

ABA Antitrust Section

Joint Conduct Committee E-Bulletin

EDITOR'S NOTE

By Brian K. Grube

The Joint Conduct Committee is pleased to provide the latest issue of its E-Bulletin. This issue leads with four articles, featuring a comparative analysis of Canada's approach to sanctioning individuals for cartel-related offenses by Mark Katz, Elisa Kearney, and James Dinning. Daniel Laytin offers insights into whether today's seemingly ever-worsening economy might make private antitrust claims more (or less) likely, and how it might affect tactics in those cases that are pursued. Katia Callahan updates us on the U.S. DOJ's criminal enforcement activities over the last six months, and Chris Margison reports on the Canadian Competition Bureau's recent enforcement actions. We close with summaries of recent decisions by U.S. courts involving joint conduct.

Not long from now, we will begin soliciting articles for the next edition of the newsletter. Chief among our goals is to continue expanding the newsletter to capture even more developments outside the United States, not to mention more contributing authors. We invite everyone who would like to be involved, as an author, editor, or provocateur of ideas, to contact me and, most importantly, to forward any articles (or ideas for articles) you would like to see published.

CHAIR'S REPORT

By Thomas J. Collin

We are indebted to Brian Grube for his fine work in preparing for publication this latest issue of the newsletter and to each of the article and case summary authors. The newsletter reflects the collective efforts of many members of the Committee, and I am confident you will find it both informative and interesting.

The Spring Meeting is fast approaching, and I want to call to your attention two 90-minute programs that the Joint Conduct Committee is co-sponsoring, both on Wednesday, March 25. The first, *Resources for Class Action Litigation: A Demonstration of Critical Issues and Techniques to Deal with Them*, looks at key issues that arise in the prosecution and defense of antitrust class actions. Starting at 9:30 a.m., the program will be moderated by John M. Majoras, and speakers will be Ruthanne Gordon, Margaret E. Guerin-Calvert, R. Mark McCareins, and Schonette Jones Walker. The second, *Daubert 15 Years Later: How Have Economists Fared?*, looks at the effect of *Daubert* on economic testimony in antitrust cases from the standpoints of plaintiffs and defendants. Starting at 2:00 p.m., the program will be moderated by Mary T. Coleman, and speakers will be Joseph Angland, Linda Nussbaum, Thane D. Scott and Gregory Werden. Sharis Arnold Pozen is heading up the Committee's Spring Meeting efforts, and I join her in encouraging all of you to attend.

The Committee recently assisted in preparing comments in response to a questionnaire issued by the European Commission in connection with review of its current rules for assessment of horizontal cooperation agreements. Mark Botti headed up the Committee's working group, and we want to thank Mark, along with Barbara J. Alexander, Flavia Distefano, John Eklund, Beth Farmer, and Stefano Grassani, for their excellent contributions. The comments were forwarded on January 28 by the Chair of the Section of Antitrust Law, James Wilson, and the Chair of the Section of International Law, Aaron Schildhaus, to Director General Philip Lowe at DG Competition and are posted on the Section of Antitrust Law's website in the "Comments & Reports" file.

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DOING TIME: JAIL SENTENCES & ANTI-CARTEL ENFORCEMENT IN CANADA

**By Mark Katz, Elisa Kearney & James Dinning,
Davies Ward Phillips & Vineberg LLP**

There continues to be ongoing debate in antitrust circles over whether the prospect of imprisonment is needed to effectively deter cartel behavior. Antitrust authorities in the United States, for example, consider jail sentences to be an integral part of their anti-cartel arsenal. Other jurisdictions remain unpersuaded.

The Canadian experience offers an interesting middle ground. As in the United States, cartels in Canada are a criminal offence, punishable by fine and/or imprisonment. As a practical matter, however, Canadian authorities rarely obtain prison sentences for individuals who participate in cartel offences. Instead, they have resorted largely to alternative sanctions for individuals in lieu of jail terms. Nonetheless, in our experience, even the threat of jail represents a potent means of deterring cartel behavior in Canada.

Brief Survey of Approaches

OECD. Ten years ago, the OECD's Council issued a Recommendation Concerning Effective Action Against Hard Core Cartels (the "1998 Recommendation"). The 1998 Recommendation stated that, in order to ensure that competition laws effectively halt and deter "hard core" cartels, member countries' competition laws should provide for "effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance."¹ The 1998 Recommendation identified three elements necessary to deter hard core cartels: detection, likelihood of prosecution, and optimal sanctions.

The OECD Competition Committee's Second Report on the implementation of the 1998 Recommendation, issued in 2003, addressed the issue of sanctions.² The Committee found that financial sanctions imposed on cartels remained significantly below the optimal level for deterrence, and observed that there is a place for sanctions against individuals to complement corporate fines. The Committee said the prospect of spending time in jail could be a powerful deterrent for businesspeople contemplating a cartel, but recognized that not all countries consider that criminalizing cartel conduct is appropriate and may conflict with existing social or legal norms in a jurisdiction.³

In its Third Report, the Committee concluded that countries should further increase corporate fines and consider imposing sanctions on individuals, including criminal sanctions.⁴ The Committee cautioned, however,

that no systematic empirical evidence existed to assess whether the benefit of introducing sanctions against individuals exceeds the additional costs that such a system entails, including the costs of investigation and prosecution as well as the administration of a prison system.⁵ Recognizing that the decision to criminalize depends on a number of factors, including a jurisdiction's cultural and legal environment, the Committee said that "[c]ountries might, for example, consider other mechanisms to provide greater incentives for individuals to defect from cartels, which could be adopted as an alternative or as a complement to individual sanctions."⁶

The Committee also said that if a jurisdiction decides to introduce criminal sanctions, several factors should be taken into account to ensure that the sanctions contribute as effectively as possible to anti-cartel enforcement while minimizing the costs associated with criminal enforcement, namely, coordination between prosecutors and competition authorities and the proper definition of the criminal offence.⁷

International Competition Network (ICN). To the extent the ICN has addressed cartel sanctions, it has been more willing to explore the potential deterrent effect of penalties other than jail sentences. For example, the ICN Working Group on Cartels noted in a 2005 report that the issue of alternative means of achieving deterrence "is one of the points which will definitely need to be further developed in the future, since it offers a completely new perspective on punishing cartels."⁸ Examples of alternative sanctions include exclusion from public procurement procedures, company director disqualification, restitution orders, community service, orders not to leave the country, and supervision.⁹ A more recent report of the Cartels Working Group (Subgroup 1), focused on the setting of fines for cartel offences and noted the different kinds of administrative punishments available, including ineligibility for official financing, the cancellation of tax incentives or public subsidies, and prohibitions against corporate indemnification of individual fines and costs of litigation and settlement.¹⁰

United States. Support for the imposition of prison sentences against individuals is strongest in the United States. The U.S. DOJ's Antitrust Division has long believed prison sentences are the most effective way to deter and punish cartel offences. Thomas Barnett, the former head of the Antitrust Division, made this point in an April 2008 speech: "[O]ur investigators have found that nothing in our enforcement arsenal has as great a deterrent as the threat of substantial jail time in a United States prison ... We have, for example, encountered international cartels where the participants purported to carve the United States out of their price fixing. The reason given was fear of prison sentences for cartel offences."¹¹

Recent statistics confirm that prison sentences play a central role in U.S. anti-cartel enforcement. In fiscal year 2007, 87 percent of defendants charged by the DOJ received jail sentences.¹² Defendants prosecuted by the DOJ were sentenced to serve 31,391 jail days, representing the highest total number of jail days imposed in any given year, and more than doubling the previous record of 13,157 jail days set in fiscal year 2005. Of note, foreign nationals are now as likely to serve prison sentences for cartel offences as are U.S. defendants. Indeed, this is a key goal for the DOJ, which has sought to treat “similarly situated foreign cartel members no differently than their U.S. co-conspirators.”¹³ Between 2000 and 2005, the average prison sentence imposed on foreign nationals in cartel cases was three to four months. By fiscal 2007, this had risen to approximately 12 months, and to 20 months, in the first four months of fiscal year 2008.¹⁴

Other Jurisdictions. The question whether jail sentences should be imposed on individuals convicted of cartel conduct has been raised in several countries recently. In Australia, for example, the final exposure draft of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,¹⁵ which would criminalize cartel conduct under the Trade Practices Act 1974, proposes a maximum term of imprisonment of 10 years for individuals convicted under the criminal cartel provision. This is double the five year term proposed in the initial exposure draft.¹⁶

On the other hand, competition authorities in Sweden and South Africa have opposed including jail sentences in the sanctions available against individuals for cartel conduct. Sweden’s new Competition Act, which came into effect in November 2008, allows the Swedish Competition Authority to levy fines against individuals and to ban them from controlling businesses for three to ten years after a cartel offence is committed (*näringsförbud*), but does not provide for imprisonment.¹⁷ South Africa’s competition commissioner recently told a parliamentary committee examining the issue, that higher corporate administrative fines would be a more effective solution than criminal sanctions against individuals. For example, the commissioner believes that making individuals personally liable would lead company directors to be less willing to reach consent agreements with the authorities.¹⁸

Finally, it may be noted that the United Kingdom, which enacted a criminal cartel offence as part of the Enterprise Act 2002,¹⁹ recently saw the first prison sentences handed down under that legislation. These sentences related to charges brought in December 2007 against three British executives accused of participating in a cartel in the marine hose industry.²⁰ In June 2008, each of the three pleaded guilty, with two being sentenced to three years in prison and the third being sentenced to 2.5 years.²¹ The U.K.

