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ANTITRUST LITIGATOR

# BUNDLED REBATES: A TEMPORARY BLIP ON THE ANTITRUST RADAR

BY: COLIN R. KASS *

Is private antitrust litigation becoming a dead letter? It seems as though the few doors that remain open are rapidly closing, leaving only the most hard-core offenses – like horizontal price-fixing – and the occasional patent misuse or abuse claim subject to serious scrutiny. That trend will likely continue.

In the last few years, the antitrust plaintiffs' bar has suffered a series of stinging blows at the High Court. Not once since 1995 has the Supreme Court sided with the plaintiffs in a major antitrust case. This unprecedented string of defeats continued through the last term, where the Court erected more roadblocks to plaintiffs' recovery in antitrust cases. Two more plaintiff-friendly decisions from the Courts of Appeal are now on deck for possible reversal this term. All of these cases demonstrate the Court's continued vigilance against using the Sherman Act as tool through which juries substitute their emotionally-driven judgment for free-market outcomes.

But this alone does not spell the end of private antitrust lawsuits. Despite High Court set-backs, lower courts remain more hospitably inclined. With recent judgments rendered against the likes of Microsoft, U.S. Tobacco, Visa/MasterCard, and 3M – all affirmed by the Courts of Appeals – the plaintiffs' bar can hardly complain about a lack of targets, now that many markets have been reduced to two or three players after the rush of "strategic mergers" in the 1990's.

In fact, right now is perhaps the most plaintiff-friendly time to bring a monopolization claim. A prime example of this plaintiff-friendly attitude is the Third Circuit's decision in *3M v. LePage's*, which purports to illegalize both "program pricing" (*i.e.*, prices or rebates that apply across multiple products) and individually-negotiated volume discounts. *LePage's Inc. v. 3M*, 324 F.3d 141 (3rd Cir. 2003). In *LePage*'s, the Third Circuit decided *en banc* (with now-Justice Alito dissenting) that 3M – the well-known maker of Post-it® Notes and Scotch® Tape – violated Section 2 of the Sherman Act.

*(cont'd on p. 21)*

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CHARLES H. SAMEL    JOHN H. MCDOWELL, JR.

# MESSAGE FROM THE CO-CHAIRS

We are excited to bring you the first issue of *The Antitrust Litigator* for the 2006-2007 ABA year. All signs point to a very productive year ahead – we have some new leadership, new editors, cutting edge content and fresh ideas for delivering benefits to Committee members. First, on the leadership front, John McDowell of Hughes Luce LLP has been appointed Co-Chair of the Committee. John previously served on our Website Subcommittee in 2005-2006, where he was instrumental in modernizing the website and generating new and valuable content for the membership. Our outgoing Co-Chair, Joe Esposito of Akin Gump Strauss Hauer & Feld LLP, deserves special recognition. He served three years as one of the leaders of this Committee, and his contributions in that capacity cannot be understated. Joe devoted countless hours to improving the Committee's organization, initiating programs and features for members, and guiding our activities in constructive ways. We will miss his energy, creativity, and sense of humor, but we know he will remain involved in other ways in the Section of Litigation. We wish him the best.

Second, our editorial board has grown and seeks to build on the solid foundation established by current and former newsletter contributors, editors and Committee participants. Joining the board are Elizabeth Brown of Covington & Burling LLP and Bradley Weber of Locke Liddell & Sapp LLP. We are very fortunate to have attorneys of their caliber involved in the newsletter and playing a part in the Committee. The Editors' Outlook describes in more detail the articles and upcoming features the board looks forward to introducing this year.

In addition to newsletter developments, our Committee website continues to improve its design and content. You will notice a number of new features when you visit http://www.abanet.org/litigation/committees/antitrust/home.html, including updated Circuit Notes, Online Resources and archived issues of *The Antitrust Litigator*. We are also pleased to welcome our two new Website Editors, Bryant Delgadillo of Kaye Scholer LLP and John Patton of Hughes Luce LLP. They bring a variety of talents and creative ideas to the Website Subcommittee, and are committed to delivering up-to-the-minute coverage of important antitrust developments.

There are now more than 850 members of the Antitrust Litigation Committee! As always, your active participation in Committee activities is encouraged and appreciated. If you would like to learn more about one of our subcommittees, or offer suggestions as to how we could do a better job or make your committee membership more valuable, feel free to contact us or anyone on our Subcommittee Leadership Roster, located on the website at: http://www.abanet.org/litigation/committees/antitrust/docs/roster.pdf. The Antitrust Litigation Committee needs your input in order to concentrate our activities on relevant and timely issues of concern. In that regard, if there are particular procedural or substantive antitrust litigation topics you would like to see addressed in telephonic CLE programs, the Antitrust Litigator's Corner on the website, newsletter articles or other Committee content, we want to hear from you.

Finally, we hope to have the chance to meet you in person at the Section Annual Conference April 11-14, 2007 in San Antonio. Although it may seem a long way off, the conference is only four months ahead, and registration will open soon! Each year the Section of Litigation manages to assemble an extraordinary slate of speakers, events and programs. Don't miss this unique opportunity to learn about the art and science of litigation, and to meet other attorneys who share a passion for advocacy.

We hope you enjoy this issue of *The Antitrust Litigator*. Let us know if we can do anything to enhance your membership experience.■

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# EDITORS' OUTLOOK

This issue of The Antitrust Litigator has a seasonal flavor, like the Thanksgiving holiday, when we observe old traditions while starting new ones. For example, we continue to publish articles on substantive topics, such as litigation risks to trade associations from joint conduct and to newly-merged companies from price increases. We also carry on the very informative Antitrust 101 series with a new piece from John McDowell, one of our Committee Co-Chairs, on p. 18.

In addition, this issue introduces a variety of new features we hope you will enjoy. First off, we are launching a column of opinion and commentary on current events in antitrust litigation titled "Antitrust News and Views." It is intended to be thought-provoking, and we invite those with other points of view to respond. Similarly, if you have suggestions for other hot topics or controversies that can be illuminated through discussion and debate, we welcome your input. In fact, we need your input, because we want to publish your ideas! Please submit opinions, responses or comments to AntitrustLitigator@abanet.org. You can also use that email address to send us your feedback on any aspect of the newsletter, from suggestions for new subjects, issue themes or other content, to thoughts about style, format or graphics. If your comments are selected for publication, we will ask your permission to reprint them in the newsletter, either in this new column or in a "Reader Feedback" feature that is in progress.

