations, there is no evidence to suggest that the burden imposed by the second request process leads to better decision-making. Moreover, since it was implemented in the United States, no country (other than Canada) has implemented a similar, open-ended "second request" review process of this nature.

Another drawback to the amendments is that the amended merger review process eliminates any judicial oversight of the Bureau's production demands. Under the prior regime, the Bureau had to obtain a court order to compel production of information from merging parties. Although the courts tended to grant these orders without much question, parties had some ability to challenge them ex post facto. Indeed, in a recent case, the reviewing judge quashed a series of compulsory production orders on the basis of inadequate disclosure by the Bureau. With the enactment of the new process, the Bureau can issue a wide-ranging "supplementary request" for any information that is deemed "relevant" to an assessment of the transaction without need for a court order.

Moreover, unlike in the United States, it appears that parties in Canada will not be able to satisfy their burden by achieving "substantial compliance" with the "supplementary request." Rather, it appears that there must be "full compliance," *i.e.*, the Bureau must receive <u>all</u> of the required information from the parties. This also leaves open the possibility of disputes with the Bureau over whether the merging parties have filed all the required information and are entitled to close their transaction. The consequences of disagreement on the issue are serious – the Bureau can apply for an injunction to prevent closing or seek fines and divestiture/dissolution orders if the transaction has been completed.

The amendments also do not adequately address one of the key failings of the former merger review process, namely the lack of a set deadline within which the Bureau must complete its reviews of mergers that go beyond the initial 30-day review. For example, there is no limit on how long the "supplementary request" process can last – the burden is placed on merging parties to respond as quickly as they can. In addition, although parties will be entitled to close their transactions within 30 days of successfully completing the "supplementary request," the amendments do not require the Bureau to complete its review by that time. Thus, in theory, the Bureau could still continue its investigation, and withhold substantive approval, even after the 30 day period expires, thereby leaving parties in the same type of regulatory limbo as commonly occurred under the old system.

The Bureau has tried to address some of these concerns in draft enforcement guidelines that it issued in late March 2009 (Draft Guidelines). The Draft Guidelines go to some lengths to emphasize the Bureau's view that the "supplementary request" process will not be used often and express the Bureau's commitment to minimize the burden of complying. In the absence of judicial oversight, the Bureau also will establish various internal controls to vet "supplementary requests" before they are issued and to deal with complaints from parties regarding the scope of requests or disputes about compliance. It is good see that the Bureau recognizes some of the potential pitfalls of its new "supplementary request" process. However, only time and experience will tell whether the Bureau's expressions of intent and internal controls will be sufficient to avoid the types of problems experienced in the United States.

(2) Increased Merger Notification Thresholds

On the positive side, the Bill C-10 amendments increase certain thresholds for pre-merger notification. Previously, the *Competition Act* generally required the aggregate value of the target's assets in Canada, or the annual gross revenues from sales in or from Canada, to exceed CDN$50 million in order for the notification requirements to be triggered. This "size of the transaction" threshold is now increased to CDN$70 million initially, with future increases tied to changes in inflation (or as prescribed by regulation).

The threshold increase for pre-merger notifications will mean that some mergers that had to be notified previously will no longer be subject to notification. Although this is a positive development, it is not clear how significant a decrease there will be in the number of notifiable transactions.

(3) Ex Post Review

The other notable change ushered in by the Bill C-10 amendments is that the period within which the Bureau can challenge transactions post-closing has been reduced from three years to one year following closing. This amendment is of theoretical benefit to merging parties, especially those that do not cross the notification thresholds, as it purports to reduce post-closing deal risk. However, since the Bureau has rarely exercised its power to challenge transactions post-merger, the practical benefits are limited.

Agreements Among Competitors

The Bill C-10 amendments also repeal the *Competition Act*'s existing conspiracy offense and replace it with a per se criminal prohibition against agreements between competitors to fix prices, affect production or supply levels of a product, or allocate sales, customers or territories. Unlike the former conspiracy provision, the new offense does not require proof that the conspiracy, if implemented, would prevent or lessen competition unduly. However, liability can be avoided if the agreement is ancillary to a broader agreement that does not contravene the new conspiracy offense and is necessary for giving effect to the objective of that broader agreement. Maximum penalties under the new offense are 14 years imprisonment and a $25 million fine per count, up from the previous maximum of five years and $10 million per count.

As part of this reform, a new civil provision will apply to all agreements between competitors that are not caught by the new per se offense, but that have the effect of lessening or preventing competition substantially. The Bureau will be able to apply to the Competition Tribunal under this new civil provision for an order to remedy the effects of such agreements.

The introduction of a per se offense for agreements between competitors represents a fundamental shift in one of the cornerstones of Canadian competition law, eliminating the requirement to prove that the agreement, if implemented, would have a negative impact on competition in the relevant market.

Although the new provision contains a defense that applies when the relevant conduct is "ancillary" to a broader, legitimate agreement, there is no guidance on what "ancillary" means in this context. In the U.S., where the courts have developed a similar concept, there continues to be an ongoing and extensive debate over the meaning of "ancillary." It will likely be some time before Canadian courts settle how that term should be interpreted in the context of the new offense.

As a result, the new conspiracy offense casts doubt on the legality of many agreements between competitors that involve prices, allocation of customers or territories, or levels of production or supply. This means that many common, ordinary course and seemingly benign types of agreements between competitors could now be subject to the risk of criminal prosecution, civil litigation, or a party's attempted avoidance of a contract. Examples may include:

- "swap" agreements (even efficiency enhancing ones) such as used in the petroleum industry;
- non-competition agreements in the context of mergers or joint ventures;
- IP licensing agreements;
- distribution agreements where the supplier restricts where its distributors may sell, or to whom they can sell, particularly if the supplier also sells the products directly in competition with its distributors;
- agreements between franchisors and franchisees that limit where the franchisees can operate; and
- cooperative agreements in network industries.

Fortunately, the new conspiracy offense only comes into effect on March 12, 2010, *i.e.*, one year from the date of enactment of the Bill C-10 amendments (this also applies to the new civil provision regarding anti-competitive agreements). In recognition of the uncertainty the new law creates, the Bureau is promising to use this transition period to publish guidelines setting out its own interpretation of the new provisions and is also offering to issue advisory opinions at no cost for one year.

Increased Penalties/Expanded Offenses

A series of additional amendments were also enacted to expand the scope of certain contraventions of the *Competition Act* or to increase their penalties. These include:

- Granting the Competition Tribunal the power to order an "administrative monetary penalty" of up to $10 million for a contravention of the abuse of dominance provisions and up to $15 million for subsequent offenses.
- Expanding the bid-rigging offense to make it illegal for one person to agree with another to withdraw their already-submitted bid.
- Expanding the false or misleading representation offense to apply to companies targeting foreign individuals.
- Increasing the maximum penalties for contravention of the misleading advertising provisions.
- Granting the Competition Tribunal or a court the power to order restitution to consumers in relation to certain misleading marketing practices and in certain circumstances to issue "freezing orders" forbidding the disposition of specified property.
- Increasing the maximum penalties for obstruction of a Bureau investigation.

The increased penalties underscore the new seriousness with which the current government perceives violations of the *Competition Act*. It is expected that this attitude will also manifest itself in a mandate to the new Commissioner of Competition to increase enforcement levels over the previous administration (the former Commissioner having left office in December 2008).

The most significant innovation in terms of penalties is the Competition Tribunal's new power to impose substantial "administrative monetary penalties" for contraventions of the abuse of dominance provisions. This is a controversial change, which may deter conduct that is not inherently anticompetitive and raises constitutional issues that may have to be litigated.

Pricing Matters

One other positive aspect of the amendments is that they repeal the *Competition Act's* price discrimination, predatory pricing and promotional allowances offenses. These provisions were almost never enforced and were considered out of step with the modern approach to competition law, because they tended to focus on the protection of individual competitors rather than the competitive process overall.

The price maintenance offense is also repealed, but replaced with a similar civil provision pursuant to which the Bureau can apply to the Competition Tribunal for relief in situations where the conduct is having or is likely to have an "adverse effect" on competition in a market. Private parties are also entitled to apply to the Tribunal for remedies under this new provision.

The repeal of the pricing offenses should offer suppliers more flexibility in developing pricing and distribution strategies in Canada and to influence the resale prices of their distributors or retail customers. This is particularly true because of the repeal of the price maintenance offense, which had been enforced more vigorously by the Bureau than the other pricing offenses. Now, resale price maintenance will no longer be a per se criminal offense subject to fines and penalties. Price maintenance will only be a potential civil contravention, and only if the conduct has an "adverse effect on competition." Potential remedies are limited to ordering the party to cease its offending conduct or requiring the party to supply a customer within a specified time on usual trade terms.

Conclusion

The Bill C-10 amendments are ostensibly designed to protect Canadian consumers while enhancing the competitiveness and efficiency of the Canadian economy. A very open question, however, is whether Canadian consumers were really at such terrible risk under the prior legislative regime. An even bigger question is whether the new amendments will help promote efficiency and competitiveness. Unfortunately, it appears that several of the key amendments are more likely to mean greater financial costs and uncertainties for the business community, particularly the new merger review process and the new criminal offense for agreements with competitors. It seems strange that these measures were included in legislation meant to help Canada recover from an economic downturn. It is stranger still that they were enacted with such haste and without the usual stakeholder consultations.

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[1] ***See* 15 U.S.C. § 18a**.