Court of Appeal subsequently reduced the sentences in a judgment released in November 2008.²²

The Canadian Experience

Penalties for Cartel & Related Offences. Canada’s principal cartel provision is section 45 of the Competition Act, which makes it a criminal offence to enter into agreements that prevent or lessen competition “unduly” or whose effect is to “unreasonably enhance” the price of a product. Violations are punishable by a fine not exceeding CDN \$10 million, imprisonment for up to five years, or both.²³

Other potentially relevant offences include the prohibition against implementing foreign-directed cartels in Canada (section 46); bid-rigging (section 47); and price maintenance (section 61).²⁴ Parties convicted of implementing a foreign-directed cartel in Canada are liable for fines in the discretion of the court. Violations of the bid-rigging prohibition are also punishable by a fine in the discretion of the court, or imprisonment for a term not exceeding two years, or both. Parties convicted of price maintenance are liable to a fine in the discretion of the court, imprisonment for up to five years, or both.

In addition to fines and jail sentences, the courts are also authorized to impose “prohibition orders” on corporations or individuals found to have committed cartel offences. These orders prohibit parties from continuing or repeating the offence. They also may contain “prescriptive terms,” such as the positive obligation on a corporation to implement a competition compliance program.²⁵

Sentencing for Individuals in Cartel Cases. There are no formal sentencing guidelines in Canada for cartel (or any other) offences. The principles governing sentencing are those set out in the Criminal Code, as interpreted by the courts. Under these principles, a criminal sentence must:

- have one or more of the following objectives: denouncing the unlawful act; specific and general deterrence; rehabilitation of the offender; reparations to the victims and to the community; and providing and promoting a sense of responsibility in the offender;
- be proportionate to the gravity of the offence and reflect the degree of responsibility of the offender;
- be similar to relevant precedent sentences; and
- reflect any aggravating or mitigating circumstances.

In addition to those general principles, the Competition Bureau has published a draft “information bulletin” describing how it decides what penalties to recommend for cartel offences (the “Draft Bulletin”), including those for individuals.²⁶ According to the Draft Bulletin, sanctions against individuals, including the prospect of imprisonment, constitute a “significant deterrent” against cartel behavior. As the Draft Bulletin states, individual liability “brings home the real costs of committing a crime.” In developing sentencing recommendations for individuals, the Bureau will have regard to factors such as:

(i) the degree to which the individual personally profited from the offence (including salary, bonuses and career enhancement); (ii) sanctions, if any, against the individual for participating in other cartels or the same cartel in another jurisdiction; (iii) any other punishment (such as loss of employment); and (iv) ability to pay. The Bureau will consider recommending prison sentences where the individual: (i) was the primary instigator or leader of the cartel; (ii) used coercion or otherwise encouraged compliance with the illegal arrangement; (iii) obstructed the Bureau's investigation; (iv) gained personal benefit from the unlawful conduct; or (v) is a recidivist.

Monetary fines constitute the typical penalty sought by the Bureau against individuals in cartel cases. Out of the eleven individuals sentenced for cartel offences in Canada over the last ten years, nine were required to pay fines, ranging between CDN \$10,000 and CDN \$250,000.²⁷ Only two individuals received any form of jail sentence during that same period of time, the most recent being in October 2008, when an individual charged with conspiring to fix the price of retail gasoline in Québec pled guilty and was sentenced to 12 months imprisonment. The court agreed to allow him to serve his sentence "in the community" rather than prison given that he had no prior criminal record and was not considered a danger to society. Serving a sentence "in the community" can involve restrictions such as curfews, limits on travel, reporting to an official, and community service.²⁸

The dearth of jail terms in Canada has several possible explanations. First, in recent years, very few cartel cases have been tried in Canada and, of those that did go to trial, virtually none resulted in successful prosecutions. In the last ten years, every cartel conviction in Canada has been the product of a negotiated guilty plea. The practical result is that, while the courts theoretically have the final say over any proposed fine or other penalty, the sanctions imposed in cartel cases are effectively determined by negotiations between the parties and the Bureau/DPP. And a key objective of these negotiations, from a defense perspective, is to avoid individual sanctions.

Second, as the former Commissioner of Competition has acknowledged, Canadian courts are still reluctant to impose prison sentences on individuals for "white collar" crimes, including for conduct violating the Competition Act. As a general rule in such matters, the courts tend to favor less restrictive sanctions over depriving an accused of his or her liberty.²⁹

The former Commissioner stated that the Bureau would "continue to work hard to educate the Canadian ... judiciary" about the value of prison sentences in light of the serious impact of cartel offences. But, in recognition of reality, the Bureau is also exploring other avenues of establishing personal accountability, such as prohibition orders (see above) and registering convicted individuals

with the Canadian Police Information Centre to restrict their ability to travel across international borders.³⁰ Restricting the mobility of convicted executives, and forcing them to operate solely within Canada, can seriously affect their careers and prospects for advancement.

The penalties in a 2006 cartel prosecution show how alternative sanctions can be employed against individuals in Canada. In that case, key personnel involved in the alleged conduct were ordered removed from their positions as part of the plea agreement and demoted to positions entailing a lower level of managerial responsibility. The Commissioner said that this penalty would "put corporate executives and employees on notice that they are accountable for their actions."³¹

As a final consideration, Canadians involved in cross-border conduct must also take into account the possibility they may be extradited to face prosecution—and possible prison sentences—in jurisdictions outside Canada. This is of particular concern if the other jurisdiction at issue is the United States, which has shown a willingness to resort to extradition proceedings to get at persons who have violated its antitrust laws. The most notorious example of this, of course, is the lengthy Norris extradition proceeding involving the United States and the United Kingdom. But, from a Canadian perspective, the more sobering case occurred in 2008, when several individuals were extradited from Canada to the United States, where they received lengthy prison sentences and fines for their involvement in a cross-border deceptive telemarketing scheme.³²

Conclusion

The United States and more recently the U.K. are committed to using the incarceration of individuals as a principal sanction against cartels. Other countries, such as Sweden and South Africa, are taking a different route, focusing on monetary fines and alternative penalties. Canada is somewhere in the middle. The Bureau is committed to employing measures against individuals and will seek jail sentences in appropriate cases. Yet it also recognizes the practical difficulty of securing jail sentences for cartel offenses. As a result, the Bureau has been willing to explore a range of alternative sanctions to achieve individual deterrence. Nevertheless, in our experience, the potential for jail time, even if largely theoretical, still operates as a powerful disincentive to cartel behavior in Canada. Moreover, the threat of imprisonment also becomes a major focus of plea negotiations, which can often help the Bureau secure increased fines against both individuals and corporations. Without the threat of prison, the Bureau's ability to achieve meaningful penalties under Canada's cartel provisions would be weakened.

¹ OECD Council Recommendation, *Recommendation Concerning Effective Action Against Hard Core Cartels*, adopted at 921st Session (March 25, 1998), [webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(98\)35](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35).

- ² Implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels: Second Report by the Competition Committee, at 22 (2003).
- ³ *Id.* at 23.
- ⁴ OECD Comp. Comm., *Hard Core Cartels: 3d Report on the Implementation of the 1998 Council Recommendation* 2005, www.oecd.org/document/39/0,3343,en_2649_34715_2474407_1_1_1_1,00.html.
- ⁵ *Id.* at 27.
- ⁶ *Id.*
- ⁷ *Id.* at 28.
- ⁸ *Defining Hard Core Cartel Conduct Effective Institutions Effective Penalties*, Report by the ICN Working Group on Cartels, ICN 4th Annual Conference, Bonn, Germany, at 75 (June 2005), www.internationalcompetitionnetwork.org.
- ⁹ *Id.* at 75.
- ¹⁰ ICN Cartels Working Group (Subgroup 1), *Setting of Fines for Cartels in ICN Jurisdictions*, Report to the 7th ICN Annual Conference, at 10 (April 2008), www.internationalcompetitionnetwork.org.
- ¹¹ Thomas O. Barnett, Asst. Attorney General, Antitrust Div., U.S. Dep't of Justice, *Perspectives on Cartel Enforcement in the United States and Brazil*, presented at the Universidade de Sao Paul, Sao Paulo, Brazil (April 28, 2008), www.usdoj.gov/atr/public/speeches/236096.htm; see also Gerald F. Masoudi, Deputy Asst. Attorney General, Antitrust Div., U.S. Dep't of Justice, *Cartel Enforcement in the United States (and Beyond)*, presented at the Cartel Conference, Budapest, Hungary (Feb. 16, 2007), www.usdoj.gov/atr/public/speeches/221868.htm.
- ¹² Scott Hammond, Dep'y Asst. Attorney General, Antitrust Div., U.S. Dep't of Justice, *Recent Developments, Trends & Milestones in the Antitrust Division's Criminal Enforcement Program*, 56th Annual Spring Meeting ABA Section of Antitrust Law (March 26, 2008), www.usdoj.gov/atr/public/speeches/232716.htm.
- ¹³ Scott Hammond, Dep'y Asst. Attorney General, Antitrust Div., U.S. Dep't of Justice, *Charting New Waters in International Cartel Prosecutions*, 20th Annual Nat'l Inst. on White Collar Crime (March 2, 2006), www.usdoj.gov/atr/public/speeches/214861.htm.
- ¹⁴ Hammond, *supra*, note 12.
- ¹⁵ Trade Practices Am. (Cartel Conduct & Other Measures) Bill—Exposure Draft, 2008, www.treasury.gov.au/contentitem.asp?NavId=006&ContentID=1426. The Australian Parliament has not yet passed the bill.
- ¹⁶ Trade Practices Am. (Cartel Conduct & Other Measures) Bill—Exposure Draft, 2008, www.treasury.gov.au/contentitem.asp?ContentID=1330&NavID=006.
- ¹⁷ *Sweden Launches New Competition Act*, Global Comp. Review (April 14, 2008), www.globalcompetitionreview.com/news/article/10069/sweden-launches-new-competition-act/.
- ¹⁸ *South Africa Authorities Oppose Criminal Sanctions*, Global Comp. Review (July 30, 2008), www.globalcompetitionreview.com/news/article/9618/south-african-authorities-oppose-criminal-sanctions. The parliamentary committee was considering a draft law, released in May 2008, that proposed penalties for individuals of up to 500,000 South African Rand in fines and 10 years in prison for cartel conduct.
- ¹⁹ Enterprise Act 2002 (U.K.), 2002, c. 40.
- ²⁰ Office of Fair Trading, *OFT Brings Criminal Charges In International Bid Rigging, Price Fixing & Market Allocation Cartel* (Dec. 19, 2007), www.oft.gov.uk/news/press/2007/177-07.
- ²¹ Office of Fair Trading, *Three Imprisoned In First OFT Criminal Prosecution For Bid Rigging* (June 11, 2008), www.oft.gov.uk/news/press/2008/72-08.
- ²² The same individuals pled guilty to participating in the marine hose cartel in the United States and agreed to serve time. But under their U.S. plea agreements, they could serve the agreed-upon time in the U.K. as long as their U.K. sentences were no shorter than their U.S. sentences. As it turned out, the sentences imposed by the U.K. Court of Appeal matched the sentences recommended in the U.S. plea agreements. Thus, the defendants will not be required to serve any prison time in the United States. (While it appears the U.K. court might have been inclined to reduce the sentences even further, the defendants did not press the point because they would then have been required to serve time in the United States.)
- ²³ Because nothing precludes Canadian authorities from charging a party with multiple counts, the total fine sought against a party could well exceed of CDN \$10 million. It also should be noted that the current government has proposed increasing the maximum fine per count to CDN \$25 million, although no legislation has yet been introduced.
- ²⁴ The price maintenance offence is usually applied in cases involving “vertical” price maintenance, i.e., where a manufacturer of a product influencing a customer to raise (or to refrain from lowering) the resale price for that product. However, the wording of section 61 is broad enough to cover cases of “horizontal” price maintenance, i.e., agreements between competitors, and a limited number of prosecutions have been brought under section 61 on those grounds.
- ²⁵ A prohibition order also may be issued by courts without a finding of guilt, where the accused has committed acts directed toward the commission of an offence but did not commit the offence itself.
- ²⁶ See www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/en/02663.html. The Bureau is responsible for investigating offences under the Competition Act,

while criminal prosecutions are the responsibility of the Director of Public Prosecutions of Canada (DPP). When the Bureau decides criminal charges are warranted, it refers a matter to DPP with a recommendation to prosecute and typically a recommendation as to penalties. The DPP formally decides whether to prosecute, and what penalties to seek. But, in practice, the Bureau and the DPP work closely in the investigation and prosecution of cases.

- ²⁷ The single-highest Canadian fine ever imposed on an individual for a cartel offense was CDN \$550,000, which was levied in a 1997 case.
- ²⁸ Competition Bureau, News Release, *Third Individual Pleads Guilty in Quebec's Gasoline Cartel Case* (Oct. 31, 2008), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02744.html. In 1999, the other individual was sentenced to serve 9 months, also in “the community,” and to perform 50 hours of community service, in the global choline chloride cartel.
- ²⁹ Sheridan Scott, Comm'r of Competition, Competition Bureau Canada, *Criminal Enforcement of Anti-Trust Laws—The U.S. Model—A Canadian Perspective*, Fordham Corporate Law Inst. Annual Conference (Sept. 14, 2006). This is apparently an issue in Ireland as well. The Irish Competition Act provides for jail sentences of up to two years and fines of up to €4 million for cartel offences. Yet in the first conviction under this provision, in 2007, the defendant received a 12-month suspended sentence and was fined €30,000. Some commentators saw this relatively light sentence as stemming from a reluctance by Irish courts to treat competition offences with the same degree of seriousness as other crimes, even though the legislation allows for significant penalties. Curtis and McNally, *The Class Cartel-Hatchback Sentence*, Competition Law Review, Vol. 4, Issue 1, at 41-50 (Oct. 2007).
- ³⁰ Scott, *supra*, note 29.
- ³¹ Competition Bureau, News Release, *Competition Bureau Investigation Leads to Record Fine in Domestic Conspiracy* (Jan. 9, 2006), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02018.html.
- ³² Competition Bureau, News Release, *15 Years in Jail for Canadian Extradited to U.S. in Deceptive Telemarketing Case* (Dec. 18, 2008), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02867.html.

LITIGATING SECTION 1 CASES IN THIS ECONOMY

By Daniel Laytin, Kirkland & Ellis LLP

There is no Jean-Valjean defense in U.S. Section 1 jurisprudence. See generally Victor Hugo, *Les Misérables*. Nor is there any such defense under EC law. But that is not to say that the state of the economy is irrelevant to Section 1 litigation. It is not. Indeed, the viability of antitrust defenses and doctrines can turn on factors related to general economic conditions and the particular economic conditions of the parties.

First, the effect of the economy on an antitrust plaintiff's business is highly relevant to damages. In commercial antitrust litigation, an antitrust plaintiff often asserts that its business failed as a result of the defendants' allegedly illegal conduct. It is, of course, black-letter law that antitrust plaintiffs can only recover damages tied to the effects of defendants' conduct, and not other factors. *U.S. Football League v. NFL*, 842 F.2d 1335 (2d Cir. 1988). Thus, if defendants can establish that the reason that a plaintiff's business failed to achieve its goals was reduced demand for the plaintiff's good, or other factors tied to a recession, that crucial, causal link is broken. Defendants have persuaded courts in numerous cases (many of which were litigated during previous economic downturns) that plaintiffs had failed to establish a causal link between defendants' conduct and their claimed damages in light of the possibility that the negative effects on their business was caused by general, economic conditions. See, e.g., *Foremost-McKesson, Inc. v. Instrumental Lab.*, 527 F.2d 417 (5th Cir. 1976) ("Muller's testimony tended only to establish that Curtin had suffered losses. On cross-examination, evidence was introduced that would support inferences that the losses were caused by the recession in general and particularly by decreased government spending, and by mismanagement of the Curtin operation."); *Bob Nicholson Appliance, Inc. v. Maytag*, 883 F. Supp. 321, 327 n.7 (S.D. Ind. 1994) ("BNA's evidence is insufficient to create an issue for the jury on the causation issue—whether Smith Furniture's participation in the Super Value Program had a substantial effect on BNA's ability to capture a sizeable market. BNA offers no evidence refuting other relevant factors such as two recessions in the Louisville market, additional competition from Sears Brand Central and Circuit City, changes in the distribution procedures in the appliance industry, and increases by Whirlpool and G.E. in their market shares."); and *R.S.E., Inc. v. Penn. Supply, Inc.*, 523 F. Supp. 854, 964 (M.D. Pa. 1981) ("In private antitrust actions, the burden is placed upon the plaintiff to show that the damage claimed was in fact caused by the unlawful acts of the defendant and did not result from some other factor, such as management problems, a recession in the economy or lawful competition by the defendant.").