The second new feature you will find in the newsletter is our first installment of "Judicially Noticed." This feature highlights unique and noteworthy antitrust opinions issued by federal and state courts in recent months, and briefly discusses their practical significance. For more in-depth discussions of antitrust opinions issued by federal appellate courts, please explore the *Antitrust Litigator's* Circuit Notes on the website at http://www.abanet.org/litigation/committees/antitrust/circuitnotes.html. The October 2006 edition is now posted.

Speaking of the Committee's website, we are exploring ways to integrate new content and improve functionality for members in conjunction with our colleagues on the Website Subcommittee. In addition to the "Reader Feedback" feature, which you should soon be able to access through the website, a variety of new ideas and offerings are under consideration. Please let us know what you want to see, and check in periodically at: http://www.abanet.org/litigation/committees/antitrust/home.html for developments.

Finally, all of us on the Editorial Board extend a warm welcome to those members who are new to the Antitrust Litigation Committee. And to returning members, we welcome you back for another productive year. We hope you will find the articles and features in The Antitrust Litigator relevant and useful in your practice. We expect to generate three more issues in the coming year. That means you will have several opportunities to get your work published, if you are interested in writing an article, column or other feature.

Above all, the newsletter is a resource for your antitrust litigation practice. If you have ideas or suggestions on how we can improve this publication, please tell us and we will make it happen. ■

# BUYER BEWARE: CONSUMMATING NON-HSR REPORTABLE TRANSACTIONS MAY PROVE COSTLY IN THE END

BY: HARRY S. DAVIS, MICHAEL E. SWARTZ, AND MATTHEW S. WILD (NOT PICTURED) *

Parties to a merger or acquisition that is not reportable under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") sometimes assume they will not have substantial antitrust exposure from the transaction. That is anything but the case. Although non-HSR reportability does significantly increase the odds that a transaction will not be subject to a government enforcement action or private litigation, ironically this "free pass" to closing ultimately may leave the parties – and in particular the buyer – with increased antitrust exposure. The failure to eliminate any potential anticompetitive effects of the transaction before closing leaves the parties vulnerable to a claim that the transaction led to a price increase or other adverse effect. Thus, without any remedial measures pre-closing, the buyer may be subject to (1) post-closing divestitures that are even more burdensome than would have been pre-closing, and (2) substantial private litigation risk. Indeed, this potential outcome has become more likely after 2001 when Congress amended the HSR Act to increase the reportability thresholds.

The HSR Act was designed to provide the Federal Trade Commission ("FTC") and the Antitrust Division of the United States Justice Department ("Antitrust Division") with advance notice of certain mergers or acquisitions to afford them the opportunity to study their potential anticompetitive effects and to block them before they close.[1] In enacting HSR's pre-merger notification requirements, Congress expressly recognized the comparative difficulty of eliminating the harmful effects of an anticompetitive merger – by "unscrambling the assets" – after the fact rather than preventing the merger from going through in the first place.[2] Recognizing that the original notification thresholds established in 1976 had grown obsolete and overly burdensome over time – as the average size of deals grew larger and many small deals that were not anticompetitive still required pre-merger notification – Congress amended the HSR Act in 2001 to raise the notification thresholds. This increase was intended to reduce the burden on the antitrust agencies and the parties of pre-merger review for seemingly less significant transactions, thus allowing many smaller deals to avoid pre-merger notification. As a result, parties consummate many smaller deals every year without giving the competition authorities an opportunity to review them pre-merger for potential anticompetitive effects. Although the vast majority of deals that do not meet the pre-merger notification thresholds are pro-competitive or neutral in terms of their effect on competition, some anticompetitive deals have closed without any pre-merger review.

In an effort to rectify this problem, the FTC has recently shown an increased interest in challenging consummated mergers that may harm competition. In July and August 2006, the FTC challenged two mergers that had been consummated and obtained divestiture orders in both cases.[3] Although the FTC had challenged consummated mergers before Congress amended the HSR Act in 2001 to reduce its coverage,[4] these more recent actions illustrate that the FTC does in fact "devote more effort to identifying (through means such as the trade press and other news articles, consumer and competitor complaints, hearings, and economic studies) those unreported, usually consummated mergers that could harm consumers."[5] Indeed, since 2001, the FTC has challenged at least seven consummated mergers.[6] By contrast, while the Antitrust Division has concurrent jurisdiction to challenge consummated mergers, it has rarely done so.[7]

As a result of this focus, it is important for corporate and antitrust practitioners to understand that whenever a newly-combined firm raises prices based upon market power acquired through an anticompetitive merger (a "supracompetitive price increase") as distinguished from changes in supply and demand, the parties might very well receive scrutiny from the federal antitrust authorities. Obviously, a successful government challenge to an anticompetitive merger – regardless of the size of that merger – can have significant adverse consequences for the merging parties.[8] This article explains those consequences. In particular, this article examines the remedies available to federal antitrust authorities, state attorneys general and private plaintiffs for mergers that violate federal and state antitrust laws. In addition to exploring equitable remedies – including injunctive relief – that might be ordered in the face of a consummated anticompetitive merger, this article further analyzes the parties' potential exposure to damage awards

from direct purchasers under the federal antitrust laws as well as indirect purchasers under state antitrust laws. Defendants theoretically can be liable for as much as three times the amount that they caused purchasers to overpay for their products and those of their competitors and, in certain states, three times what indirect purchasers may have overpaid.