Consumer Protection

Federal Trade Commission Act

Ninth Circuit Affirms Summary Judgment for FTC in Enforcement Action against Promoters of Mortgage Scheme

Federal Trade Commission v. Stefanchik, No. 07-35359, 2009 BL 51448 (9th Cir. Mar. 13, 2009)

The Ninth Circuit recently affirmed a district court's grant of summary judgment in favor of the Federal Trade Commission in its deceptive marketing action against a get-rich-quick scheme. The scheme fraudulently promised consumers the chance to earn a substantial income in little time through buying and quickly reselling privately held mortgages if they bought defendants' "method," at a cost of between $3,000 and $8,000. Defendants were John Stefanchik and his corporation, Beringer Corp., as well Atlas Marketing, Inc., and its principals and a related company. The court affirmed the district court's findings of liability and damages under the Federal Trade Commission Act, 15 U.S.C. § 45(a) and the Telemarketing Sales Rule (TSR), 16 C.F.R. § 310.3(a)(2)(iii) and (a)(4), based on the finding that the FTC presented strong and extensive evidence of defendants' deceptive acts, including an expert survey showing that only a very small number of customers were able to make any money using defendants' method.

Background

According to the FTC complaint, Stefanchik is the author of a book called *Wealth Without Boundaries* and related materials, including video and audiotapes, in which he presents his purported method for making substantial amounts of money in very little time. The method known as the "Stefanchik Program" called for consumers to locate privately held mortgages, and to either purchase them or to broker a sale transaction with an interested buyer. In 2002, Stefanchik also organized Beringer to hold the rights to his materials. Stefanchik used the services of Atlas, a company whose sole business was to sell products and services for Stefanchik and his corporation under the name "The Stefanchik Organization," using direct mail, telemarketing and a website. Atlas, in turn, paid Stefanchik and Beringer a royalty fee of 15 to 22 percent of its sales.

The scheme, according to the FTC, worked as follows: Atlas sold the book for a nominal amount, using direct mail to generate interest in the book. Thereafter they targeted consumers who purchased the book, via telemarketing, to urge them to purchase even more materials and services. As part of their sales pitch, defendants' telemarketers promised customers that working just five to ten hours per week could easily yield them an income of $3,000 to $5,000 per deal. The FTC further alleged that the telemarketers promised customers the expert assistance of personal coaches, who were knowledgeable and experienced in the real estate industry.

The district court granted the FTC summary judgment on both liability and damages. It determined that the FTC presented strong evidence, including consumer declarations and surveys, as well as defendants' own advertising and marketing materials, to show that defendants made false and misleading claims concerning the ability to earn substantial income with little or no effort. Additionally, the district court concluded that the alleged coaching claims were also deceptive as the coaches did not have particularly relevant knowledge or experience. The district court found Stefanchik and Beringer jointly and severally liable under the FTC Act and the TSR, granting the FTC nearly $18 million in damages, as measured by Atlas's sales figures, and injunctive relief.

Summary Judgment was Proper

Defendants appealed the summary judgment on the FTC Act claim arguing that the conflict between the survey results of the FTC's expert and the opinions of their own experts, who opined that the survey was biased and unreliable, raised an issue of fact as to their liability.

The Ninth Circuit began its analysis by explaining that Section 5 of the FTC Act bars unfair or deceptive acts or practices, which may be found where a representation creates a net impression that is likely to mislead a consumer.

The court then highlighted the FTC's strong and extensive evidence, which showed that, contrary to the impressions created by defendants' marketing materials, very few consumers made any money using their method. Specifically, the court noted that defendants' own marketing materials represented that by using the Stefanchik method to broker mortgage deals consumers could easily earn $10,000 per month working a mere five to ten hours per week. The FTC also submitted numerous consumer affidavits averring that, contrary to the marketing materials, consumers found it nearly impossible to locate mortgages that could easily be resold within the promised short period of time. Consumers also averred that defendants' personal coaches were useless. Furthermore, the FTC also submitted an expert survey that fully supported these declarations. In particular, the court noted, of the 380 respondents who confirmed that they had purchased defendants' program, only one person reported that he made any money on a mortgage deal and just 6 percent reported that they found their personal coach was useful. Finally, the court noted that the FTC also presented additional support for its claims in the form of an affidavit from a former personal coach, and evidence developed by FTC investigators, who had examined 8,000 customer records.

In light of this overwhelming evidence, the court explained, defendants needed to offer competent evidence of their own, either expert surveys or consumer affidavits attesting that they were indeed able to make money from using defendants' method, to avoid summary judgment on the Section 5 claim. Defendants, however, failed to do so. Accordingly, the court concluded that summary judgment with respect to this claim was proper.

The court also concluded that summary judgment with respect to the FTC's TSR claim was proper for similar reasons. The court noted that the allegations at issue here – defendants' false and misleading statements to customers through their telemarketing agents – fell squarely within the TSR's prohibition against deceptive claims in connection with telemarketing. The court rejected Stefanchik's and Beringer's claims that they could not be responsible for the telemarketing claims as this effort was conducted by Atlas, a separate entity. The court noted that there was no dispute that Stefanchik had entered into an agreement with Atlas for such services, reviewed the script, and retained authority to review and approve all marketing materials. Accordingly, the court concluded their conduct placed them squarely within the reach of the TSR, which reaches not only telemarketers but also "sellers" who arrange for such telemarketing to sell their goods.

Liability and Apportionment of Damages Affirmed

The court found that holding Beringer liable as a principal for the actions of Atlas, its agent, was proper in light of the evidence that Atlas was using the name, "The Stefanchik Organization," and of Stefanchik's own admission that consumers often perceived both companies as one seamless operation, among other things.

The court similarly concluded that Stefanchik was properly held liable in his individual capacity in light of the evidence that showed that he was the sole principal of Beringer, had complete control over the marketing of his products, and had recklessly ignored his counsel's advice about the need to substantiate his claims or the reports of certain personal coaches that the sales representatives were misleading consumers.

Finally, the court rejected Stefanchik and Beringer's contention that they should not be held liable for the full amount of Atlas's sales on the grounds that they only received a percentage of the sales as a royalty. Noting that courts have generally not limited recovery under the FTC Act to defendant's profit and that Stefanchik and Beringer were clearly the driving force behind the deceptive scheme, the court affirmed the damages award.

Criminal Liability

Criminal Antitrust Briefs

LCD Probe Continues: Hitachi Executive Indicted After Company Agrees to Plead and Pay Fine

United States v. Hitachi Displays Ltd., No. 09-CR-00247 (N.D. Cal., filed Mar. 10, 2009); United States v. Someya, No. 09-CR-00329 (N.D. Cal., filed Mar. 31, 2009)

As the DOJ investigation into price-fixing in the market for Thin Film Transistor-Liquid Crystal Display (TFT-LCD) panels progressed, another major manufacturer of the panels admitted to participation in the worldwide conspiracy, and an executive of that same company was indicted for his role in the illegal activities. Hitachi Displays Ltd. agreed on March 10, 2009, to plead guilty to a single count of conspiring to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The criminal information filed against Hitachi focuses on fixing prices of LCD panels sold to a single customer – Dell Inc. Hitachi will plead guilty to fixing prices of panels sold to Dell from April 2001 through March 2004, and, according to a DOJ press release, will pay a fine of $31 million and cooperate with the ongoing investigation. A plea hearing and expedited sentencing have been scheduled for May 1 in the U.S. District Court for the Northern District of California. On March 31, Sakae Someya, former Senior Manager for Sales and Marketing at Hitachi, was indicted on a single count of violating Section 1, for his individual participation in the conspiracy to fix prices for LCD panels sold to Dell. Someya is alleged to have participated in the conspiracy from January 2001 through December 2004, by, among other things, attending meetings at which the price-fixing activities were discussed and exchanging sales information with competitors. Someya faces a maximum $1 million fine and 10 years in prison if convicted.

For prior coverage of the LCD investigation, *see Longest Sentence for Antitrust Violation Imposed in Shipping Probe; Chunghwa Exec Has "Worst Week Ever,"* Bloomberg Law Reports, Antitrust & Trade, Vol. 2, No. 3 (March 2009).

Governmental Enforcement

Leibowitz Appointed to FTC Chairmanship

President Barack Obama named Jon Leibowitz, a member of the Federal Trade Commission since 2004, the new Chairman of the Commission. Leibowitz has been an outspoken member of the Commission, often dissenting from Commission decisions and advocating for more aggressive enforcement of antitrust and consumer protection laws. He has been especially active on the issue of "reverse payment" settlements, condemning these arrangements where a brand name drug manufacturer pays its competitors to keep less expensive generic equivalents off the market for a period of time. Leibowitz succeeds William E. Kovacic, who was named Chairman by President George W. Bush. Kovacic has said he intends to remain on the Commission, which still leaves one seat vacant, since no replacement was ever named after the departure of former Chairman Deborah Platt Majoras last year.

Mergers & Acquisitions

Horizontal Mergers

Challenge to Microsemi Acquisition Transferred to West Coast

United States v. Microsemi Corp., No. 08-CV-1311, 2009 BL 49112 (E.D. Va. Mar. 4, 2009)

The U.S. District Court for the Eastern District of Virginia granted defendant Microsemi Corp.'s motion to transfer venue of the Department of Justice's post-transaction challenge to Microsemi's acquisition of certain Semicoa, Inc. assets. Applying Section 12 of the Clayton Act, 15 U.S.C. § 22, the court first denied Microsemi's motion to dismiss the case for improper venue and lack of personal jurisdiction, but nonetheless transferred the case, pursuant to 28 U.S.C. § 1404, to the Central District of California for the convenience of the parties and witnesses and in the interest of justice.

Microsemi and Semicoa each produced high reliability semiconductors used in mobile, notebook/monitor, medical, defense/aerospace, and automotive devices and applications. Both companies' principal places of business were in central California. On July 14, 2008, Microsemi completed an acquisition of substantially all of Semicoa's assets. The DOJ, on December 18, 2008, began an enforcement action in the Eastern District of Virginia, charging that the acquisition violated of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 2 of the Sherman Act, 15 U.S.C. § 2. Microsemi moved to dismiss the complaint on the grounds that venue was improper and the court lacked personal jurisdiction. Microsemi also moved in the alternative for an order transferring the action to the Central District of California.