Second, general economic conditions may make entry or exit from a particular market more or less likely. The ability of firms to easily enter or exit the marketplace is highly relevant to whether defendants have market power, see, e.g., *New York ex rel. Abrams v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 873 (E.D.N.Y. 1993), which often will determine whether many Section 1 cases are viable. See, e.g., *Gordon v. Lewiston Hosp.*, 423 F.3d 184, 213 (3d Cir. 2005). A recessionary economy presents several issues in litigating the ease of entry into the market at issue. Depending on the industry, it could be the case that entry would be less likely for other firms, if access to necessary capital or credit was difficult. See *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000) ("A significant barrier to entry may exist when large amounts of capital would be required."). Or, in other cases, if competitors had recently exited the industry and their assets and expertise were still available, it could be argued that those assets could re-enter the market in response to supra-competitive profits by existing competitors.

Finally, the effect of a recession on a company can affect the likelihood (and scope) of Section 1 litigation in the first place. It is conceivable that, like Jean-Valjean, a company might be more likely to engage in illegal behavior in desperate times. And unlike Hugo's Javert, who seemed to ignore both economic and political uncertainty in his single-minded pursuit of Valjean, a firm's willingness (and ability) to prosecute a Section 1 claim could be significantly affected by its cash position, as well as factors related to broader economic trends. By the same token, settlements and other negotiated outcomes are also impacted by each side's financial situation. In any event, if a case were pursued, the parties' positions, defenses, and likelihood of success will be shaped by both their actual claims and the economic climate in which they find themselves.

RECENT US CRIMINAL ANTITRUST ACTIONS

By Katia S. Callahan, Cleary Gottlieb Steen & Hamilton LLP

International Cartels. Over the second half of 2008 and now early 2009, the U.S. Department of Justice's Antitrust Division (DOJ) has collected more than \$1 billion in criminal fines in its ongoing prosecution of international cartels in the marine hose and air transportation industries. Five executives, including three foreign nationals, pled guilty and agreed to serve terms of confinement in connection with those investigations. The DOJ also filed charges against a series of price-fixing conspiracies involving liquid crystal display (LCD) panel manufacturers.

In the DOJ's marine hose investigation, uncovered in 2007, two companies pled guilty and agreed to pay about \$6.5 million in criminal fines. Four corporate executives, including an Italian and a Japanese national, agreed to plead guilty and pay criminal fines of about \$195,000; three agreed to serve prison terms between one year and one day

and two years and the fourth will serve six months under house arrest. Eight other executives already had pled guilty and agreed to serve prison terms and pay criminal fines. Two others were acquitted of conspiracy charges, and charges against another are still pending.

The DOJ's investigation into the air transportation industry produced guilty pleas in July 2008 from five companies that agreed to pay fines totaling \$504 million. Also in July, a former U.S. executive of one of the companies agreed to plead guilty and serve six months in jail. In September 2008, another former executive, a British national, agreed to plead guilty, serve eight months in prison, and pay a \$20,000 fine. And in January 2009, three more air cargo carriers agreed to plead guilty and pay fines totaling nearly \$125 million. The DOJ has now charged twelve air carriers and three executives resulting more than \$1.3 billion in fines and prison terms totaling 20 months.

The DOJ's investigation into the LCD panels industry uncovered a series of price-fixing conspiracies among three leading electronics manufacturers based in Asia (LG Display Co. Ltd., Sharp Corp., and Chunghwa Picture Tubes Ltd.). These companies agreed to plead guilty and to pay criminal fines totaling \$585 million. Notably, LG will pay a \$400 million fine, the second highest criminal fine ever imposed by the DOJ. In January 2009, four executives from LG and Chunghwa—a Korean national and three Taiwanese nationals—agreed to plead guilty, pay fines, and serve prison terms between six and nine months for their roles in the cartel. In February, the DOJ indicted three more former executives, one from LG and two from Chunghwa, who reside in Korea and Taiwan, respectively.

Domestic Conspiracies. The DOJ also investigated several domestic conspiracies, one of which produced the longest individual prison sentence ever imposed for a single antitrust charge. In its ongoing investigation of the marine products industry, the DOJ uncovered a conspiracy to rig bids and allocate customers for products purchased by the U.S. Navy, the U.S. Coast Guard, and other public and private entities. In November 2008, a former executive of one of the conspiring companies became the fifth individual to agree to plead guilty and to serve prison time and pay a criminal fine for participating in this cartel. The four executives who preceded him agreed to plead guilty to antitrust and other criminal charges and to serve jail terms ranging between four months and two years and to pay fines totaling nearly \$500,000.

The DOJ's probe into the coastal shipping industry uncovered a conspiracy to fix prices, rig bids, and allocate customers for the shipment of goods between the United States and Puerto Rico. Four U.S. shipping executives agreed to plead guilty, serve prison terms, and pay criminal fines. In February 2009, one was sentenced to serve 48 months in prison—the longest term ever imposed for a single antitrust charge. A fifth executive agreed to plead

guilty and serve time for destroying evidence; he faces a maximum sentence of 20 years and a \$250,000 fine.

In another case, the DOJ charged two Texas companies, two top executives, and a former employee with conspiring to rig bids and allocate customers for construction contracts to supply and install doors and hardware. The employee and one of the executives pled guilty in September and October of 2008, respectively. Charges against the companies and the second executive, who was also charged with obstruction of justice for destroying and creating false documents, are pending.

The DOJ also indicted a Texas-based convenience store and one of its employees for conspiring with competitors to fix retail gasoline and diesel prices in Antlers, Oklahoma. The investigation is ongoing.

The DOJ also continued to prosecute non-antitrust offenses discovered in its antitrust investigations, including obstruction of justice, bribery of public officials and witnesses, conspiracy to defraud the United States, wire fraud, theft of trade secrets, and tax evasion.

CANADIAN COMPETITION BUREAU DEVELOPMENTS **By Christopher Margison, Davies Ward Phillips & Vineberg LLP**

During the Canadian Bar Association's 2008 Spring Meeting, Canada's former Commissioner of Competition reaffirmed the Competition Bureau's focus on pursuing domestic and international cartels:¹

I have said before that combating domestic cartels is the number one anti-trust priority for the Bureau, but also that it would take time to see the fruits of our efforts.

We have chosen to focus our resources domestically because it is our duty to pursue made-in-Canada cartels to the fullest extent possible. This shift in focus has brought its own challenges. Domestic cartel cases can be hard slogging. They are complicated and time-consuming, and the fact we have one under way often becomes public only after a multi-year investigation. I can assure you that Bureau officers are engaged, as we speak, in multiple major domestic investigations.

Does this mean we are abandoning our work on international cartels? Far from it, and the record will bear this out. Over the past two years we have recorded fines totaling \$8.6 million against four companies involved in international cartels, and are actively investigating more than a dozen such cases.

But our emphasis on home-grown cartels does mean an increased openness to considering whether a full-blown Canadian investigation is warranted, or whether the remedies pursued in other jurisdictions might also serve to halt the activity in the Canadian market and provide the deterrent effect in the marketplace we seek.

The Bureau's focus on cartels is illustrated by the developments discussed below. It is also shown by the Bureau's ongoing investigation into the pricing practices of a number of Canadian chocolate manufacturers. It is worth noting in this regard that what began as a purely Canadian investigation of those manufacturers has now also led to investigations by U.S., German, and EU authorities.

Quebec Gasoline Cartel Investigation—On June 12, 2008, the Bureau announced criminal charges had been laid accusing 13 individuals and 11 companies of fixing gasoline prices in Victoriaville, Thetford Mines, Magog and Sherbrooke, Quebec.² While many defendants have indicated they will contest the charges, some individuals and companies have pled guilty and agreed to pay fines totaling more than Cdn.\$2 million. Most recently, on October 31, 2008, one of the individual defendants pled guilty and agreed to be sentenced to 12 months imprisonment to be served in the community. Competition Bureau, News Release, *Third Individual Pleads Guilty in Quebec Gasoline Cartel Case* (Oct. 31, 2008).

The Bureau said the charges and guilty pleas are the result of an investigation that found that gasoline retailers or their representatives phoned each other and agreed on the prices they would charge customers. The Bureau said the evidence suggests the overwhelming majority of gasoline retailers in Victoriaville, Thetford Mines, Magog and Sherbrooke participated. The Bureau is continuing to investigate other retail markets in Canada.

Quebec Construction Companies Charged with Bid-Rigging—On November 10, 2008, the Bureau announced three Quebec-based construction companies and their presidents had been charged with rigging bids for the expansion and refitting of the emergency room at the Chicoutimi Hospital and finishing work to be performed at a smelter in Alma, Quebec.³ The Bureau alleges the defendants agreed to allocate the contracts, the total value of which exceeded Cdn.\$1 million.