## Injunctive Relief

A merger that actually causes supracompetitive pricing likely would violate Section 7 of the Clayton Act and Section 1 of the Sherman Act.[9] Equitable relief for violations of those statutes is available, under Sections 4 and 16 of the Clayton Act, to many different types of plaintiffs including the Antitrust Division, state attorneys general, customers and consumers (and, under limited circumstances, competitors). In particular, Section 4 of the Clayton Act authorizes the Antitrust Division to challenge anticompetitive mergers,[10] and Section 5 of the Federal Trade Commission Act authorizes the FTC to challenge them in administrative proceedings.[11] Similarly, Section 16 of the Clayton Act authorizes customers, consumers, actual and potential competitors (under certain circumstances) and state attorneys general acting as *parens patriae* to seek injunctive relief.[12]

Courts have discretion to fashion broad equitable relief that will remedy the harm caused by an anticompetitive merger.[13] Notably, in addition to a consent decree that may require a post-closing divestiture, most post-merger injunctions typically impose ongoing restrictions and continuing obligations on the parties. Depending upon the anticompetitive effects caused by the challenged merger, conduct remedies can include restrictions on acquiring or operating competitors, mandatory intellectual property licensing, transfer of employees and ongoing compliance reporting to the FTC and/or Antitrust Division.[14] Such provisions may be more burdensome in the context of a consummated merger, where the assets and employees may already have been integrated. Consent decrees often last for ten years.

## Monetary Relief

An anticompetitive merger can create substantial monetary exposure to the FTC, customers and consumers (or state attorneys general as *parens patriae*). Section 13 of the FTC Act authorizes the FTC to obtain disgorgement of profits derived from supracompetitive price increases.[15] While the FTC has emphasized that it will seek disgorgement only in "exceptional circumstances,"[16] this remedy nevertheless exists and can increase the monetary exposure of the parties.

Moreover, a successful government challenge to a consummated merger because of post-deal supracompetitive price increases also can bring attention to a transaction and spark private class action litigation.[17] Plaintiffs may claim that, as a result of the merger, the prices of the defendant's products increased (or did not decrease as much as they otherwise would have), resulting in overcharge damages. Treble damage awards to direct purchasers can be substantial and exceed the entire supracompetitive profit that the defendant obtained as a result of the anticompetitive merger.[18]

In addition, if the so-called "umbrella standing" doctrine were available under Section 4 of the Clayton Act, a defendant could theoretically be liable for the direct purchaser overcharge damages of the entire industry. In a highly concentrated industry of the type that would allow the merged firm to charge supracompetitive prices,[19] one can expect competitors to follow the price increase announced by the firm that gained market power through the anticompetitive merger.[20] Consequently, customers that purchase the product directly from one of the merged firm's competitors also may suffer overcharge damages. Courts are split as to whether those plaintiffs have suffered antitrust injury allowing them to obtain treble damages under Section 4.[21] This exposure could be many times more than the supracompetitive profits that the merged firm actually earned from the anticompetitive merger.[22]

Damages exposure can multiply if indirect purchasers sue under state law. As a result of the limitation of damages recoveries under federal law, indirect purchasers have relied upon state law for compensation. In some states, either the legislatures have amended their antitrust laws or courts have interpreted them to provide damages (often trebled) to indirect purchasers.[23] State law claims challenging anticompetitive mergers can arise generally under two types of state statutes. First, six states have statutes that are comparable to Section 7 of the Clayton Act but also allow recoveries to indirect purchasers.[24] Second, ten states have statutes that are comparable to Section 1 of the Sherman Act but also allow recoveries to indirect purchasers.[25] If these state law analogues are interpreted consistently with the Sherman Act,[26] consumers in these states can also recover. Lastly, one other state seems to establish liability for anticompetitive mergers under its consumer protection statute.[27] While there are no reported cases of indirect purchaser litigation arising from an anticompetitive

**Merging parties should not assume that after consummation, their mergers will never be challenged.**

consummated merger, such litigation has become typical for other alleged antitrust violations where indirect purchasers have claimed that they absorbed overcharge damages. Those cases illustrate that, as a result of the interplay between Section 4 and certain state laws, defendants might be subject to litigation seeking many multiples of damages – treble damages to direct purchasers and, in some states, damages (often trebled) to indirect purchasers.

Such a result can arise because (1) direct purchasers are entitled to treble overcharge damages even if they passed on the entire overcharge to their customers;[28] and (2) in certain states, indirect purchasers are entitled to treble damages based upon the overcharge that they observed. To illustrate, assume that a consummated merger between two widget manufacturers resulted in a price increase of $1 per widget and further assume that (1) the combined firm sells its widgets to independent distributors who operate in a competitive market; and (2) the independent distributors sell the widgets to ultimate consumers and, in doing so, the independent distributors pass on the $1 price increase. Under this hypothetical, direct purchasers (the independent distributors) of the combined firm would be entitled to treble damages of $3. As economic theory suggests that firms in a perfectly competitive market pass on cost increases,[29] one would expect that the distributors passed on the entire $1 price increase to their customers (the ultimate consumers). The independent distributors would therefore have suffered no overcharge damages, but the ultimate consumers would have paid $1 more per widget. In states that allow damages suits by indirect purchasers, the ultimate consumers might also claim $3 of damages (after trebling). Thus, the combined firm can be subject to litigation seeking $6 per widget sold even though it only inflated the price by $1. In addition, if the combined firm's competitors were able to increase their prices because of the merger and the umbrella standing theory were accepted, it is possible that the combined firm also can be subject to litigation from its competitors' customers seeking treble overcharge damages. Thus, under certain limited circumstances, the parties to the acquisition could be exposed to litigation where plaintiffs' aggregate damages demands would exceed six times the damages caused by the merger.

Direct and indirect purchasers in Kansas might do even better. Kansas law prohibits anticompetitive mergers,[30] and allows a plaintiff to recover "full consideration damages."[31] This measure provides plaintiffs (both direct and indirect purchasers) with damage awards of the full amount that they paid for the defendant's product and then trebled.[32] Thus, if the statute is applied in this manner, the combined firm could theoretically owe Kansas plaintiffs 600% of the price that they paid for their widgets -- 300% to direct purchasers and 300% to indirect purchasers.[33] While arguments have been made that such a result would violate the Eighth Amendment's prohibition against "excessive fines," no court has resolved this issue. In two cases where the constitutionality of the Kansas antitrust statute's damages provisions were challenged on Eighth Amendment grounds, the trial courts deferred ruling on the motions to dismiss. In doing so, both courts held that any constitutional decision would be premature until after the jury determined the amount of damages.[34]

[D]efendants might be subject to litigation seeking many multiples of damages -- treble damages to direct purchasers and, in some states, damages (often trebled) to indirect purchasers.