Section 12 of the Clayton Act states that venue in an antitrust case is proper in any district where the defendant corporation is an inhabitant, may be found, or transacts business. Microsemi's annual sales in the Eastern District of Virginia amounted to $6 million, which Microsemi argued amounted to a de minimis 0.35 percent of its worldwide sales. The court rejected the argument that the business Microsemi did in the Eastern District of Virginia should be evaluated solely from Microsemi's perspective, *i.e.*, as a percentage of its overall sales. Rather, to achieve Section 12's remedial purpose of providing a convenient forum to those injured by a perhaps distant corporate defendant's antitrust violations, the court reviewed the significance of Microsemi's contacts with the forum and determined that the items it sold were of critical importance to those who purchased them in Virginia and that $6 million was a sufficiently large dollar amount to hold that Microsemi transacted business in the Eastern District of Virginia. The court thus denied Microsemi's motion to dismiss for improper venue and, the parties having agreed that if Microsemi's contacts satisfied the venue statute, then Microsemi was also subject to the court's personal jurisdiction, the court also denied Microsemi's motion to dismiss for lack of personal jurisdiction.

The court, however, granted Microsemi's motion to transfer the case to the Central District of California, pursuant to 28 U.S.C. § 1404(a), which allows a court to transfer a properly venued case to another venue for the convenience of the parties and witnesses and in the interests of justice. The court found the DOJ's choice of venue did not carry significant weight as DOJ was located in the District of Columbia, not the Eastern District of Virginia. Moreover, the convenience of potential witnesses weighed heavily in favor of transfer, as Microsemi identified many potential party and non-party witnesses in California and elsewhere outside Virginia and the government identified only a handful of witnesses in Virginia. The court found that the speed of the docket in the Eastern District of Virginia was only a minor consideration in the "interest of justice" calculus, outweighed by the public interest in hearing the case in California, where the claim arose and where the merging parties were located. For these reasons, the court held that the convenience of the parties and witnesses and the interest of justice favored granting defendant's motion to transfer the case to the Central District of California.

Whole Foods and FTC Settle Administrative Proceeding with Divestiture of 32 Stores and Wild Oats Brand

In re Whole Foods Market, Inc., FTC Docket No. 9324 (F.T.C. Mar. 6, 2009)

Whole Foods Market, Inc. has settled its long-running seesaw battle with the Federal Trade Commission, agreeing to sell 32 stores as well as all rights to the intellectual property of Wild Oats Markets, Inc., the former competitor it acquired in August 2007. The consent order, if approved by the court, should end the FTC investigation of the merger, and, according to the FTC's press release, should "provide competitive relief" to several geographic markets in which it alleged competition could have been harmed by the merger.

The 32 stores Whole Foods has agreed to divest include 13 which are currently in operation, and 19 which were closed after the merger. The settlement provides for the appointment of a divestiture trustee, who will sell the stores and related assets to a purchaser or purchasers satisfactory to the Commission, within six months of the consent order being finalized. In the interim, Whole Foods is required to continue operating the 13 active stores and maintain them as viable businesses. The agreement is subject to a 30-day public comment period, which was scheduled to conclude April 6.

For prior coverage of administrative and judicial proceedings relating to the Whole Foods/Wild Oats merger, *see, e.g., District Court Limits Scope of* Whole Foods *Case on Remand; FTC Seeks Preliminary Injunction Requiring Rebranding and Appointment of Receiver*, Bloomberg Law Reports, Antitrust & Trade, Vol. 2, No. 2 (February 2009); *D.C. Circuit Denies Whole Foods' Motion for Rehearing En Banc, Issues Amended Opinions*, Bloomberg Law Reports, Antitrust & Trade, Vol. 1, No. 9 (December 2008).

District Court Grants FTC's Motion to Enjoin $1.4 Billion CCC Holdings/Aurora Merger; Parties Abandon Deal

Federal Trade Commission v. CCC Holdings, Inc, No. 08-CV-2043 (D.D.C. Mar. 18, 2009)

The U.S. District Court for the District of Columbia recently granted the FTC's motion for a preliminary injunction pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, pending an administrative review of a proposed merger between the parent companies of CCC Information Systems Inc. and Mitchell International, Inc. The FTC alleged that the merger would create a duopoly and decrease competition in the markets for partial loss estimation systems (estimatics) and total loss valuation (TLV) systems. After finding that the FTC had presented serious questions about the merger that required investigation, the court enjoined the merger pending the completion of the FTC adjudicatory hearing.

CCC Holdings, Inc. and Mitchell's parent company, Aurora Equity Partners III L.P., announced their agreement to merge on April 11, 2008. CCC and Mitchell supply estimatics, and TLV systems, among other products, to auto insurance companies, repair facilities, appraisers, and auto dealers to help evaluate and settle automobile damage claims. Estimatics is a system of databases containing information regarding passenger automobile parts, parts pricing, and repair times that is used to estimate the cost to repair automobiles damaged in accidents. TLV systems work in conjunction with estimatics and other systems to provide local market comparable values for vehicles deemed a total loss under individual state insurance regulations. There are currently three independent providers of estimatics and TLV systems – CCC, Mitchell, and Audatex North America, Inc.

The FTC filed an administrative complaint against the merger on November 25, 2008, and its preliminary injunction complaint with the district court the following day. The FTC alleged that a merged CCC-Mitchell would control more than half the estimatics and TLV market. The proposed merger would be a merger-to-duopoly and thus would not only eliminate head-to-head competition between CCC and Mitchell, but would also facilitate coordination between the remaining two competitors.

The FTC accordingly asserted that the merger, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. The FTC further alleged that the merger agreement itself amounted to an unfair method of competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. CCC and Aurora argued that new entry post-merger would create competitive pressure and prevent any potential post-merger price increase or diminution of quality. The FTC, however, argued that any such entry would not be timely, effective or sufficient, given the barriers to entry into the market, including the creation and compilation of an accurate repair database for every automobile on the road in the United States and overcoming customer loyalty to existing market participants. The FTC also disputed defendants' assertions that the two remaining competitors, post-merger, would have no information about what each was doing, as the firms, even pre-merger, already had deep intelligence about competitors' pricing.

The court found that the equities balanced in favor of the FTC, and that the FTC was likely to succeed on the merits, so issued an injunction order. Following the court's order, CCC and Mitchell chose to abandon the transaction.

Early Terminations Granted

The table below lists the ten largest transactions, by announced value, for which the Federal Trade Commission and the Department of Justice granted early termination of the Hart-Scott-Rodino waiting period, indicating either that the agencies do not intend to challenge the transaction on antitrust grounds or that the parties have addressed any prior agency concerns.

Largest Deals Granted Early Termination of Hart-Scott-Rodino Waiting Period, March 2009[1]

	Description of Deal	Date Early Termination Granted	Announced Value (in millions USD)[2]
1	Acquisition of NOVA Chemicals Corporation by Abu Dhabi Investment Authority	March 27, 2009	2076.97
2	Acquisition of CV Therapeutics, Inc by Gilead Sciences, Inc.	March 30, 2009	1337.47
3	Divestiture of Multi-gigawatt Utility Scale Pholtovaltaic Pipeline from Optisolar, Inc. to First Solar, Inc.	March 23, 2009	400.00
4	Divestiture of Airfoil Technologies International Singapore Pte. Ltd from Teleflex, Inc. to General Electric Co.	March 19, 2009	300.00
5	Divestiture of Texas retail business from Reliant Energy, Inc. to NRG Energy, Inc.	March 30, 2009	287.50
6	Divestiture of Heard County Power LLC from Dynergy, Inc. to Oglethorpe Power Corporation	March 20, 2009	105.00
7	Divestiture of Filtron Extrusion Holding Co. from Filtrona PLC to Saw Mill Capital LLC	March 23, 2009	85.00
8	Acquisition of Gleacher Partners by Broadpoint Securities Group, Inc.	March 20, 2009	75.57
9	Divestiture of exclusive worldwide rights to Elinogrel from Portal Pharmaceuticals, Inc. to Novartis AG	March 3, 2009	75.00
10	Acquisition of The Clearing Corp by Intercontinental Exchange, Inc.	March 2, 2009	39.00

[1] Includes all public and private deals in the Bloomberg Mergers and Acquisitions database through 03/31/09 with a disclosed value and a U.S. buyer, seller, or target. Further information on these and other transactions is available at MA <GO>.
[2] All dollar values subject to rounding.

Monopolies

Anticompetitive Conduct

District Court Rules in Favor of Rambus on Equitable Claims in Antitrust and Patent Action

Hynix v. Rambus, No. C-00-20905 RMW, 2009 BL 42204 (N.D. Cal. Mar. 3, 2009)

Following a jury verdict finding in favor of Rambus, Inc. on a number of antitrust and related legal claims asserted by competitors Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor U.K. Ltd., Hynix Semiconductor Deutschland GmbH (together, Hynix), Nanya Technology Corporation, Nanya Technology Corporation U.S.A. (together, Nanya), Micron Technology, Inc., and Micron Semiconductor Products, Inc. (together, Micron), (collectively "Manufacturers") the U.S. District Court for the Northern District of California issued its Phase III (Conduct Trial) Findings of Fact and Conclusions of Law (Phase III Findings), regarding the equity claims and defenses presented in the consolidated actions.

A jury previously found Rambus not liable for unlawful monopolization, attempted monopolization or fraud. The claims against Rambus were largely based upon Rambus's participation in the Joint Electron Device Engineering Council (JEDEC), an organization that sets standards for dynamic random access memory (DRAM), and Rambus's subsequent patent applications and enforcement of patents covering industry-standard DRAM. In considering the related equitable claims and defenses, the court partially relied on the adopted findings in the jury's special verdict. Finding in favor of Rambus on all equitable claims and defenses, the court held Rambus did not engage in unfair competition in violation of Cal. Bus. & Prof. Code § 17200, did not commit fraud, had not engaged in patent misuse, had not given an implied license to Micron to use its patents, and held Rambus was not barred from enforcing its patent rights by the doctrines of equitable estoppel, waiver, laches, or unclean hands.