Akzo Nobel Chemicals International BV Fined for Role in International Cartel—On November 21, 2008, the Bureau announced that Akzo Nobel Chemicals International BV pled guilty and was fined Cdn.\$3.15 million for its role in an international conspiracy to fix the price of hydrogen peroxide sold in Canada.⁴ Hydrogen peroxide is primarily used in the pulp and paper industry as a bleaching agent and chemical oxidant. It is also used in households as a disinfectant for minor cuts and wounds, as well as in environmental, chemical, textile and food processing industries. The investigation remains ongoing.

Competition Policy Review Panel Recommends Changes to Conspiracy Provisions—On June 26, 2008, the Competition Policy Review Panel presented a report on Canada's competition and investment policies to the

federal Minister of Industry.⁵ The Panel proposed "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." In a press release, the Panel's chair said, "Canada needs to be more open to competition, as competition spurs the productivity enhancements that underpin our economic performance and ultimately our quality of life," and added that "Canada needs to get its act together as a nation" and adopt a more globally competitive mindset.

One of the report's key recommendations is to replace the conspiracy provisions in the *Competition Act* with a per se criminal offence to address "hard core" cartels and a civil provision to deal with other types of agreements between competitors that have anti-competitive effects. In the Panel's view, criminal law sanctions should be reserved for "conduct that is unambiguously harmful to competition and where clear standards can be applied that are understandable to the business community."

Reform of the conspiracy offence has been widely debated in Canada for years. No consensus has emerged on how to frame an amendment to more effectively deter hard core cartel behavior without also deterring efficiency-enhancing agreements. The Bureau has argued the current offence, by requiring proof that the parties to an agreement possess market power, makes it too difficult to obtain convictions. But this may be an area that requires flexibility and evolution through judicial interpretation in light of economic thinking. While the Panel suggested that harmonizing Canadian conspiracy laws with those in the U.S. would be desirable, the U.S. cartel offence is not contained in explicit statutory code, but has evolved over 100 years through judicial consideration of particular restraints, and continues to evolve today. Drastic amendments to the Canadian conspiracy offence that abandon Canada's own 120 years of judicial consideration of the current provisions risk creating the type of uncertainty that is contrary to the encouragement of innovation, collaboration and investment in Canada. It is not clear how these proposed amendments to the conspiracy provisions would enhance the efficiency and competitiveness of Canadian businesses.

¹ Competition Bureau, Speaking Notes for Sheridan Scott, *Change and Redemption in Cartel Enforcement*, Address to CBA Spring Meeting (April 29, 2008).

² Competition Bureau, News Release, *Competition Bureau Unveils Gasoline Cartel in Quebec: Price-fixing Charges and Guilty Pleas Announced in Four Local Markets* (June 12, 2008).

³ Competition Bureau, News Release, *Quebec Construction Companies Charged with Bid-rigging Following Competition Bureau Investigation* (Nov. 10, 2008).

⁴ Competition Bureau, News Release, *Akzo Nobel Chemicals International BV Fined \$3.15 Million for its Role in an International Cartel* (Nov. 21, 2008); R. v. *Akzo Nobel Chemicals International BV*, No. T-1698-08, Statement of Admissions by Accused Pursuant to Section 655 of the Criminal Code (F.C.T.D.).

⁵ Competition Policy Review Panel, *Compete to Win* (June 2008), www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/home.

CASE SUMMARIES

GROUP BOYCOTT CLAIMS REQUIRE ADEQUATE PROOF OF AGREEMENT:

JUST NEW HOMES V. BEAZER HOMES & GOLDEN BRIDGE TECHNOLOGY V. MOTOROLA

By Jeny M. Maier, Morrison & Foerster LLP

Two recent U.S. courts of appeals decisions illustrate the importance of developing sufficient evidence of a horizontal agreement to support group boycott claims. *Just New Homes, Inc. v. Beazer Homes*, No. 07-1518, 2008 U.S. App. LEXIS 20540 (3d Cir. 2008), and *Golden Bridge Technology Inc. v. Motorola Inc.*, 547 F.3d 266 (5th Cir. 2008), upheld trial court decisions ruling that plaintiffs failed to adduce sufficient evidence to exclude the possibility that the defendants acted independently, rather than as part of a conspiracy, as required by *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In *Just New Homes*, the plaintiff, an internet-based buyer's brokerage firm, claimed that defendants—a group of eleven builders, five realtors, and the trade association to which they all belonged—conspired to exclude plaintiff from offering its internet-based buyer-brokerage service from the local real estate market. Plaintiff built its brokerage business on a system that allowed plaintiff to attract and represent prospective homebuyers without being present at the homebuyer's initial visit to a property. From its website, plaintiff promoted a database of new-construction properties across a fourteen state area, and prospective homebuyers registered as brokerage clients and received coupons that identified plaintiff as their buyer-broker. The prospective buyers would then submit their coupon to home builders or seller-brokers.

Plaintiff claimed that to exclude it from the market, defendants developed a "physical presence requirement" for buyer-brokers, under which buyer-brokers had to physically appear with their clients at the initial visit to a property to receive their share of a commission. Plaintiff further alleged that defendants enforced this requirement by collectively adopting a standard form agreement that included the physical presence requirement and that was distributed to builders by the trade association.

Affirming summary judgment for defendants, the Third Circuit found that the record "fail[ed] to show any collusion among or simultaneous actions taken by the defendants," and "[did] not lend any support to a conclusion that the defendants acted other than independently." *Id.* at *8. On the contrary, the court pointed to evidence showing that the standard form agreement had been created three years before plaintiff was even founded, and that the fifteen-year-old "physical presence requirement" historically had been followed by brokers associated with other realtor associations as a

means to avoid conflicts over sales commissions by verifying the buyer-broker's identity in the presence of the buyer and the seller-broker. *Id.* at *5-*6.

In *Golden Bridge*, the Fifth Circuit similarly affirmed summary judgment against plaintiff Golden Bridge Technology's (GBT's) claim that defendants—various cell phone manufacturers (e.g., Nokia, Motorola, T-Mobile, Ericsson, Qualcomm, and Lucent)—conspired to remove GBT's technology from an industry standard and thereby exclude GBT from the market. Applying *Matsushita*, the court held that GBT's evidence failed to show "an explicit understanding between the [defendants] to collude and unlawfully eliminate [GBT's technology] from the standard." 547 F.3d at 272.

GBT was a wireless communications technology company and a member of Third Generation Partnership Project (3GPP), a standard-setting organization that creates technology standards for the telecommunications industry. GBT owned patents to Common Packet Channel (CPCH), a technology that was adopted in 1999 as an optional feature of the 3GPP standard. As an optional feature, manufacturers were not required to use CPCH, but if they did, they had to follow the 3GPP standard to ensure compatibility with other equipment and networks. In the intervening years, no manufacturer field tested or implemented CPCH.

Changes to 3GPP standards are made by agreement among 3GPP members, who are organized into working groups that address different aspects of the 3GPP standard. Through a series of working group and plenary meetings, the CPCH technology was removed from the 3GPP standard. In a plenary meeting in 2004, certain members proposed simplifying the 3GPP standard by removing old and unused technologies. At a subsequent working group meeting (GBT did not attend), two members presented a list of features to remove that did not include CPCH. No decision was reached at the working group meeting and discussions continued via email among several companies who had attended the meeting (not GBT). Those companies (which included most defendants) discussed adding CPCH to the list, but again no agreement was reached and they ultimately did not include CPCH on the list due to a concern that including it on the list would prevent consensus in the working group.

The defendants all attended the next plenary meeting, but (again) GBT did not. At that meeting, the proposed removal list was presented (sans CPCH), but a representative from one of the defendants suggested adding CPCH to the list. Another member agreed, and there were no objections. On the last day of the meeting, the revised list was presented and again no member objected. The changes were approved at a subsequent working group meeting, which GBT also failed to attend.

The court examined GBT's evidence in light of the *Matsushita* rule that "to survive a motion for summary judgment ... a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* at 270-71 (quoting *Matsushita*, 475 U.S. at 587-88). After reviewing GBT's evidence, the court found (as had the district court) that "GBT ha[d] not met the threshold requirement of demonstrating the existence of an agreement." *Id.* at 273. The court rejected GBT's assertions that the defendants had economic motives to exclude GBT's technology from the standard, concluding that "[i]t is not sufficient under *Matsushita* for GBT to simply propose conceivable motives for conspiratorial conduct; GBT's evidence must tend to show that the possibility of independent conduct is *excluded*." *Id.* at 272-73. The court noted that GBT's evidence did not exclude the possibility that the defendants acted independently, such as if they were independently "motivated by a desire to improve the 3GPP standard by removing outdated and underused technologies." *Id.* at 273.