Finally, Massachusetts law creates even more exposure. The Massachusetts Consumer Protection Act authorizes ultimate consumers to obtain nominal damages of $25 per consumer if they absorbed at least a fraction of the overcharge.[35] If the product subject to the overcharge was an ingredient in a product widely consumed by individuals (*e.g.,* citric acid) and a class action of all Massachusetts consumers were certified, this class could obtain substantial damages (which theoretically could exceed $150,000,000 if every resident in the state were an indirect purchaser).[36] Parties to an anticompetitive merger might have the same liability because the Massachusetts Consumer Protection Act likely applies to mergers.[37] As with Kansas, a damages award of this sort would present constitutional problems. Indeed, to avoid this constitutional issue, class certification has been denied where nominal damages were available under other statutes.[38] However, no court has decided the constitutionality of the Massachusetts statute as applied to an award of damages to a class of Massachusetts consumers, or to the authors' knowledge, certified a litigation class under such a theory.

## Conclusion

Merging parties should not assume that after consummation, their mergers will never be challenged. If the combined firm increases prices because the merger gave it market power,

government detection and challenge of the merger is a genuine possibility. In such a case, the merging parties should understand that not only may they be subject to a government consent decree to resolve the competition concerns, but they may also be exposed to costly private class action litigation with the possibility of high damage awards or settlements. Any such awards may dwarf the profits that the combined firm would have received from its price increase. ■

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**ENDNOTES**

* Harry S. Davis and Michael E. Swartz are litigation partners with Schulte Roth & Zabel LLP whose practices focus on complex litigation and antitrust counseling. Matthew S. Wild is a litigation associate with Schulte Roth & Zabel LLP whose practice focuses on antitrust counseling and litigation.

[1] The HSR Act requires parties to a merger that exceeds a certain size and where at least one of the parties has sales or assets of a certain amount to notify the FTC of the prospective merger and imposes an initial thirty-day waiting period before the parties can close. The statute and regulatory scheme allow the FTC and Antitrust Division additional time to investigate if they choose and an opportunity to seek a court order enjoining the merger before the parties close the transaction. Enacted in 1976, Congress amended the HSR Act effective February 1, 2001 and increased the thresholds for the size of the parties and value of the assets subject to pre-merger notification to reflect more realistic values in 2001 dollars and adjust annually for inflation.

[2] As Peter Rodino, Jr., a sponsor of the original HSR Act, explained, "[the HSR Act] stopped 'midnight mergers.' … [E]ven when [the government] won, competition was often impossible to restore. The merged company had already closed plants, cut jobs and scrambled assets. … *That had to be corrected.*" Statement of Peter W. Rodino, Jr. on the 25th Anniversary of the Hart-Scott-Rodino Act.

[3] *See Matter of Hologic, Inc.*, FTC No. 051-0263 (July 7, 2006); *Matter of Duncan*, FTC No. 051-0108 (Aug. 18, 2006).

[4] *See, e.g., FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989); *Matter of the Hearst Trust*, FTC File No. 991-0323

[5] Joseph J. Simons, Director, FTC Bureau of Competition (2001-03), "Report from the Bureau of Competition," (Apr. 4, 2003).

[6] *See Matter of Duncan; Matter of Hologic, Inc.; Matter of Evanston Nw. Healthcare Corp.,* FTC File No. 011-0234 (Fed. 10, 2004); *Matter of Aspen Tech., Inc.,* FTC Dkt. No. 9310 (Aug. 7, 2003)*; Matter of Chi. Bridge & Iron Co,.* FTC Dkt. No. 9300 (Oct. 25, 2001)*; Matter of Airgas, Inc.,* FTC File No. 001-0040 (Oct. 26, 2001)*; Matter of MSC.Software Corp.,* FTC Dkt. No. 9299 (Oct. 10, 2001).

[7] It appears that the DOJ has only challenged one consummated merger since 2001. *See United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850 (6th Cir. 2005).

[8] Indeed, one former Director of the FTC's Bureau of Competition warned that "[a]ntitrust counsel would be well advised to counsel their clients about the likely consequences of consummating transactions that raise substantial competitive issues." FTC Press Release, "FTC Challenges Chicago Bridge's Acquisition of Pitt-Des Moines' Industrial and Water Storage Tank Assets," (Oct. 25, 2001).

[9] *See, e.g., FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 50 (D.D.C. 2002) (preliminarily enjoining merger because "the effect of the amended agreement could result in the elimination of what is now Anchor as a competitor in the food service glassware market. … Although no statistics were presented, … the best evidence of its potential effect is the impact of the original agreement because the post-merger landscape could quite possibly be similar to the terrain that would have been created if Libbey had acquired all of Anchor's business"); *Todd v. Exxon Corp.*, 275 F.3d 191, 206 (2d Cir. 2001) ("If a plaintiff can show that a defendant's conduct exerted an actual adverse effect on competition, this is a strong indicator of market power. In fact, this arguably is more direct evidence of market power than calculations of elusive market share figures").

[10] 15 U.S.C. § 4.

[11] 15 U.S.C. § 45.

[12] *See, e.g.,* 15 U.S.C. § 26; *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 399 (3d Cir. 2000) (indirect purchasers); *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999) (competitors); *California v. Am. Stores, Co.*, 495 U.S. 271, 295-6 (1990) (state attorney general).

[13] *See, e.g., id.*, 495 U.S. at 295.

[14] *See* note 6, *supra.*

[15] *See, e.g., FTC v. Mylan Labs.*, 62 F. Supp. 2d 25, 37 (D.D.C. 1999).

[16] *See, e.g., Matter of the Hearst Trust*, FTC File No. 991-0323, Statement of Commissioners Anthony & Thompson.

[17] *See In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 99 (D.D.C. 2002) ("The FTC submits that private attorneys[] … r[o]de[] 'piggyback' on a prior case, in particular one in which the government conduct[ed] the investigation and perform[ed] much of the 'spadework'").