Background

The findings of fact focused on evidence relevant to determining the obligations of JEDEC members to disclose pending or future patent applications covering items or processes that would be incorporated into JEDEC approved standards. The Manufacturers accused Rambus of violating JEDEC's disclosure obligations, patenting technology incorporated into JEDEC standards, and unfairly profiting as a result. Beyond determining disclosure obligations, the court further considered Rambus's statements and actions both at JEDEC and with particular Manufacturers during licensing negotiations for Rambus's patents, to determine whether Rambus made misrepresentations or omissions that would bar its later attempts to sue for patent infringement.

Rambus participated in JEDEC from 1991 until it resigned from the Council in 1996. During that time, Rambus attended committee meetings where the members developed industry-wide standards for DRAM and other semiconductor products. Both manufacturers and customers of semiconductor products are members of JEDEC, and Rambus was a member at the same time as Hynix, Nanya and Micron.

Examining the various alleged standards in place at JEDEC related to members' patents, as well as members' recollections regarding the same, the court found there was no clear policy regarding the disclosure of pending and future patent applications covering standards being considered by the Council. Although JEDEC did have a policy about existing patents, the court found it significant that Rambus had not even applied for any of the patents at issue until well after it had resigned from JEDEC.

The court also reviewed allegations about the various ways Rambus was alleged to have misled the Manufacturers about its future intellectual property intentions, including: Rambus's vote on a series of ballots; a contested head shake by a Rambus representative supposedly in response to a request for knowledge about Rambus's intellectual property intentions; a statement prepared by Rambus in response to questions about its intellectual property and a particular kind of DRAM; as well as Rambus's resignation letter. The court, adopting the findings of the jury, found in every instance Rambus had not made any misrepresentations to the other members of JEDEC about its "intellectual property pertaining to the work of JEDEC," or "its intellectual property coverage or potential coverage of products compliant with synchronous DRAM standards being considered by JEDEC." Phase III Findings at 44. In fact, the court found Rambus had solid reasons not to disclose future patent applications, not the least of which was the explicit advice rendered by Rambus's intellectual property counsel telling Rambus not to disclose the same. Regarding the contested interactions between Rambus and specific manufacturers, the court also found Rambus had not misled any Manufacturer by its conduct at JEDEC or by its dealings with that Manufacturer.

This litigation consolidated several actions bringing antitrust and related claims against Rambus because of its enforcement of its patented DRAM technology. See *District Court Denies Memory Chip Manufacturers' Motion for New Trial in Rambus Case*, Bloomberg Law Reports, Antitrust & Trade, Vol. 1, No. 5 (August 2008); *Jury Finds for Rambus on Antitrust Claims Pressed by Hynix, Micron and Nanya*, Bloomberg Law Reports, Antitrust & Trade, Vol. 1, No. 1 (April 2008). The first action, Case No. 00-20905, was a suit by Hynix seeking a judgment regarding certain Rambus patents. This case was divided into three trial phases, the last being a "conduct trial" to determine whether Rambus obtained patents in violation of its obligations to JEDEC, and to determine whether Rambus's attempts to enforce its patent claims against Hynix constituted antitrust and related violations. This phase of trial began on January 31, 2008, and a jury returned a special verdict on March 26, 2008 in favor of Rambus on all of the legal claims asserted against it, including finding Rambus had not committed unlawful monopolization or attempted monopolization under the Sherman Act. The Phase III Findings decided the remaining equitable claims and defenses in Case No. 00-20905, resolving all issues in the action. These findings of fact and conclusions of law are also to be applied to the still pending consolidated cases stemming from Rambus's DRAM patent enforcement and its conduct at JEDEC.

District Court Decides All Equitable Claims and Defenses in Favor of Rambus

The court began its analysis by noting that due to the substantial factual overlap between the jury claims and the equitable claims and defenses, the Seventh Amendment of the U.S. Constitution required the court to adopt the findings of the jury.

Unfair Competition Claim Rejected

Each of the Manufacturers claimed Rambus engaged in unfair competition in violation of California Business & Professions Code § 17200, but the court rejected their claims. The Manufacturers based their argument on Rambus's conduct at JEDEC, as well as its alleged exercise of unlawful monopoly power and deception outside of JEDEC, such as enforcement of invalid patents. Unfair competition under § 17200 encompasses any "unlawful, unfair, or fraudulent business act or practice." Cal. Bus. Prof. Code. § 17200.

The court held the jury's findings in the special verdict defeated any claim of unfair competition based on "unlawful" or "fraudulent" conduct under the statute. Rambus's failure to disclose its intent to apply for patents covering DRAM standards considered at JEDEC could not be "unlawful" or "fraudulent" in light of the following findings of the jury: Rambus had not engaged in anticompetitive conduct in any of the relevant markets; Rambus had not made misrepresentations about its intellectual property and JEDEC's work; Rambus did not make partially true statements about Rambus's intellectual property or potential intellectual property coverage and proposed JEDEC standards; and there was not a clear expectation among JEDEC members that pending or future patent applications related to JEDEC standards needed to be disclosed.

Analyzing evidence of whether Rambus's conduct could be qualified as unfair, the court determined that it could not. As the jury found Rambus's conduct was not anticompetitive and JEDEC policies did not require disclosure of pending and future patent applications, the court held this conduct could not be considered "unfair." In fact, the court noted Rambus had a solid rationale for not disclosing its pending or future patent applications including substantial business risks as explained by Rambus's counsel. The court independently analyzed the evidence presented by Manufacturers regarding the disclosure duties of JEDEC members, and also found no clear agreement among members to disclose pending or future patent applications applicable to JEDEC standards. The court was not persuaded by language in a JEDEC manual that was not clearly adopted by the Council, or by ambiguous language on meeting sign-in sheets and voting ballots. Similarly, the court noted that a JEDEC patent tracking list was not a determining factor as it only contained a fraction of JEDEC members' patents, primarily did not include patent applications, and was rarely updated. Emphasizing Rambus had not yet applied for any of the patents at issue when it resigned from JEDEC, the court ruled in favor of Rambus on the unfair competition claims.

Equitable Estoppel Doctrine Does Not Protect the Manufacturers

Based on Rambus's conduct at JEDEC and its interactions with Manufacturers outside of JEDEC, the Manufacturers argued Rambus was barred from asserting its patent claims by the doctrine of equitable estoppel. This doctrine protects would-be patent infringers in situations where the patent holder communicated it would not pursue an infringement claim against the infringer, the infringer relied on that communication, and the infringer would be materially prejudiced if the patent holder were to then enforce the patent. *See, e.g., B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1425 (Fed. Cir. 1997); *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020 (Fed. Cir. 1992).

Despite the repeated claims of the Manufacturers, the court once again noted there was no clear expectation that JEDEC members disclose pending or future patent applications. The court distinguished a recent case by pointing out important factual differences leading the court in that instance to find there might be a defense of equitable estoppel. *See Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004 (Fed. Cir. 2008). Unlike Rambus, Qualcomm had a clear duty to disclose existing patents at issue, was involved in the creation of the standards to which Qualcomm's patents applied, although it attempted to conceal its participation in creating the standards, and further intentionally concealed the existence of the patents from the other members of its organization. The court found Rambus had no duty to disclose and had not intentionally concealed any existing patents, as the patents at issue had not, in fact, been applied for at the time Rambus was a member of JEDEC. Further analyzing evidence to determine whether there was an unintentional communication by Rambus supporting an estoppel defense, the court found insufficient the evidence of an ambiguous head shake by a Rambus representative, and Rambus's refusal to comment on patent coverage when questioned. Similarly, no facts regarding Rambus's negotiations with each individual Manufacturer were sufficient to support a claim of estoppel.

Manufacturers' Remaining Defenses Fail

The court was not convinced by any of the evidence put forth in support of the other defenses raised by the Manufacturers to defend against Rambus's patent enforcement, namely waiver, implied license, patent misuse, laches and unclean hands. As the alleged defense that Rambus waived its right to sue for infringement was based in large part on Rambus's failure to disclose future patents, the court dismissed this argument as it had repeatedly dismissed the notion of a duty to disclose pending and future patents throughout the Phase III Findings. Nanya separately argued, however, that the delay by Rambus in bringing suit to enforce its patents constituted evidence of waiver. The court determined there was no significant enforcement delay, and Nanya's argument lacked support both factually and legally. Nanya and Micron argued Rambus engaged in patent misuse, a defense based on the doctrine of unclean hands, whereby the patent holder uses a patent to gain unfair commercial advantage. *See C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1372 (Fed. Cir. 1998). The court rejected this defense, finding it based on the same evidence previously deemed insufficient to support antitrust and unfair competition claims. Micron's implied license argument was rejected because Micron had not proven Rambus was barred from enforcing its patents because of waiver or equitable estoppel. The laches argument was described by the court as primarily a recasting of the equitable estoppel defense, and thus rejected. Nanya attempted to assert a more specific laches defense, attributing it to delay in patent prosecution by Rambus, but as with Nanya's waiver argument, the court found any delay in bringing suit was not unreasonable. Lastly, the court found no basis for a defense of unclean hands or unenforceability of the patents.

Price Discrimination

Discrimination in Price

First in Line for iPhone Rebuffed by EDNY on Robinson-Patman Claim

Xi v. Apple Inc., No. 07-CV-4005, 2009 BL 50831 (E.D.N.Y Mar. 13, 2009)

The U.S. District Court for the Eastern District of New York recently dismissed an antitrust action against Apple and AT&T, brought by a putative class of iPhone purchasers who bought the product in the first few months of its launch. The complaint asserted claims under the seldom litigated Robinson-Patman Act, 15 U.S.C. § 13, claims under Section 3 of the Clayton Act, 15 U.S.C. § 14, Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and Section 202 of the Communications Act, 47 U.S.C. § 202, as well as a pendent New York state law claim. The court dismissed the federal law claims with prejudice, and the state law claim without prejudice by declining to exercise supplemental jurisdiction.