MLB PROPERTIES V. SALVINO, INC.

By Kara A. Elgersma, Bell Boyd & Lloyd LLP

In *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d. Cir. 2008), Salvino appealed the dismissal of its Sherman Act Section 1 claim that Major League Baseball Properties' (MLBP) exclusive right to license Major League Baseball club names and logos for use on retail products was anticompetitive. Salvino originally had asserted its claim in California state court, but it was consolidated with trademark claims MLBP had asserted against Salvino in federal court in New York.

The dispute in the district court centered on how the court should analyze Salvino's antitrust claims—should they be treated as *per se* illegal, did they merit a "quick look" analysis, or did they require a full rule of reason evaluation? Salvino argued the exclusive licensing rights were *per se* illegal, characterizing the agreements as naked output and price restraints. Alternatively, Salvino argued they should be analyzed under "quick look" analysis. Salvino did not argue why its claims should survive summary judgment if the court applied a full rule of reason analysis. MLBP argued a full-blown rule of reason analysis was necessary, and that under that analysis, the licensing agreements were lawful. The district court found the conduct at issue warranted a full rule of reason analysis and held that Salvino had failed to bear its initial burden of demonstrating that MLBP's actions had an adverse effect on competition. The district court also held that Salvino provided no evidence of relevant market or market power.

The Second Circuit agreed with the district court that the licensing agreements should be evaluated under the full rule of reason and applying *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979), held that MLBP's

conduct did not violate Section 1. The Second Circuit found the undisputed evidence to show that the MLBP's coordination of the licensing of the clubs' names and logos actually increased output over the relevant time period, and that the "price-fixing" alleged by Salvino, was really not price-fixing at all, but rather an arrangement whereby all of the Major League clubs received an equal share of the profits generated by the licensing agreements. Based on the lack of any evidence of reduced output or increased prices, the Second Circuit explicitly rejected Salvino's argument that the "quick look" analysis in *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984), should apply, having found no similarities between *NCAA* and this case.

FLYING J, INC. V. TA OPERATING CORP.

By Katia S. Callahan, Cleary Gottlieb Steen & Hamilton LLP

In *Flying J v. TA Operating Corp.*, No. 1:06-CV-30-TC, 2008 U.S. Dist. LEXIS 92852 (D. Utah Nov. 14, 2008), the court declined to dismiss claims of a group boycott claim, monopolization, attempted monopolization, and conspiracy to monopolize under Sections 1 and 2 of the Sherman Act. The court held that the plaintiffs plausibly alleged both unlawful unilateral conduct and a *per se* illegal conspiracy to cut off the plaintiffs' access to the leading trucker fuel card processing technology and, therefore, to a significant segment of the market for trucker fuel cards, diesel fuel, and other truck stop services.

The plaintiffs in *Flying J* were Flying J, a national truck stop chain and three of its affiliates, including TCH, which distributed the TCH card, a charge card with special features (e.g., fuel discounts and purchase tracking) to truck fleets. The defendants were rival national truck stop chains, Pilot and TA, and Comdata, which issued trucker fuel cards that competed with the TCH card and provided hardware and software for point-of-sale trucker fuel card transactions.

Flying J alleged that Comdata dominated the markets for trucker fuel cards and trucker fuel card processing technology, and that Pilot and TA together dominated the market for truck stops. Flying J further claimed that Comdata—both on its own and together with Pilot and TA—had discriminated against the TCH card, charging independent truck stops that accepted the TCH card higher transaction fees than it charged large truck stop chains (such as Pilot and TA) that refused to accept it, as a means to restrict the TCH card's "acceptance network and [its] attractiveness" to truck fleets. Flying J further alleged that Pilot and TA had agreed to help maintain Comdata's dominance in the trucker fuel card market by refusing to accept the TCH card in exchange for receiving financial and other rewards from Comdata, and thereby cutting off Flying J's access to Comdata's dominant trucker fuel card processing technology and thus a substantial segment of

the market for trucker fuel cards, diesel fuel, and other truck stop services.

The court analyzed Flying J's group boycott allegations under the per se rule, and held that the alleged group boycott was sufficiently egregious to merit per se treatment. Relying on *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 290, 293-94 (1985), the court noted that per se illegal group boycotts typically involve efforts to disadvantage a competitor by directly denying, coercing or persuading its customers or suppliers to "cut[] off access to a supply, facility, or market necessary to enable the boycotted firm to compete," often coupled with the boycotting firms having a "dominant position in the relevant market." The court also noted that Comdata's participation in the alleged conspiracy (which introduced a vertical element to the conspiracy) did not bar application of the per se rule, since two of the alleged conspirators (TA and Pilot) were "competitors at the same market level" and thus established the existence of a horizontal agreement.

IN RE RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION

By Katia S. Callahan, Cleary Gottlieb Steen & Hamilton LLP

In the *Rail Freight Fuel Surcharge Antitrust Litigation*, MDL No. 1869, 2008 U.S. Dist. LEXIS 95456 (D.D.C. Nov. 7, 2008), the court rejected a motion to dismiss claims asserted by a putative class of direct purchasers of rail freight transportation services that four major U.S. railroads conspired to fix freight prices through coordinated use of new and complex fuel surcharge methods.

The plaintiffs alleged that in 2003 the four defendants, which allegedly control about 90 percent of all U.S. rail freight traffic, agreed to increase their revenues by adopting a fuel surcharge. At that time, most rail freight contracts included rate escalation clauses that accounted for various cost factors (including fuel) set out in an index called the All Inclusive Index (AII), which was published by AAR, the railroad trade association allegedly dominated by the defendants.

According to plaintiffs, shortly after an AAR meeting, two of the defendant railroads began charging identical fuel surcharges. The plaintiffs further alleged that, during two other meetings, the defendants agreed to have AAR remove fuel from the AII index and to create a new cost escalation index that excluded fuel, called the All Inclusive Index Less Fuel (AIIILF), after which the two other defendants instituted identical fuel surcharges. The plaintiffs contended that, because fuel was excluded from the AIIILF, the defendants were able to adopt uniform fuel surcharge and capture profits "beyond the real increased cost of fuel" without renegotiating existing contracts.

The court held that plaintiffs' allegations, considered as a whole and taken as true, put defendants' purported parallel conduct in a context plausibly suggesting a prior agreement and thus satisfied the pleading standard articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The court explained that the plaintiffs' complaint supplied "robust factual details" from which a court could infer that "it is plausible that an actual agreement existed," including the particulars of the alleged conspirators' meetings, their coordination before and shortly after the meetings, and a specific description of the "complex and completely new" surcharge method implemented by the defendants. The court also concluded that the plaintiffs plausibly alleged that the defendants agreed to create—and collectively used—the AIIILF index as part of their scheme to impose the uniformly calculated, "new, separate[,] and artificially high" fuel surcharge. The court noted that the AAR meetings and the creation of the AIIILF, though not unlawful standing alone, were "probative of a conspiracy" when coupled with other allegations in the complaint.

DAHL V. BAIN CAPITAL PARTNERS

By Daniel D. Edelman, Crowell & Moring LLP

In *Dahl v. Bain Capital Partners, LLC*, No. 07-12388-EFH, 2008 WL 5206990, __ F. Supp. 2d __ (D. Mass. Dec. 15, 2008), the court denied a motion to dismiss plaintiffs' claim that a number of high-profile private equity firms and their affiliates conspired in violation of Section 1 of the Sherman Act to depress the prices paid for target companies involved in leveraged buyouts (or LBOs). The plaintiffs—all shareholders in companies subject to the suspect LBOs—asserted that two more defendants submitted sham bids, agreed not to submit bids, granted incentives to management, and included "losing" bidders in connection with at least nine separate LBOs, as the result of which plaintiffs were under-compensated in the final LBO transactions.

Defendants moved to dismiss, arguing the federal securities laws preempted plaintiffs' antitrust claims under *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007), and that plaintiffs failed to allege enough facts to make out a "plausible" conspiracy under *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

The court rejected defendants' preemption argument, concluding that "pre-emption does not apply here as the private nature of the LBOs at issue prevents the SEC from regulating these transactions." *Id.* at *4. The court held that application of the antitrust laws to the conduct challenged in this case was not "clearly incompatible" with the U.S. securities laws after finding that none of the four factors enumerated by the Supreme Court in *Billing* was satisfied.