[18] Where a plaintiff claims that it paid too much because of an anticompetitive price increase ("overcharge damages"), the Supreme Court has held that only customers that purchased the goods or services directly from the defendants (or any of their co-conspirators) have suffered antitrust injury. The Supreme Court therefore denied damages recoveries to "indirect purchasers," holding that their injuries were too remote to justify recovery under Section 4. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977).

[19] *See FTC and DOJ Horizontal Merger Guidelines* (Rev. Apr. 8, 1997) at 16.

[20] *See, e.g., Clamp-All Corp. v. Cast Iron Pipe Inst.*, 851 F.2d 474, 484 (1st Cir. 1988) (Breyer, J.) ("A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. … One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry").

[21] *See, e.g., FTC v. Mylan Labs.*, 62 F. Supp. 2d at 38-9 & n.4 (collecting cases).

[22] Under certain limited circumstances, actual and potential competitors also can recover treble damages -- for example, where the merger foreclosed them from a market. *See Gulf States Reorganization Group,*

*Inc. v. Nucor*, No. 05-15976, 2006 WL 2828673 at *4 (11th Cir. Oct. 5, 2006).

[23] *See, e.g., In re Chicken Antitrust Litig.*, 669 F.2d 228, 239 n.18 (5th Cir. 1982) (Alabama); *Bunker's Glass Co. v. Pilkington plc*, No. CV-02-0140-PR, 2003 WL 22000584 (Ariz. Aug. 25, 2003) (Arizona), Haw. Rev. Stat. 480-13(a)(1) (2006) (Hawaii); Idaho Code § 48-113 (2006) (Idaho); *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002) (Iowa); note 30, *infra* (Kansas); note 35, *infra* (Massachusetts); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 331 (E.D. Mich. 2001) (Michigan); 1984 Minn. Laws ch. 458, § 1 (2006) (Minnesota); Nev. Rev. Stat. § 598A.210 (2006) (Nevada); N.M. Stat. Ann. § 57-1-3(A) (2006) (New Mexico); *Asher v. Abbott Labs*, 737 N.Y.S.2d 4 (1st Dep't 2002) (New York); *Hyde v. Abbott Labs*, 473 S.E.2d 680 (N.C. Ct. App. 1996) (North Carolina); *Howe v. Microsoft Corp.*, 656 N.W.2d 285 (N.D. 2003); W.V. Code St. R. § 142-9-2 (2006) (West Virginia); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 665 (E.D. Mich. 2000) (Wisconsin).

[24] *See* AL Code § 8-20-2 (2006); AK Stat. § 45.50.568 (2006); Haw. Rev. Stat. title 10, § 480-7 (2006); Idaho Code 48-106 (2006); ME Rev. Stat. Ann. Title 10, § 1102-A; Nev. Rev. Stat. § 598A.060(1)(f) (2006).

[25] *See* Ariz. Rev. Stat. Ann. § 44-1402 (2006); Idaho § 48-104 (2006); Kan. Stat. Ann. § 50-101 (2006); Mich. Comp. Laws Ann. § 445.772 (2006); Minn. Stat. § 325D.51 (2006); N.Y. Gen. Bus. Laws § 340(6) (McKinney 2006); N.C. Gen. Stat. § 75-1 (2006); N.D. Cent. Code § 51.08.1-02 (2006); W.Va. Code § 47-18-3; Wis. Stat. Ann. § 133.03 (2006).

[26] *See, e.g., Reading Int'l, Inc. v. Oaktree Capital Management LLC*, 317 F. Supp.2d 402, 332 (S.D.N.Y. 2004) ("Under New York law, the state and federal antitrust statutes require identical elements of proof") (citation omitted).

[27] *See Commonwealth v. Campeau Corp.*, Civ. A. No. 8801918-MA, 1998 WL 106896 (D. Mass. May 5, 1988) (merger challenge stated a claim under the Massachusetts Consumer Protection Act).

[28] *See Hanover Shoe Co. v. United Mach. Corp.*, 392 U.S. 481, 494 (1968).

[29] *See, e.g.,* Jeffrey M. Perloff, *Microeconomics* (2d Ed. 2001) at 31.

[30] *See State v. Int'l Harvester Co. of Am.*, 106 P. 1053, 1056 (Kan. 1910).

[31] *See* K.S.A. § 50-115.

[32] *See, e.g., Four B Corp. v. Daicel Chem. Indus. Ltd.*, 253 F. Supp. 2d 1147, 1152 (D. Kan. 2003).

[33] *See id.*, 253 F. Supp. 2d at 1153.

[34] *See id.*, 253 F. Supp. 2d at 1154; *Cox v. F. Hoffman-La Roche, Ltd.*, No. 00 C 1890, 2003 WL 24461996 at *3 (Kan. Dist. Ct. Oct. 10, 2003).

[35] *See Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E.2d 303, 313-4 (Mass. 2002).

[36] According to the 2000 U.S. Census, Massachusetts has a population of 6,349,077. Thus, $25 per resident would equal $158,726,925.

[37] *See* note 27, *supra.*

[38] *See, e.g., Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 26 n.4 (2d Cir. 2003).


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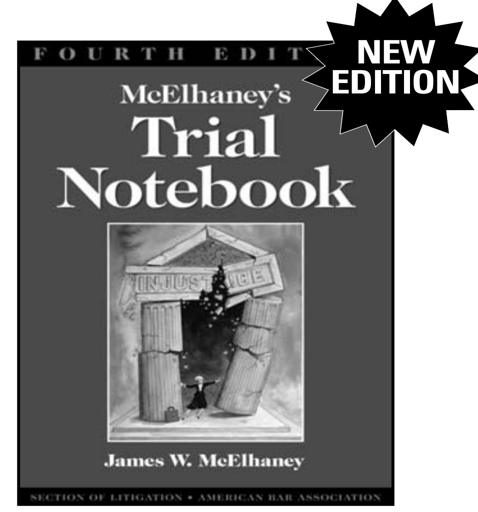


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# Trade Associations: Boundaries in Antitrust Litigation (Part II)

By: Charles H. Samel and Jennifer A. Carmassi*

## Introduction

Part One of this article, which was published in the Spring 2006 edition of the *Antitrust Litigator*, began by asking you, as trade association counsel, or an executive charged with managing the association, to envision the nightmare scenario in which the trade association itself is named as a defendant in a lawsuit in which the plaintiffs allege that members of the association engaged in a conspiracy to violate the antitrust laws. That unpleasant occurrence has become an all too commonplace reality whenever members of the association are accused of antitrust violations. It seems that antitrust plaintiffs now almost routinely allege that an illicit cartel has used its industry trade association to conceal an antitrust conspiracy and then, as an almost inevitable consequence, the plaintiffs include the trade association as a defendant in the action. What is your defensive strategy should the worst happen, and, probably more importantly, what proactive steps can you take now to help reduce the risk that this may someday happen to you?