Background

According to the complaint, on June 29, 2007, Apple began selling its newest product, the iPhone, in two models – an 8 gigabyte and a 4 gigabyte. The putative class was comprised of iPhone purchasers who bought the 4GB model when the product was first introduced, between June 29 and September 5, 2007, and activated the phones with a two-year wireless service contract with AT&T, the phone's exclusive wireless service provider, with the intent to resell. The complaint alleged that within months of introducing the product, on September 5, 2007, Apple announced that it would no longer produce the 4GB model and reduced the price of the 8GB model from $599 to $399. Pursuant to its purported price protection policy, Apple offered consumers who purchased the iPhone within 14 days of the price cut a refund or credit of the difference between the price they paid and the current selling price, or $200 back, and those who purchased the product more than 14 days before the price cut a $100 store credit.

The complaint alleged, however, that this price protection policy did nothing to address plaintiffs' harm. Specifically, the complaint alleged that Apple's decision to lower the price of the iPhone harmed the class of early purchasers because they could not resell their iPhones for as low a price as they intended, or for as great a profit as they could have obtained before the price cut, though later purchasers could do so.

Robinson-Patman Act Claims against Apple Legally Deficient

After a brief distillation of the "plausibility" standard applicable in evaluating a motion to dismiss under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the court addressed and rejected each of plaintiffs' Robinson-Patman Act claims.

Plaintiffs alleged that that Apple discriminated in price between the putative class, who purchased iPhones before September 5, 2007, and later purchasers of the 8GB iPhone who enjoyed the price reduction, in violation of Section 2(a) of the Robinson Patman Act, 15 U.S.C. § 13(a). The court found this claim legally deficient on two grounds.

First, as the court explained, Section 2(a) "'addresses price discrimination in cases involving competition *between different purchasers for resale* of the purchased product.'" *Xi* at 4 (quoting *Volvo Trucks North Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 169-70 (2006)). Here, the court found, the alleged discrimination was not between competing resellers. Rather, plaintiffs merely alleged that the putative class purchased their iPhones with the intent of reselling them; they did not allege, however, that they were engaged in the business of reselling iPhones, or that they were in actual competition with an alleged favored purchaser, or that they ever actually resold or attempted to resell their iPhones. Moreover, the court noted, the complaint incorporated by reference the sales agreement between Apple and plaintiffs, in which plaintiffs acknowledged that they were not authorized to purchase for resale.

In addition to the failure to allege the competing resellers element, the court added that the complaint also failed to allege contemporaneous price discrimination, another requisite element of a Section 2(a) claim. Section 2(a) only forbids discrimination in price or terms as between *contemporaneous* purchasers. Plaintiffs merely alleged, however, that while pre-price cut purchasers enjoyed identical price and terms, they were different than the price and terms enjoyed by later purchasers. The court concluded that rather than describe unlawful contemporaneous price discrimination, these allegations described only a subsequent price reduction, which was not prohibited by the Act.

Plaintiffs also asserted claims under Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13a. They alleged that Apple had given discriminatory rebates and discounts favoring later purchasers, and had engaged in predatory pricing by reducing the price of the iPhone to $399. Citing *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 382 (1958), the court observed that Section 3, which bars discriminatory discounts or rebates or predatory pricing in the sale of goods is enforceable only by the government and there is no implied right of action for violations.

Claims Challenging the Apple-AT&T Relationship Rejected

Plaintiffs also asserted claims based on the fact that Apple had designated AT&T as the iPhone's exclusive wireless service provider. The provider, in turn, required iPhone subscribers to enter a two-year service agreement with a $175 early termination fee. The court gave relatively short shrift to all three of these claims.

First, plaintiffs argued that the arrangement between Apple and AT&T was an unlawful tying arrangement, in violation of Section 3 of the Clayton Act, 15 U.S.C. § 14. The court summarily disposed of this claim, stating that while Section 3, prohibits the tying of "goods, wares, merchandise, machinery, supplies or other commodities," it does not apply to "service agreements."

The court also dismissed plaintiffs' unfair competition claim under Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) holding that, as with Section 3 of the Robinson-Patman Act, there was no implied private right of action.

Finally, the court dismissed plaintiffs' claim that AT&T sold its wireless service in connection with unjust and unreasonably higher prices for iPhones, in violation of § 202 of the Communications Act, 47 U.S.C. § 202(a). That statute, the court explained, applies only to price discrimination for communication services, and not to price discrimination with respect to a product for which communication services are themselves available on nondiscriminatory terms.

Having granted defendants' motion to dismiss with prejudice all six federal law claims, the court elected not to exercise jurisdiction over plaintiffs' deceptive acts and practices claim brought under New York Gen. Bus. Law. § 349, and dismissed it without prejudice.

Private Actions

Arbitration

Cotton Yarn Price-fixing Claims Heading to Arbitration after Fourth Circuit Reversal

In re: Cotton Yarn Antitrust Litig., No. 04-MD-1622, 2009 BL 43412 (M.D.N.C. Mar. 6, 2009)

Purchasers of cotton yarn who claim that they were forced to pay artificially high prices as a result of a conspiracy among manufacturers will have to fight their battle in an alternative forum, after the U.S. District Court for the Middle District of North Carolina ordered the purchasers to arbitrate their claims. The order came on remand, following the U.S. Court of Appeals for the Fourth Circuit's reversal of the district court's order, which would have allowed the plaintiffs to litigate their claims. *See Yarn Price-Fixing Conspiracy Claims Should Be Arbitrated, Fourth Circuit Concludes*, Bloomberg Law Reports, Corporate Law, Vol. 1, No. 25 (Oct. 22, 2007). The Fourth Circuit had found that all of the sale contracts at issue, between several plaintiffs and two major manufacturers of the yarn, Avondale, Inc and Frontier Spinning Mills, Inc., contained enforceable arbitration provisions, but remanded to the district court to determine whether the one-year statute of limitations which was incorporated into the arbitration provisions barred plaintiffs from asserting their claims in such a forum.

On remand, plaintiffs argued, and defendants did not contest, that the one-year limitations period did not present an obstacle to their proceeding to arbitrate their claims, because, though the alleged anticompetitive behavior dated back to 1999, the statute of limitations was tolled because defendants had fraudulently concealed their activities. It was only in February 2004, when the parent company of one of the defendants issued a press release disclosing possible anticompetitive activities that the statute began to run. Thus, the filing of plaintiffs' complaint in January 2005 was timely, and the court ordered the parties to arbitrate those claims.

Standing

Court Dismisses Three Wireless Consumer Class Actions against Qualcomm

Meyer v. Qualcomm, Inc., No. 08-CV-655, 2009 BL 42997 (S.D. Cal. Mar. 3, 2009); Lorenzo v. Qualcomm, Inc., No. 08-CV-2124, 2009 BL 44617 (S.D. Cal. Mar. 3, 2009); Valikhani v. Qualcomm, Inc., No. 08-CV-655, 2009 BL 45241 (S.D. Cal. Mar. 3, 2009)

On March 3, 2009, the U.S. District Court for the Southern District of California dismissed three separate putative class action complaints alleging that Qualcomm Inc.'s licensing practices on several patents deemed essential to the wireless telecommunications industry violated several federal and state antitrust and unfair competition laws. The three complaints raised slightly different claims, depending on the patents at issue and the statutes under which each sought relief, but the court dismissed each on the grounds that the plaintiff lacked standing, as his alleged injuries were too remote from the alleged anticompetitive acts.

Three Class Actions Directed at Qualcomm's Licensing Practices

Qualcomm owns several patents on technology used in the wireless communications field and earns billions of dollars of revenue by licensing these patents to chipset, phone, and other equipment manufacturers. The importance of Qualcomm's patents is in large part the result of the need for interoperability between the various hardware and software components that comprise a wireless network and the phones or other communication devices themselves.

Each named plaintiff alleged that he had paid a supracompetitive price for his cellular phone as a result of Qualcomm's patent licensing practices. In *Meyer v. Qualcomm*, Meyer purchased a Motorola phone from AT&T and alleged that he paid a supracompetitive price due to Qualcomm's representations to and activities involving a number of standards determining organizations (SDOs). Specifically, Meyer alleged that, after its technology and "essential" patents were integrated into a new third-generation standard technology called Universal Mobile Telecommunications System (UMTS), Qualcomm refused to adhere to its express written agreements with the SDOs that it would license its essential patents on fair, reasonable and non-discriminatory (FRAND) terms. Instead, Meyer alleged, Qualcomm wielded its patent monopoly power to force industry participants to accept anticompetitive licensing terms, including higher royalty payments for manufacturers using non-Qualcomm chipsets and the imposition of unfair grant-back provisions and pricing exchanges. As a result, Meyer alleged, UMTS chipset prices remained artificially high for a longer period and innovation in UMTS hardware was delayed. Meyer asserted federal claims for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, for Qualcomm's alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, as well as damage claims under California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16700-16770, and Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17209.

In *Valikhani v. Qualcomm, Inc.*, Valikhani alleged the same facts and anticompetitive conduct related to UMTS set forth in *Meyer*, but only raised claims under California's Cartwright Act and Unfair Competition Law and not the Sherman or Clayton Acts.