The court first found the challenged conduct was not "squarely" regulated by the securities laws. According to

the court: “Private equity LBOs do not lie within an area of the financial market[s] that the securities laws seek to regulate as their *private*, as opposed to public, nature leaves them untouched by the securities laws.” *Id.* at *3. The court observed that plaintiffs alleged that the defendant firms “carefully avoided SEC oversight” and were exempt from the statutes regulating investment activity. *Id.*

The court next found that neither the SEC nor any other regulatory authority supervised the challenged conduct. The court distinguished between general filing requirements and substantive regulation directed at the challenged conduct, explaining: “The SEC does not substantively regulate the [private equity] firms, it merely requires certain disclosures to be filed as part of an LBO transaction.” *Id.* Having already determined the SEC had no authority over the challenged conduct, the court found the SEC had exercised no such authority and that there could be no conflict between the antitrust and securities laws since “the securities laws ... [were] absent *vis-à-vis* private equity LBOs.” *Id.* at *4.

In rejecting the defendants’ *Twombly* argument, the court found that plaintiffs “ha[d] pled enough facts for a § 1 claim” and that “the circumstances [alleged] ‘plausibly suggest[ed]’ that an illegal agreement existed in violation of § 1.” *Id.* at *5. The court found the alleged conspiracy to be “plausible”—and distinguishable from mere unilateral conduct—as *Twombly* requires, based on the “presence of the same firms in multiple transactions.” *Id.* at *5. That “overlap,” the court reasoned, “tie[d] the firms together” and, “coupled with the ... allegations that the firms conspired to prevent open, competitive bidding for the Target Companies, ‘plausibly suggests’ an illegal agreement here.” *Id.*

APPLE, INC. V. PSYSTAR CORP.

By Sarah Ciarelli Walsh, Wilson Sonsini Goodrich & Rosati LLP

In *Apple, Inc. v. Psystar Corp.*, __ F. Supp. 2d __, No. 08-3251 (WHA), 2008 WL 4943034 (N.D. Cal. Nov. 18, 2008), the court dismissed Psystar’s antitrust counterclaims asserting that Apple had illegally tied the sale of its Mac OS X operating system to sales of its Mac PCs and laptops in violation of Sections 1 and 2 of the Sherman Act and California state law. Psystar, a PC manufacturer, filed its claims in response to a lawsuit Apple filed charging Psystar with copyright and trademark infringement based on its alleged sale of computer systems and servers that ran unauthorized versions of Apple’s operating system.

Psystar’s antitrust counterclaims principally challenged the terms of Apple’s Software License Agreement, which forbade Apple’s licensees from loading its operating system on non-Apple hardware. Apple argued that Psystar’s antitrust counterclaims should be dismissed because Psystar failed to allege plausible relevant markets,

an essential element of each of its claims, and because Apple was not required to license its operating system on different terms even assuming it had market power in some market. *Id.* at *4. The court ruled for Apple based on the insufficiency of Psystar’s market definition allegations.

The court first held that Psystar’s allegations defining the relevant “tying” product market to include only a single brand—the Mac OS X operating system—were implausible. *Id.* at *9. The court rejected Psystar’s attempt to analogize its alleged tying product market to the special case of “derivative aftermarket[s] for products related to or dependent on a specific company’s products.” *Id.* at *5. “Single-brand markets are, at a minimum,” the court observed, “very rare.” *Id.* at *6. And while, “[i]n theory, it may be possible that, in rare and unforeseen circumstances, a relevant market may consist of only one brand of a product” (*id.*), Psystar’s pleadings failed “to allege facts plausibly supporting the counterintuitive claim that Apple’s operating system is so unique that it suffers *no* actual or potential competitors.” *Id.* The court rejected Psystar’s claim that there was no cross-price elasticity between Apple’s operating system and other competing operating systems as conclusory and therefore insufficient. *Id.* at *7. Further, the court identified allegations in Psystar’s own complaint that contradicted its assertion that Apple’s operating system was not interchangeable with other operating systems. *Id.* at *8.

The court similarly rejected Psystar’s attempt to define a “tied product” market limited to “computer hardware systems which utilize Mac OS.” *Id.* at *9. The court ruled that Psystar’s alleged market was distinguishable from single-brand tied-product aftermarkets because it was defined entirely by contract—Apple’s licensing agreement—rather than by the technological incompatibility of any potentially competitive products. *Id.* at *9-10. Moreover, the court explained, Apple customers signed their licensing agreements with Apple knowing the full extent of the restraint; thus there was not lock-in effect. *Id.* at *10-11. The court also discounted Psystar’s attempt to rely on the findings in *United States v. Microsoft* that Mac OS was not a substitute for Microsoft Windows, holding that “those factual findings [were made] nearly ten years ago,” and that while “the decision found that Microsoft had attained a very large market share in the [Windows] market, it did not limit the relevant market to a single brand or product as Psystar seeks to do.” *Id.* at *11.

The court dismissed Psystar’s claims under California’s antitrust and unfair competition statutes for the same deficiencies in Psystar’s pleadings. *Id.* at *11-12.

IN RE VITAMIN C ANTITRUST LITIGATION

By Caterina Nelson, CRA International

The court in the *Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008), denied a motion to dismiss

putative class action claims that four Chinese vitamin C producers conspired to fix the price (and allocate the volumes) of vitamin C exported to the United States and elsewhere from China. For purposes of their motion, defendants did not deny the price-fixing allegations, but argued that plaintiffs' claims should be dismissed under the "doctrines of act of state, foreign sovereign compulsion and international comity" (*id.* at 550) because the alleged "price-fixing activities were compelled by the Chinese government." *Id.* at 548.

According to plaintiffs' complaints, beginning in December 2001, after a period of low prices and consolidation in the Chinese vitamin C industry (and a failed attempt to form a cartel), the defendants agreed, under cover of a Chinese trade association, to restrict their vitamin C exports and to increase prices. *Id.* at 548-49. As a result, U.S. vitamin C prices allegedly increased substantially, before abating to some degree in late 2003, when defendants allegedly began to cheat on the cartel. This price-cutting allegedly prompted a series of meetings in late-2003, among defendants and their trade association, the result of which was an agreement to rationalize capacity and restore prices. *Id.* at 549.

To support their motion, defendants relied on an amicus brief submitted by the Chinese Ministry of Commerce—the "highest administrative authority in China authorized to regulate foreign trade." *Id.* at 552. The brief represented the Chinese government's first-ever appearance before a U.S. court as amicus. *Id.* Defendants argued that the Ministry's amicus brief had to be accepted as fact because it reflected "the official position of the government of China." *Id.*

In its brief, the Ministry asserted that the "trade association" that allegedly facilitated the cartel was actually "an entity under the Ministry's direct and active supervision that play[ed] a central role in regulating China's vitamin C industry." *Id.* The Ministry further asserted that in 1998 it had approved the association's request to establish a subcommittee to regulate the price and volume of all vitamin C exported from China by the association's members. *Id.* at 552-53. Member companies that did not comply with association policies were subject to sanctions including revocation of their export licenses. *Id.* While defendants conceded the Ministry actually did not determine prices, "[they] and the ministry assert[ed] that [they] could not have exported vitamin C that did not conform to the agreed-upon price." *Id.* at 554.

Plaintiffs argued in opposition that defendants' actions were voluntary. Plaintiffs argued that the Ministry's brief failed to identify "a single law or regulation compelling a price or price agreement at issue in the Complaint." *Id.* They discounted the exhibits attached to the Ministry's brief as "mere notices and charter documents of a nongovernmental organization" (*id.*), and pointed to

publicly available documents, as well as documents and deposition testimony that suggested defendants' price agreements might have been voluntary. *Id.*; *see also id.* at 555-56. Plaintiffs also proffered testimony by a purported Chinese law expert who opined "based on a review of the Ministry's brief and its exhibits that defendants' conduct was not compelled by Chinese law." *Id.* at 555.

After reviewing the case law, the court concluded "the issue at this stage of the case [was] whether there [was] a factual dispute as to the alleged compulsion." *Id.* at 557. The court ruled that "[t]he Ministry's Brief [was] ... entitled to substantial deference," but that it would "not be taken as conclusive evidence of compulsion, particularly where ... the plain language of the documentary evidence submitted by plaintiffs directly contradict[ed] the Ministry's position." *Id.* Ultimately, the court held "the record as it [stood] [was] simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions." *Id.* at 559.

MADISON SQUARE GARDEN V. NHL

**By Svetlana S. Gans & Sean M. Green, Kilpatrick
Stockton LLP**

In *Madison Square Garden, L.P. v. National Hockey League*, No. 07-cv-8455 (LAP), 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008), the court granted in part and denied in part a motion to dismiss antitrust claims asserted against the NHL by Madison Square Garden (MSG), the owner of the New York Rangers.

The NHL is a joint venture among its member clubs. In its lawsuit, MSG challenged as antitrust violations four different restraints imposed by the NHL on each of the member clubs as a condition of their membership: (1) merchandising and licensing restraints that require the clubs to grant the NHL exclusive rights to market and license the clubs' trademarks; (2) broadcasting and streaming restraints that prohibit member clubs from transmitting games outside defined territories; (3) "new media" restraints, which stem from a "new media policy" instituted by the NHL in 2006, that, among other things, prohibit clubs from operating team websites independent of the NHL server; and (4) advertising and sponsorship restraints that restrict the clubs' ability to compete in those alleged markets. *Id.* at *2.