In Part One, we examined the contours of the associational privacy doctrine and the First Amendment petitioning privilege. In particular, Part One explored the extent to which courts have recognized the potential "chilling effect" of civil discovery on the public policy advocacy activities of trade associations, and how trade associations can use the First Amendment and the associational privacy doctrine to bar, or limit, requests for information and documents, including minutes and other records that contain the viewpoints expressed by members during internal debate and deliberations. Here, we will focus on antitrust litigation liability issues and the principal defenses available to trade associations to obtain pretrial dismissal of antitrust claims. In addition, at the end of this part of the article, we provide a checklist of best practices for trade association counsel, first, as a matter of preventive law to help avoid litigation as an initial matter, and, second, to help manage litigation once the trade association is a defendant. Indeed, there appears to be a heightened need for counsel to have a better understanding of these issues and their practical implications. Underscoring the importance of *Noerr-Pennington* as an issue of current concern and relevance, on November 2, 2006, the Federal Trade Commission released a report that provides the staff's views on how best to apply the doctrine to conduct that imposes a risk to competition but does not further the First Amendment and government decision-making principles that underlie the doctrine. *Enforcement Perspectives on the Noerr-Pennington Doctrine*, An FTC Staff Report (2006), available at: http://www.ftc.gov/opa/2006/11/noerr.htm

## *Noerr-Pennington* Immunity

The *Noerr-Pennington* doctrine developed in the context of two United States Supreme Court cases decided during the 1960s, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). The doctrine is rooted in the First Amendment, which guarantees the right of the people "to petition the Government for a redress of grievances."[1] It also reflects the idea that the antitrust laws were designed to "regulate business activity, not political activity."[2] The *Noerr-Pennington* doctrine is an affirmative defense that renders "the antitrust laws inapplicable to individual or group action intended to influence legislative, executive, administrative, or judicial decision-making . . ."[3] Further, the doctrine applies to lobbying efforts regardless of intent or purpose and even if those efforts result in legislation, or a decision or policy, which limits economic competition.[4]

In *Eastern R.R. Presidents Conference v. Noerr,* plaintiffs, a group of trucking operators and their trade association, alleged that defendants, including a group of railroads, engaged in a publicity campaign against the plaintiffs in an effort to foster the adoption and retention of legislation destructive of the trucking industry and in violation of the Sherman Act.[5] The defendants filed a counterclaim and argued that the truckers sought to establish a monopoly through similar political activities.[6] The Supreme Court found that violations of the antitrust laws cannot be "predicated upon mere attempts to influence the passage or enforcement of laws."[7] The Court further found that the "Sherman

Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly."[8]

In *United Mine Workers of America v. Pennington*, a group of large mining companies and a union allegedly worked together to persuade the Secretary of Labor to set minimum wages.[9] The Supreme Court extended *Noerr* to attempts to influence governmental administrative processes, and thus found that this activity did not violate the Sherman Act.[10] The Court explained that *Noerr* confirmed that lobbying efforts not only could not constitute a violation of law, but also could not constitute evidence of an act in furtherance of a conspiracy: "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[11]

The *Noerr-Pennington* doctrine applies to petitioning activity by a trade association itself, and by its members, including individuals and entities. The *Noerr-Pennington* doctrine is important in the context of antitrust litigation because it means that a trade association cannot be held liable under the antitrust laws for influencing the government through legitimate First Amendment lobbying activity. A primary function of trade associations is to define public policy goals, and formulate and implement public policy advocacy strategies, messages, and tactics on behalf of their members and their industries, including by lobbying legislators and regulators. The doctrine allows trade associations and their members to exercise their First Amendment right to associate and petition the government without fear that their conduct could somehow violate the antitrust laws.

Despite the fact that the *Noerr-Pennington* doctrine immunizes genuine lobbying activity, plaintiffs still sue trade associations and their members for alleged violations of antitrust laws. The next section will explore, by way of example, two antitrust cases involving application of the *Noerr-Pennington* doctrine to activities of a trade association.

**Examples of Cases Applying the *Noerr-Pennington* Doctrine to a Trade Association's Activities**

In a number of cases, courts have found that trade associations are immune from antitrust liability under the *Noerr-Pennington* doctrine. For instance, in *GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876 (10th Cir. 2005), the Tenth Circuit Court of Appeals found that an association's activities consisting of lobbying government officials fell within the ambit of the *Noerr-Pennington* doctrine.[12] In *GF Gaming*, plaintiffs, business and property owners in the Colorado city of Central City, alleged that the neighboring City of Black Hawk and a number of other defendants, including several casinos and a casino owners' association, engaged in a conspiracy to monopolize trade in the gaming industry to block plaintiffs' petition to annex certain property.[13] The district court granted defendants' motion to dismiss because the complaint did not state sufficiently specific allegations of antitrust injury and because some of the defendants were immune from antitrust liability under the *Noerr-Pennington* doctrine.[14] On appeal, the Tenth Circuit held that plaintiffs' allegations that certain defendants, including the association, conspired with Black Hawk officials to block plaintiffs' access road was "essentially an allegation that defendants met with city officials and urged them to take anticompetitive action" and, therefore, "amount[ed] to nothing more than lobbying of government officials, which is immune from Sherman Act liability under the *Noerr-Pennington* doctrine."[15] The court further observed that it was of no consequence that defendants allegedly engaged in the conspiracy solely for the purpose of restraining trade because "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[16]