In *Lorenzo v. Qualcomm*, Lorenzo also alleged that certain Qualcomm anticompetitive licensing practices resulted in his payment of supracompetitive prices for Research in Motion and Palm phones from Verizon. Lorenzo's complaint concerned a different wireless standard, Code Division Multiple Access (CDMA) technology, used by Verizon in the U.S. The essence of Lorenzo's claims was similar, however. Lorenzo alleged that Qualcomm, again despite express promises to several SDOs, did not license its essential patents on FRAND terms, but instead reduced royalty rates for certain Chinese manufacturers who agreed to use Qualcomm chipsets and, with regard to other manufacturers who did not use Qualcomm chipsets, double-collected royalties. Specifically, Qualcomm charged manufacturers for the right to use Qualcomm technology in their chipsets and cell phone manufacturers for the right to use those chipsets. Lorenzo alleged that Qualcomm's double-collection violated the "patent exhaustion" doctrine, because it allowed Qualcomm to receive two payments for the same use of its technology.

Lorenzo raised claims for injunctive relief under Section 16 of the Clayton Act and damages for violations of California's Cartwright Act, Unfair Competition Law, and Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17000-17100, as well as for common law monopoly and unjust enrichment.

Plaintiffs Lack Standing to Bring Federal and State Antitrust and Unfair Competition Claims

The court held that each plaintiff lacked standing to bring the antitrust or unfair competition claims raised in his putative class action complaint.

With regard to the federal claims raised in *Meyer* and *Lorenzo*, the court noted that the indirect purchaser rule did not preclude suits for injunctive relief – as opposed to damages – under Section 16 of the Clayton Act. The court explained, however, an antitrust plaintiff lacks standing unless injured in the market in which the anticompetitive acts occurred. The only exception to this rule applies where the plaintiff's injury is inextricably intertwined with the injury suffered by a market participant. The exception is a narrow one, as it requires the non-market-participant plaintiff to have been the direct victim of the anticompetitive conduct or the means by which it was carried out.

Here, the court explained, Meyer and Lorenzo were end users of cellular phones and services and thus plainly not participants in the market in which Qualcomm's alleged anticompetitive acts occurred. Further, the plaintiffs' claims did not qualify for the narrow "inextricably intertwined" exception. Specifically, Qualcomm's alleged anticompetitive licensing practices were aimed at chipset manufacturers and plaintiffs, as end users, would thus have to trace their injuries through three levels of the supply chain – chipset manufacturers, wireless device manufacturers, and, finally, the vendors who sold plaintiffs their phones. The court thus found that plaintiffs' injuries were too remote and dismissed the federal antitrust claims in *Lorenzo* and *Meyer*.

The indirect purchaser rule was similarly not a bar to recovery for a violation of California's Cartwright Act – a claim raised by all three plaintiffs – but the court nonetheless found that each plaintiff's alleged injuries were too remote from the alleged anticompetitive conduct. The court thus dismissed the Cartwright Act claims in *Lorenzo*, *Meyer*, and *Valikhani*.

The remoteness of plaintiffs' injuries from the alleged unfair conduct also barred recovery on the California Unfair Competition Law (UCL) claims each plaintiff raised. The court explained that, though each plaintiff may have alleged the first prong of the test for standing to recover under the UCL – an "injury-in-fact" – none of the plaintiffs had satisfied the second prong – that Qualcomm's actions were the cause of that injury. In each case, the plaintiff alleged that Qualcomm had misrepresented to SDOs that it intended to license technology on FRAND terms and that the SDOs had relied on those misrepresentations in agreeing to incorporate that technology into the CDMA (in *Lorenzo*) and UMTS (in *Meyer* and *Valihkani*) standards. But none of the complaints alleged that the plaintiff would not have purchased his phone if he had been aware of these misrepresentations to the SDOs. Each plaintiff thus lacked standing under the UCL as he had failed to allege that he relied on any Qualcomm misrepresentation and the court dismissed the UCL claims in *Lorenzo*, *Meyer*, and *Valikhani.*

Finally, the court dismissed Lorenzo's remaining state law claims, which were not raised by the other two plaintiffs. The court held that Lorenzo had failed to state a claim under California's Unfair Practices Act as the complaint did not contain any allegations of secret payments or rebates to certain purchasers with the effect of harming competition. The court also dismissed Lorenzo's claims for common law monopolization and unjust enrichment, finding that neither cause of action was available under California law.

The *Lorenzo*, *Meyer*, and *Valikhani* complaints were thus dismissed in their entirety. The court did, however, grant Lorenzo's motion for leave to amend his complaint.

Restraint of Trade

Interstate Commerce

NCAA Deflects Lawsuit over Lacrosse Stick Specs

Warrior Sports, Inc. v. Natl. Collegiate Athletic Assoc., No. 08-CV-14812, 2009 BL 49539 (E.D. Mich. Mar. 11, 2009)

The U.S. District Court for the Eastern District of Michigan granted a motion for judgment on the pleadings, dismissing an action challenging a change to the allowable specifications for equipment in collegiate lacrosse. The National Collegiate Athletic Association (NCAA) changed its rule specifying the size of lacrosse stick heads allowed in college lacrosse. As a result, Warrior Sports, a manufacturer of lacrosse sticks that would not comply with the new requirements, brought a complaint alleging the rule change was a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, constituted tortious interference with its business relationships, and that the rule change should not be allowed under the doctrine of promissory estoppel. The court found in favor of the NCAA after it filed a motion for judgment on the pleadings, holding the rule changes were not a restraint of trade subject to antitrust scrutiny, there had been no actionable interference with business relationships, and no promise that the NCAA would not change the rules regarding lacrosse stick measurements.

Background

In February 2008, the NCAA implemented a rule change regarding the allowable size of the head of a lacrosse stick, thereby rendering all of manufacturer Warrior Sports' current lacrosse sticks illegal for collegiate play. The NCAA asserted that it was changing lacrosse stick head measurements in order to better ensure the ball would dislodge during play. Warrior Sports contended that the rule change would not only inhibit competition and innovation, but would also force manufacturers to trash their entire inventory, accept returns of unsold inventory from customers, and change manufacturing processes to comply with the new specifications.

After an uneventful thirty-year period in which the rules regarding lacrosse stick measurements had not changed, there were two rule changes, prior to the 2008 rule change, mentioned in the complaint as being relevant to the action.

In September 2006, the NCAA first proposed a rule change regarding lacrosse stick measurements, but after Warrior Sports filed suit, the NCAA agreed to reconsider the rule change in exchange for Warrior Sports' agreement to withdraw the suit. The following September the NCAA adopted another rule change. The September 2007 rule change still would have rendered all of Warrior Sports' currently manufactured designs illegal, although patents held by Warrior Sports would have covered the new specifications. Discovering the existence of the patents after the adopted rule change, the NCAA asked Warrior Sports whether it would be willing to license its designs to other manufacturers, and if so, on what terms it would be willing to grant licensing rights. Warrior Sports refused to give the NCAA this information, arguing that licensing had to be done on an individual basis, and that it was inappropriate for the NCAA to broker such deals. Months later in February 2008, the NCAA adopted the rule change at issue in this action, adopting lacrosse stick measurements that avoided the intellectual property implications of the previous rule.

In the complaint, plaintiffs alleged the rule change was an anticompetitive restraint of trade, violating Section 1 of the

Sherman Act, as well as being tortious interference with plaintiffs' business relationships. Additionally, plaintiffs argued that the NCAA's practice of allowing manufacturers to have their designs reviewed for specification compliance constituted a promise that the approved equipment would be allowable in play. The NCAA sought judgment on the pleadings and the district court ruled in favor of the NCAA, holding the rule change not commercial in nature and not a restraint of trade, and thereby not subject to antitrust law. The court further held there could be no tortious interference with plaintiffs' business as the rule was not adopted with malicious and unlawful purpose, and the NCAA review process did not constitute a promise to never change the rules on lacrosse stick design, defeating the promissory estoppel claim.

Equipment Specification Rules for College Sports Not Commercial and Not Subject to Antitrust Review

Examining NCAA equipment specification rule changes on their face, the court determined they were not properly subject to antitrust review as they were not commercial in nature. Reciting the standards to find an antitrust violation under the Sherman Act, the court set forth the burden shifting paradigm under a rule of reason analysis: the plaintiff must prove an unreasonable restraint of trade producing significant anticompetitive effects in a given market; the defendant then has the burden of showing that the conduct has procompetitive effects that justify the injuries; and, assuming the defendant meets that burden, the plaintiff will then have to show that there are less restrictive ways to achieve any legitimate objectives of the restraint. *See NHL Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712 (6th Cir. 2003).

The court held NCAA equipment specification rules generally not subject to antitrust scrutiny, since NCAA actions are only subject to the Sherman Act when "commercial in nature." *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 958 (6th Cir. 2004). Giving examples of commercial and noncommercial NCAA actions, the court noted that sanctioning a coach for violating recruiting rules which made it harder for him to find employment was not a commercial action subject to antitrust review, however, restricting the number of college football games to be televised was commercial and subject to review. See *Bassett v. NCAA*, 528 F.3d 426, 429 (6th Cir. 2008); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984). The court pointed to the purpose of NCAA actions as determining whether the action is inherently commercial, finding actions intended to ensure fair play or to foster competition among college teams inherently procompetitive because they further public interest in college sports. The court cited an opinion holding that an NCAA rule restricting the size of manufacturer logos on NCAA team sports apparel was noncommercial in nature and not subject to antitrust review. *See Adidas America, Inc. v. NCAA*, 40 F.Supp.2d 1275, 1286 (D. Kan. 1999). The *Adidas* court based its decision on the fact that the rule had a noncommercial purpose, and the rule did not confer any direct economic benefit to the NCAA, as the NCAA was not a competitor in the sports apparel market. *Id.* The court found the lacrosse stick measurement rule to be analogous as the rule had a noncommercial purpose designed to enhance lacrosse play, and the rule does not confer any direct economic benefit onto the NCAA, as it is not a competitor in the lacrosse stick manufacturing market. The court found NCAA lacrosse stick measurement rules generally to be noncommercial and not subject to the Sherman Act.