The court dismissed MSG's claims with regard to all but the alleged "new media" restraints, concluding that the dismissed claims had been released by a consent agreement and release executed by MSG and the NHL in April 2005. The court found that enforcing the release did not violate public policy because it was consistent with the public policy of treating legitimate joint ventures, like the NHL, more leniently than combinations of non-integrated entities and with public policy favoring the settlement of claims. *Id.* at *7. The court further held that the release

applied to conduct by the NHL that allegedly occurred after the release was executed because the post-release conduct conformed to policies in effect at the time the release was executed. *Id.* at *8.

Alternatively, the court ruled that even if the non-“new media” claims were not subject to the release, they were barred by the doctrine of laches because MSG had not diligently pursued its rights to challenge the conduct based on the restraints in place before 2003. *Id.* at *10. The court also said the NHL’s continuing actions in furthering these restraints did not justify MSG’s delay in filing suit for the same reason. *Id.*

The court held that the “new media” claims had not been released by MSG. *Id.* at *7. The court also rejected the NHL’s contentions that the “new media” claims should be dismissed either because MSG had failed to allege antitrust injury or because the NHL was a “single entity” and thus incapable of violating Section 1 under the *Copperweld* doctrine. The court ruled that MSG had plausibly alleged antitrust injury based on its allegations that the NHL’s new media restraints harmed not just the Rangers, but all competition in the alleged market for “new media.” *Id.* at *11. On the NHL’s *Copperweld* defense, the court ruled that the determination whether the NHL should be regarded as a single-entity was too fact intensive to be made at the pleading stage. *Id.* at *13.

IN RE DIGITAL MUSIC ANTITRUST LITIGATION

By Amanda P. Reeves, Federal Trade Commission

In the *Digital Music Antitrust Litigation*, No. 06-1780, 2008 U.S. Dis. LEXIS 79764 (S.D.N.Y. Oct. 9, 2008), the court held that complaints filed by putative classes of direct and indirect purchasers failed to state a plausible antitrust claim under Section 1 of the Sherman Act that the nation’s four largest music labels in the United States conspired to inflate the price of digital music sold on CDs and over the internet in the United States. The court also ruled that plaintiffs’ pleading failures required dismissal of plaintiffs’ claims under the antitrust, consumer protection, and common law of 20 states and the District of Columbia.

The named plaintiffs included fifteen individuals from nine states who allegedly purchased digital music, directly or indirectly, from the defendants, either on a CD or over the internet. Plaintiffs claimed that the defendants agreed upon and implemented a two-phase scheme that fixed the prices for and restricted the distribution of digital music over the internet, which, in turn, inflated the price of CDs.

Plaintiffs alleged that defendants first created two sham joint ventures, ostensibly to distribute digital music over the internet, but which allegedly existed only to provide defendants with opportunities to reach and enforce agreements on the prices and terms on which their internet music would be sold to customers. Defendants then allegedly manipulated digital music prices to licensees by

agreeing on a wholesale price floor for their songs and placing restrictions on the use the music. Plaintiffs also alleged that defendants were under investigation by various state and federal antitrust enforcement agencies to support their complaint.

The court dismissed plaintiffs’ Section 1 claims, holding that under *Twombly* they failed to allege an anticompetitive agreement. The Court ruled that plaintiffs’ “bald allegation that the joint ventures were shams” was “conclusory and implausible” (*id.* at *30), and contrary to declarations the plaintiffs had attached to prior complaints, which the court read to justify the joint ventures as a means to combat the unauthorized downloading of digital music. *Id.* at *31. The Court further noted that “[i]t is common sense that some level of information sharing must inevitably occur in the operation of a joint venture,” and that it could not infer an agreement from the mere existence of permissible collaboration among defendants. *Id.* at *33.

The court declined to infer an agreement based on plaintiffs’ assertion that defendants knew a price decrease by one would decrease the price charged by defendants’ competitors. According to the court “[t]here is no agreement ... merely because an oligopolist charges an inflated price knowing (or even hoping) that other oligopolists will match his high price. Such is bald conscious parallelism.” *Id.* at *37. The court also declined to infer an agreement based on the alleged governmental investigations, noting that “mere investigations by governmental agencies does not show an ‘antitrust record.’” *Id.* at *38.

The court found defendants’ alleged imposition of price and use restrictions on digital music likewise to be consistent with their economic self-interest. *Id.* at *40. And the court found plaintiffs’ allegations of parallel price increases did not establish an agreement either, noting that, while “an inference of prior agreement may be warranted from simultaneous parallel price conduct where no actor had prior knowledge of or time to consider the other actors’ conduct,” plaintiffs’ complaints included no such allegations. *Id.* at *41. Finally, the court rejected plaintiffs’ claim that the digital music industry was susceptible to conspiracy, stating, “just because you grow up in a high crime area does not make you a criminal.” *Id.* at *43.

The court dismissed the state antitrust claims because the relevant state laws adopted federal antitrust law as persuasive or controlling authority. *Id.* at 48-49. The court dismissed the consumer protection claims, ruling plaintiffs could not recast their antitrust claims as consumer protection claims (*id.* at *60-61), and the unjust enrichment claims, ruling that, in the absence of antitrust claims, plaintiffs could not plead that a benefit accrued to defendants as a result of an alleged antitrust violation. *Id.* at *63-64.

HTC SWEDEN AB V. INNOVATECH PRODUCTS & EQUIP. CO.

By Svetlana S. Gans & Sean M. Green, Kilpatrick & Stockton LLP

In *HTC Sweden AB v. Innovatech Products & Equipment Co.*, No. 3:07-CV-232, 2008 WL 4510710 (E.D. Tenn. Sept. 30, 2008), the court declined to dismiss antitrust counterclaims challenging a series of actions allegedly undertaken by HTC Sweden AB, the dominant manufacturer of industrial floor grinding equipment sold in the United States, and certain of its affiliates and their executives, and intended to drive Innovatech, one of HTC's former U.S. distributors, out of the U.S. market for those products.

Specifically, Innovatech alleged that HTC, together with its U.S. affiliates and their executives, agreed to terminate Innovatech (after assuring Innovatech it would not do so) and distribute its products through its domestic affiliates. *Id.* at *2-3. When Innovatech began distributing grinders for a competing grinder manufacturer (Contec), HTC and its affiliates allegedly threatened Contec with an allegedly groundless patent infringement suit and extracted a commitment from Contec not to sell its grinders to Innovatech. *Id.* at *3. Later, when Innovatech began manufacturing and selling its own grinders, HTC and its affiliates allegedly threatened to stop buying vacuum systems (a complementary product sold together with grinders) from Ermator AB unless Ermator stopped selling vacuum systems to Innovatech—which Ermator allegedly agreed to do because HTC was its largest customer. *Id.* at *4. HTC then sued Innovatech for patent infringement.

In response to HTC's patent infringement lawsuit, Innovatech asserted counterclaims, challenging the alleged actions of HTC, its affiliates and their executives as federal antitrust violations, among other claims. The HTC defendants moved to dismiss all of Innovatech's claims.

The court declined to dismiss Innovatech's claim that HTC's agreement with Contec, prohibiting Contec from selling grinders to Innovatech, violated Section 1 of the Sherman Act. The court ruled that Innovatech had alleged antitrust injury because Innovatech claimed to have been injured as a consumer (and not just as a competing seller) of grinders and because "HTC's [alleged] intent was to cause an antitrust injury." *Id.* at *9. The court also found that HTC/Contec agreement could constitute an unreasonable restraint of trade because it allegedly barred Contec from selling competing products that did not infringe HTC's patents. *Id.* at *9-10.

The court rejected arguments by HTC's affiliates and their executives that Innovatech's claims against them were barred by the *Copperweld* doctrine, ruling that while the affiliates eventually had become a wholly-owned

subsidiaries of HTC, they were not when the allegedly unlawful conduct took place. *Id.* at *12.

The court also sustained Innovatech's claim against HTC under Section 2 of the Sherman Act. The court found that Innovatech had sufficiently alleged monopoly power, pointing to Innovatech's allegations that "HTC had become the largest manufacturer (by sales) of industrial floor grinding machines in the world" and that "HTC had attained and continue[d] to hold a dominant market share position in the United States and Europe." *Id.* at *13. The court also ruled that Innovatech had adequately pled that HTC willfully acquired or maintained its alleged market power by using "threats and extortion to force suppliers" not to deal with Innovatech. *Id.* The court similarly found that Innovatech's allegations that HTC had conditioned its purchases from suppliers on their commitment not to supply Innovatech sufficed to state a claim under Section 3 of the Clayton Act. *Id.* at *13-14.

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