Another example of a case applying the *Noerr-Pennington* doctrine to activities of a trade association is *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F. Supp. 892 (D. Md. 1985). In *RaceTrac*, the plaintiff, a gasoline retailer, who applied for a zoning special exception, alleged that defendants, including a local trade association of gasoline retailers and a former officer of the trade association, engaged in an antitrust conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and to monopolize the sale of gasoline in violation of Section 2 of the Sherman Act, by opposing plaintiff's zoning application.[17] Both the zoning hearing examiner and District Council had denied plaintiffs' application.[18] On a motion for summary judgment, the association defendants argued that they were immune from antitrust liability based on the *Noerr-Pennington* doctrine.[19] The court concluded that the *Noerr-Pennington* doctrine protected the association defendants from antitrust liability.[20] The court reasoned that "plaintiff will be able to prove at best that the Association Defendants conspired with Association members to oppose and defeat a number of zoning applications," including the application filed by plaintiff.[21] The court held that "[b]ecause all of the Association Defendants' actions were aimed at persuading the District Council to affirm the Examiner's decision to deny plaintiff's application,

the Association Defendants' conduct is protected activity under the *Noerr-Pennington* doctrine, notwithstanding the allegedly anticompetitive purpose of the defendants' opposition."[22]

Thus, the *Noerr-Pennington* doctrine is a valuable tool in the context of litigation involving a trade association because it can be used to argue that a trade association cannot be held liable for engaging in permissible lobbying activity. Indeed, state and federal courts have uniformly held that the *Noerr-Pennington* doctrine immunizes trade associations from liability for genuine lobbying activities.[23] There is, however, an exception to the doctrine, which is explored in the next section.

**The "Sham" Exception**

The *Noerr-Pennington* doctrine does have limitations. As the Court observed in *Noerr*, immunity from antitrust laws based on petitioning activity does not extend in cases where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . ."[24]

In *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991), the United States Supreme Court further explained that petitioning activity may be considered a "sham" only where the defendant uses "the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon."[25] In that case, the plaintiff claimed that the defendant corporation and the City of Columbia engaged in an antitrust conspiracy by advocating enactment of zoning ordinances that would restrict billboard construction, including construction by the plaintiff.[26] The Court found that the sham exception did not apply, and the defendant had immunity, because "[a] 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all . . . not one who genuinely seeks to achieve his governmental result, but does so *through improper means*."[27] The Court concluded that the sham exception to antitrust immunity did not apply even though the defendants intended to disrupt plaintiff's business, because "they sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances."[28] Thus, the sham exception is applicable when "persons use the government *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon."[29]

In *California Motor Transport Co. v. Trucking Unlimited*, the United States Supreme Court further explained the sham exception to the *Noerr-Pennington* doctrine in the context of adjudicatory proceedings. In *California Motor Transport*, plaintiffs contended that defendants conspired to monopolize the trucking business in California and elsewhere by attempting to block plaintiffs' applications to obtain operating rights as highway carriers. Defendants instituted federal and state court and administrative actions purportedly designed to harass and deter the plaintiffs from having "free and unlimited access" to agencies and courts.[30] The district court dismissed the complaint for failure to state a cause of action.[31] The Ninth Circuit Court of Appeals reversed.[32] The Supreme Court, in affirming the Ninth Circuit's decision, ruled that "a pattern of baseless, repetitive claims . . . effectively barring respondents from access to the agencies and courts" would not qualify for immunity under the "umbrellas of 'political expression'."[33] The Court explained that, if the allegations that petitioners combined to "harass and deter their competitors from having 'free and unlimited access' to the agencies and courts," and "to defeat that right by massive, concerted and purposeful activities" are demonstrated as facts, "a violation of the antitrust laws [will have] been established," and it is immaterial "that the means used in violation may be lawful."[34] Thus, the Court held that the allegations in the complaint fell within the sham exception to *Noerr-Pennington* immunity.[35]

Courts have applied the sham exception to cases involving a trade association or its members' conduct

> ***The Noerr-Pennington doctrine is an affirmative defense that renders the antitrust laws inapplicable to individual or group action intended to influence legislative, executive, administrative, or judicial decision-making . . . Further, the doctrine applies to lobbying efforts regardless of intent or purpose and even if those efforts result in legislation, or a decision or policy, which limits economic competition.***

that constituted "purely private action, not genuinely aimed at prompting governmental action."[36] For example, in *Wilk v. Am. Med. Ass'n*, 895 F.2d 353 (7th Cir. 1990), plaintiffs were licensed chiropractors who alleged that the American Medical Association ("AMA") and other defendants engaged in an antitrust conspiracy to refuse to deal with plaintiffs and other chiropractors.[37] Plaintiffs clamed that the association defendants implemented the conspiracy by using former Principle 3 of the AMA's Principles of Medical Ethics, which prohibited medical physicians from associating professionally with "unscientific practitioners."[38] Plaintiffs further contended that the AMA labeled the plaintiffs "unscientific practitioners," and then advised its members that it was unethical for medical physicians to associate with chiropractors.[39] The AMA argued that its activities were protected under the *Noerr-Pennington* doctrine.[40] The court found that AMA's activities were "aimed at medical physicians and hospitals, cautioning them that it was unethical and indeed dangerous . . . to associate professionally with chiropractors."[41] Thus, the court concluded that the association's activities were not aimed at obtaining legislative action, and therefore, were not protected under the *Noerr-Pennington* doctrine.[42]

Likewise, in *Agritronics Corp. v. Nat'l Dairy Herd Ass'n, Inc.* 914 F. Supp. 814 (N.D. N.Y. 1996), private corporations engaged in the milk testing and farm dairy record-keeping business alleged that various associations comprised of dairymen refused to permit anyone other than their own employees to perform dairy records processing services.[43] Plaintiffs claimed that, as a result, they were prevented from competing in the dairy records processing market.[44] At the summary judgment stage, the association defendants argued that the *Noerr-Pennington* doctrine immunized them from antitrust liability because they entered into cooperative agreements with the United States Department of Agriculture.[45] The association defendants asserted that their contact with government entities constituted "attempts to influence governmental administrative actions" or "lobbying efforts" protected under the *Noerr-Pennington* doctrine.[46] The court, however, held that the association defendants' asserted contact with government entities did not constitute lobbying efforts to influence governmental decision-making.[47] The court reasoned that plaintiffs' primary complaint was that defendants prohibited private testers from competing in the 'official' dairy records market.[48] The court concluded that "[t]he *Noerr-Pennington* doctrine has been applied only to situations involving direct actions made to influence government decisionmaking . . . *Noerr-Pennington* immunity should not extend to actions occurring in an essentially private context."[49]

In sum, the *Noerr-Pennington* doctrine does not apply to activities of a trade association that are used as anticompetitive weapons, rather than legitimate attempts to influence the outcome of the government process. In other words, the doctrine applies to an association's activities genuinely aimed at achieving governmental action. The next section examines the extent to which *Noerr-Pennington* provides immunity from antitrust liability in the context of petitioning foreign governments.