Claims Fail Even if Plaintiffs' Competitors Involved

Continuing its analysis, the court had to accept as true plaintiffs' allegation that the 2008 rule was enacted as a result of collusion between the NCAA and plaintiffs' competitors to avoid plaintiffs' intellectual property claims on the designs allowed under the 2007 rule. The court held in that scenario, the 2008 rule would be commercial in nature because its purpose would be to benefit the competitors of the plaintiffs. Nonetheless, the court found the 2008 rule not to be a violation of the Sherman Act, as the enacted rule was not actually a restraint of trade or commerce. Noting that certain lacrosse sticks were allowed under the 2007 rule, and different sticks were allowed under the 2008 rule, the court found the end result was that the overall sale of lacrosse sticks was not restrained, there was simply a change in the measurements of the lacrosse sticks that would be sold. As a result, plaintiffs' Sherman Act claim was rejected: the 2006 and 2007 rule changes were held to be noncommercial actions, and the 2008 rule change was not a restraint of trade.

After rejecting plaintiffs' antitrust claim, the court then rejected plaintiffs' claim that the NCAA committed tortious interference with plaintiffs' business relationships. Finding that none of the rule changes were adopted with a malicious and unlawful purpose, including the 2008 rule allegedly adopted in collusion with plaintiffs' competitors, the court found the elements of a tortious interference claim were not satisfied. The court further rejected plaintiffs' claim that the NCAA process for review of manufacturers' lacrosse sticks for compliance with equipment specifications was a promise that would prohibit the NCAA from later adopting amended specifications. The court granted NCAA's motion for judgment on the pleadings.

Refusal to Deal

Thwarted Entrant into Pension Fund Investment Market May Proceed with Antitrust Action

Macquarie Group Ltd. v. Pac. Corporate Group, LLC, No. 08-CV-2113, 2009 BL 49111 (S.D. Cal. Mar. 2, 2009)

The United States District Court for the Southern District of California recently denied a motion to dismiss a complaint brought by the Macquarie Group, an Australia-based international investment bank, its subsidiary Macquarie Bank, and their respective principals (collectively, Macquarie), against the Pacific Corporate Group (PCG), a California-based fund that provides private equity investment advisory services to institutional investors. Plaintiffs alleged that PCG, which manages billions of dollars for large public pension funds, unlawfully exercised its market power in the alleged market for investment management services for public pension funds in the United States to thwart Macquarie's attempt to enter the market, ultimately at the expense of lower prices to consumers. Under the rubric of the rule of reason, the court determined that Macquarie alleged sufficient facts to state a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. The court also found that plaintiffs adequately pleaded facts to state a claim under a New York consumer protection statute, and for tortious interference with prospective economic relations and conversion.

Background

Plaintiffs filed the initial action in the Southern District of New York, in April 2008, after their unsuccessful attempt to enter the alleged market for investment management services for public pension funds. The case was later transferred to the Southern District of California pursuant to 28 U.S.C. § 1404(a).

According to the amended complaint, the acquisition of initial investment opportunities is essential for market entry. Toward that end, in the summer of 2005, Macquarie began courting Aisling Capital, a New York private equity fund that invests in the field of healthcare, for an initial investment. Plaintiffs alleged that initially their effort was met with some success and Aisling indicated that it would commit an initial investment of at least $15 million. Aisling, however, later reduced its commitment to $5 million.

The complaint alleged that Aisling's decreased commitment was a direct result of improper interference and coercion from PCG. Specifically, according to the complaint, the Director of Investor Relations & Marketing at Aisling reported to plaintiffs that PCG's president had phoned Aisling and threatened to stop referring business to Aisling if it allowed Macquarie access to the fund. PCG also circulated rumors concerning plaintiffs' inability to gain access into Aisling. Plaintiffs asserted that PCG set out to derail the Aisling investment opportunity, with full knowledge that this would significantly hinder Macquarie's attempt to enter the investment manager market. Further, plaintiffs alleged, PCG's anticompetitive conduct not only effectively barred Macquarie's entry into the market but also served to harm consumers, as PCG was then able to sustain higher fees and offer lower quality service.

Plaintiffs asserted claims under Section 1, as well as New York's deceptive acts and practices statute, N.Y. Gen. Bus. Law § 349, and also claimed tortious interference with prospective economic relations. Plaintiffs also asserted a claim for common law conversion, based on PCG's allegedly obtaining confidential Macquarie documents unlawfully. Finally, plaintiffs sought a declaratory judgment seeking to clarify the rights of the parties pursuant to an action which PCG subsequently filed against Macquarie in California state court. There, PCG alleged that Macquarie's former employee had sent emails to PCG's employees and to the press, pretending to be an executive working for PCG, and sought $25 million in damages.

Refusal to Deal Claim Adequately Pleaded

The court began its analysis by noting that the threshold issue was whether Macquarie's allegations stated the elements of a Section 1 claim. As the court explained, to properly state a Section 1 claim plaintiffs needed to allege: (1) an agreement or conspiracy to restrain trade, (2) which actually restrained trade, and (3) caused an injury to competition; as well as adequately allege (4) a relevant market, and (5) market power. The court concluded that the complaint easily met the elements of a Section 1 claim at this stage.

The court noted that an agreement to exclude a competitor from the market has been found to satisfy the first element of a Section 1 claim. Citing *Spectator's Commission Network v. Colonia Country Club*, 253 F.3d 215 (5th Cir. 2001), the court explained that the allegations here were analogous to the circumstantial evidence the Fifth Circuit found sufficient to infer an unlawful agreement. There plaintiff alleged that the PGA tour, in an effort to eliminate a competitor, pressured Anheuser-Busch to withdraw its sponsorship of the competitor's radio broadcast, which Anheuser did, thereafter becoming the official beer of the tour. Here, the court noted, plaintiffs alleged a similar effort to thwart a competitor. In sum, plaintiffs alleged that PCG pressured Aisling through its phone call threatening Aisling with the loss of potential business if it didn't withdraw its investment commitment to Macquarie. Aisling, like Anheuser-Busch, allegedly buckled under the pressure, reducing Macquarie's investment opportunity in its fund by two-thirds. The court, accordingly, concluded that the complaint satisfied the unlawful joint conduct element of a Section 1 claim.

Next, the court observed that a refusal to deal whose purpose is to exclude a competitor from the market, as Macquarie alleged here, is *a priori* a restraint of trade. Such conduct is the very type of anticompetitive conduct that reduces the number of market players, leading to supracompetitive prices. It followed, the court concluded, that the complaint satisfied the restraint of trade element of a Section 1 claim. Additionally, the court also concluded that the complaint, which drew a clear line to consumer harm, satisfied the injury to competition element of a Section 1 claim.

Finally, with respect to the relevant market and market power elements of a Section 1 claim, the court concluded that where Macquarie alleged that the relevant market was the United States market for investment management of public pension funds – a highly regulated market with high barriers to entry and few economic substitutes – plaintiffs adequately alleged a plausible geographic and product market. Observing that the ability to exclude competition is sufficient evidence of market power, the court similarly concluded that Macquarie adequately alleged market power with its allegations that PCG managed billions of dollars for large public pension funds.

Alleged Vertical Agreement is an Unreasonable Restraint under the Rule of Reason

Having determined the threshold issue, citing *NYNEX Corp., v. Discon*, 525 U.S. 128 (1998), the court then noted that courts typically analyze the type of anticompetitive conduct alleged here – a vertical agreement between PCG and Aisling to exclude Macquarie, a potential competitor to PCG in the market for investment management for public pension funds – under the rubric of the rule of reason. Under the rule of reason, a court must balance the anticompetitive effects of the vertical agreement against any possible business justifications, or procompetitive effect, to determine whether the alleged restraint is unreasonable, and therefore unlawful. The court concluded that the effect of Macquarie's exclusion from the market, in light of its allegations that it could provide services to public pension funds at a lower price than PCG, far outweighed any procompetitive justifications proffered by PCG.

Accordingly, the court denied PCG's motion to dismiss Macquarie's Section 1 claim.

Motion to Dismiss State Law Claims Denied

The court similarly denied PCG's motion to dismiss Macquarie's New York state consumer protection claim.

Macquarie alleged that PCG's phone call to Aisling was a deceptive act, in violation of N.Y. Gen. Bus. Law § 349. Section 349 mirrors Section 5 of the Federal Trade Commission Act, prohibiting "'deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state . . . .'" *Macquarie* at 12 (*quoting* N.Y. Gen. Bus. Law. § 349(a)). In particular, as the court explained, to adequately state a claim, Macquarie had to plead that (1) PCG's acts were directed at consumers, (2) that the content of PCG's communications was materially misleading, and (3) that plaintiffs were injured as a consequence.

The court observed that there was no dispute concerning the injury element as Macquarie alleged that PCG's conduct thwarted its effort to compete in the market for investment management for public pension funds. The court then turned to an analysis of the first two elements of a G.B.L. § 349 claim, concluding that they were sufficiently pleaded to survive dismissal. Noting that the "directed at consumers" element was generally construed liberally, the court found it met here. The court stated that the challenged anticompetitive conduct easily "undermine[d] New York's interest in an honest marketplace in which economic activity is conducted in a competitive manner." *Macquarie* at 13. Similarly, with respect to the misleading element of the claim, citing *New York v. Feldman*, 210 F. Supp. 2d 294, 301 (S.D.N.Y. 2002), the court noted that courts routinely treated antitrust violations as deceptive acts for pleading purposes. The court, accordingly, concluded that the complaint adequately pleaded a claim under G.B.L. § 349.

After determining that New York, rather than California law, governed plaintiffs' common law claims for tortious interference and conversion, the court also denied PCG's motion to dismiss those claims.

The court granted PCG's motion to dismiss, with prejudice, Macquarie's claim for declaratory relief with respect to the rights of the parties in the California state action, citing, among other concerns, the need to avoid needless determination of state law issues, forum shopping and duplicative litigation.

Unreasonable Restraint of Trade

District Court Lets Racetracks' Antitrust Complaint Out of the Gate

Churchill Downs v. Thoroughbred Horsemen's Group, No. 3:08-CV-225-H, 2009 BL 58126 (W.D. Ky. Mar. 20, 2009)

The U.S. District Court for the Western District of Kentucky substantially denied a motion to dismiss an amended complaint filed by Churchill Downs and its affiliates, Calder Race Course and TwinSpires, charging Thoroughbred Horsemen's Group, Kentucky Horsemen's Protective and

Benevolent Association, and two of its officers with conspiring to fix prices by boycott, a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as well as asserting a breach of contract claim against the Association. Defendants moved to dismiss on the grounds that (1) plaintiffs had insufficiently pleaded antitrust standing, (2) they were immunized from antitrust liability pursuant to the Interstate Horseracing Act (IHA), 15 U.S.C. §§ 3001-07, (3) plaintiffs' antitrust allegations failed to meet the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and (4) Churchill failed to state a claim for breach of contract. The court denied the motion with respect to plaintiffs' antitrust claim against the corporate defendants, but dismissed the contract claim against the Association and the antitrust claim against its officers.

Background

Churchill is a large racetrack conglomerate that operates both the famous racetrack in Louisville, Kentucky, and TwinSpires, an advance deposit wagering operation (ADW), with which account holders deposit money for the purpose of making wagers from remote locations via telephone, the internet, or a mobile device. Since 1978, when Congress authorized interstate wagering by enacting the IHA, an ADW must contract with the host racetrack for the right to accept wagers on and receive simulcasts of horse races at other tracks, and pay the host track a "signal fee" in exchange. A separate agreement between the host track and its authorized horsemen's group determines how much of the signal fee will be paid to the horsemen in the form of purses. The funds to pay the signal fee come from a 20 percent "takeout" from the wager pool, which is in essence the profit to be divided between an ADW or other off-track betting site, the host racetrack, its authorized horsemen's group, and various governmental agencies. The IHA further requires that any off-track wagering agreement must be consented to by the host track's authorized horsemen's group. *See* 15 U.S.C. § 3004. This is defined as "the group which represents the majority of owners and trainers racing there, for the races subject to the interstate off-track wager on any racing day." 15 U.S.C. § 3002(12). Thus, only the authorized horsemen's group at the host track can provide the required consent. The refusal to consent is commonly referred to as the "horsemen's veto."

In their amended complaint, plaintiffs alleged that in November 2007, the Benevolent Association combined with horsemen's groups from 40 other racetracks to form the Thoroughbred Horsemen's Group (the Group), and agreed to appoint the Group as their exclusive agent to negotiate directly with ADWs. Through it, the complaint further alleged, they also chose to exercise their horsemen's vetoes to force every ADW to sign a uniform Horsemen's Simulcast Licensing Agreement obliging every signatory ADW to pay a minimum of a third of the takeout to each signatory horsemen's group belonging to the Group. The complaint further alleged specific instances in which the Association and other members of the Group, acting in concert through the Group, had actually exercised their vetoes against Churchill's and Calder's contracts with ADWs who would not sign the License Agreement. The complaint also alleged that throughout 2008 no ADW would sign the Licensing Agreement and they were, thus, subjected to the Group's veto. The alleged anticompetitive effects included the fixing of a minimum cost of the signal higher than any ADW currently pays, fewer signals available for purchase, as well as fewer wagering opportunities in the interstate market for the sale and licensing of the right to receive simulcast signals and accept wagers on horse racing at locations other than the host racetrack.

Plaintiffs Have Standing under Clayton Act

The court first addressed the issue of whether the amended complaint sufficiently alleged plaintiffs' standing to sue under the Clayton Act, which gives a right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15.

For the limited purpose of this inquiry, the court assumed that the complaint's antitrust allegations were provable and sufficient to establish a *per se* violation of Section 1 of the Sherman Act. Rejecting defendants' contention that plaintiffs had not sufficiently alleged "antitrust injury," the court found that the complaint met both of the Sixth Circuit's requirements for standing: "'(1) that the alleged violation tends to reduce competition in some market, and (2) that [] plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions.'" *Churchhill Downs* at 11 (quoting *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 88 (6th Cir. 1989)).

The first requirement was satisfied, the court explained, by the allegations that defendants' group boycott causes fewer signals to be available for purchase, resulting in fewer wagering opportunities and inflated signal prices. The court noted that the Sixth Circuit has long recognized the potential for antitrust injury when the lack of market competition results in higher prices and that the Supreme Court has found that a reduction of output can be proof of actual anticompetitive effects. *Id.* (citing *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 900 (6th Cir. 2002); *FTC. v. Independent Fed'n of Dentists*, 476 U.S. 447, 460 (1986)).

The second requirement, the court found, was met where plaintiffs alleged three specific injuries caused by the purported antitrust violation. As the Court summarized, the injuries consisted of (1) Churchill's and Calder's inability to sell their signals, (2) the consequential decrease in wagering opportunities, and (3) a higher price to TwinSpires to purchase signals.

Interstate Horseracing Act Does Not Confer Antitrust Immunity

The court next addressed defendants' argument that the IHA immunized their alleged conduct from antitrust liability. Since the IHA does not explicitly confer antitrust immunity, the inquiry was whether such immunity was implicit in the statutory scheme. The court approached the question by observing that implied immunity is generally disfavored, and is only justified where there is a clear repugnancy between the antitrust laws and the regulatory scheme. Even then, the court emphasized, immunity was to be narrowly construed and found only where it was necessary to make another federal law work. The IHA's legislative framework, the court held, suggests that antitrust immunity for inter-group action should not be implied here. The court reasoned that the legislation neither created nor envisioned any supervision or regulatory scheme, and its limited provisions were not in apparent conflict directly or indirectly with antitrust principles. The court found support for its analysis in the Sixth Circuit's dictum that the IHA envisions a lack of government regulation and interference, citing *Ky. Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406, 1414-15 (6th Cir. 1994).

The court viewed *Credit Suisse Sec. LLC v. Billing*, 551 U.S. 264 (2007), and all the other cases in which the Supreme Court found implied immunity, as lending no support to defendants' position. In each of these cases, the court noted, Congress created a statutory and regulatory structure that actively controlled and monitored behavior or participants within a particular substantive area. In each case, the court added, the comprehensive regulatory scheme was deemed a substitute for antitrust regulation, which would likely produce conflicting guidance or conflict directly with regulatory practices. The court likewise considered defendants' reliance on *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399 (6th Cir. 2006), to be misplaced, since Congress had expressly authorized a unique semipublic, regulated agency, to enter into contracts with electrical cooperatives.

The court also rejected defendants' theory of "extended immunity." Defendants argued that because individual horsemen cannot comply with both the IHA and antitrust laws, the IHA creates implied antitrust immunity for horsemen's groups, and that such immunity must logically be extended to groups of horsemen's groups such as the Group here. This argument, the court found, was not supported by any of the cases proffered by defendants. Further, the court stated, it misconstrued the circumstances addressed by the IHA. Prior to its enactment, individual horsemen had no right to prevent their host racetracks from exporting a signal. The IHA restructured the business of interstate wagering so that an authorized horsemen's group could withhold consent to such exportation. Since the horsemen only have a group right, antitrust law prohibitions of concerted action do not interfere or conflict with each group's exercise of its own consent power. While the court recognized that defendants might later show such a conflict, it was not apparent to the court as a matter of law at the pleading stage.

Antitrust Allegations Satisfy *Twombly's* Pleading Standard

The court next took up defendants' argument that plaintiffs' Sherman Act Section 1 claim should be dismissed pursuant to the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which held that antitrust complaints must satisfy a "plausibility standard," requiring complaints to plead enough facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement. The court concluded that plaintiffs' allegations satisfied this requirement.

The existence, membership, terms and methods of effectuating a combination or conspiracy among horsemen's groups to fix prices, the court found, were made plausible by allegations that the Benevolent Association, by allying with the Horsemen's Group, had entered into an agreement with horsemen's groups at 40 other racetracks to impose the uniform Licensing Agreement attached to the complaint, and that once signed by ADWs, this agreement served to dictate minimum prices for ADWs purchasing signals. The court found plausible proof of a group boycott to raise prices in allegations that the Association, acting in concert through the Group, had actually refused to consent to sales of their host track's signal unless the ADWs signed the uniform Licensing Agreement. Lastly, the court found plausible plaintiffs' definition of the interstate commerce affected as the nationwide sale and licensing of the right to receive simulcast signals and accept wagers on horse racing at locations other than the host racetrack, and assumed for present purposes that racetracks, ADWs and horsemen's groups were competitors in this market for their respective shares of the takeout.

Although the court found the complaint plausible with respect to the antitrust liability of the corporate defendants, it deemed the allegations against the Benevolent Association's officers conclusory and short of lending plausible support for the requirement that they "actively and knowingly" engaged in the scheme.

Breach of Contract Claim Insufficient

Finally, the court granted the Benevolent Association's motion for dismissal of plaintiffs' breach of contract claim. Plaintiffs alleged that the Association had breached the anti-assignment and exclusive representation provisions of its contract with Churchill. Specifically, the alleged breach consisted of the Association's appointment of the Horsemen's Group as its agent to negotiate with the ADWs. Churchill averred this to be in direct conflict with the Association's contractual obligation to serve as its members' sole authorized representative to negotiate with Churchill the horsemen's groups' share of the signal fee. The court rejected this claim, finding that the parties had agreed that the contract's exclusive representation provision would not prohibit the horsemen's group from appointing an agent to negotiate on its behalf, and there were no allegations suggesting that the Group had in fact exceeded its authority in this respect.

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