## The *Noerr-Pennington* Doctrine and Petitioning Foreign Governments

There appears to be a limited number of decisions that have discussed whether the *Noerr-Pennington* doctrine applies to petitioning foreign governments. The majority view is that the *Noerr-Pennington* doctrine *does* apply to petitioning foreign governments.[50] In *Coastal States Marketing, Inc. v. Hunt,* 694 F.2d 1358 (5th Cir. 1983), for example, the court held that petitioning immunity could apply to litigation brought in foreign courts. In *Coastal States*, the Libyan Government had granted one of the defendants a concession, meaning the exclusive right to "search for . . . bore for and extract petroleum" from an area within a portion of Libya, and "to use, process, store, export and dispose" of the petroleum.[51] This defendant then assigned half of their interest in the concession to another defendant.[52] Later, the Libyan Government nationalized the defendants' interests in the concession and assigned their interests to a government-owned company.[53] The plaintiff contracted with this government-owned company to purchase oil.[54] Shortly thereafter, the defendants joined together in a publicity campaign in an effort to claim ownership over the petroleum.[55] They also instituted a number of lawsuits claiming title over the oil.[56] The plaintiff filed a lawsuit and contended that the defendants' activities of engaging in publicity campaigns and lawsuits in the United States and abroad constituted a secondary boycott.[57]

On appeal, the plaintiff argued that petitioning immunity does not apply to litigation instituted in foreign courts because petitioning immunity is based solely upon the First Amendment.[58] The Fifth Circuit, however, rejected plaintiff's argument that "petitioning immunity extends only so far as the First Amendment and then ends abruptly."[59] The court explained: "The Sherman Act, as interpreted by *Noerr,* simply does not penalize as an antitrust violation the petitioning of a government agency. We see no reason why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad."[60] Thus, the court held that

petitioning immunity applies to efforts to influence foreign governments.[61] Other courts have also recognized that the *Noerr-Pennington* doctrine extends to lobbying foreign governments and officials.[62]

On the other hand, some courts have held that the doctrine does not apply to petitioning foreign governments. For example, in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), plaintiffs, holders of offshore oil concessions granting them the right to explore, develop, and exploit petroleum reserve, alleged that the defendants, also holders of offshore oil concessions, conspired to deprive plaintiffs of their offshore oil concession in the Persian Gulf.[63] The plaintiffs claimed that the defendant "induc[ed] and procure[ed] assorted executive acts by foreign states," including decrees from foreign governments about the ownership of plaintiffs' concession area.[64] The defendants argued that the *Noerr-Pennington* doctrine applied to its asserted efforts to petition foreign governments.[65] The court held that the rationales of *Noerr* "do not readily fit into a foreign context."[66] First, the court explained: "One of the roots of the *Noerr* decision was a desire to avoid a construction of the antitrust laws that might trespass upon the First Amendment right of petition. The constitutional freedom 'to petition the Government' carries limited if indeed any applicability to the petitioning of foreign governments."[67] The court also explained: "A second basis of *Noerr* is a concern with insuring that '[i]n a representative democracy such as this,' law-making organs retain access to the opinions of their constituents, unhampered by collateral regulation. *Noerr* has been held inapplicable to situations in which this relationship has not been deemed threatened."[68] Thus, the court held that the doctrine did not extend to defendants' petitioning conduct of foreign governments.[69]

**As corollary to the rule that trade associations are immune from antitrust liability if they engage in legitimate petitioning activities, it is also well-established that trade associations do not violate the antitrust laws simply because they gather and disseminate information that is not commercially sensitive on behalf of their members.**

If a plaintiff brings a lawsuit against a trade association alleging that the trade association violated the antitrust laws by lobbying foreign governments, counsel for the trade association should determine whether the court in the applicable jurisdiction has applied the doctrine to such activity. In the next section, we discuss examples of cases in which the plaintiff named a trade association as a defendant in an antitrust conspiracy action and how the courts applied some of the legal principles described in this article.

## Trade Associations And Antitrust Liability

As corollary to the rule that trade associations are immune from antitrust liability if they engage in legitimate petitioning activities, it is also well-established that trade associations do not violate the antitrust laws simply because they gather and disseminate information that is not commercially sensitive on behalf of their members. To the contrary, the United States Supreme Court, in *Maple Flooring Mfrs.' Ass'n v. U.S.*, 268 U.S. 563 (1925), recognized that the antitrust laws permit the dissemination of information among competitors because the "natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce and its consequent effect in establishing production and price, can hardly be deemed a restraint of commerce or . . . an unreasonable restraint, or in any respect unlawful."[70] In fact, disseminating information promotes the purpose of the antitrust laws because "[c]ompetition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction."[71]

In *Biljac Assocs. v. First Interstate Bank of Oregon*, 218 Cal. App. 3d 1410 (1990), plaintiffs alleged that a number of banking institutions and their trade associations conspired to fix the prime rate of interest charged by banks.[72] In support of their conspiracy claim, plaintiffs asserted that loan pricing and interest rates were the subject of trade association panel discussions, publications, meetings, and symposia.[73] Plaintiffs also pointed to evidence that corroborated the fact that those discussions took place, including letters from members of one of the association's committees citing "appropriate pricing polices,"

"differential pricing," and credit trends as possible topics for inclusion on the agendas at the committee meeting of the trade association.[74]

In support of their separate motion for summary judgment, the trade associations "submitted declarations showing that they are not banks, do not lend money, charge, have or set prime rates, do not participate in setting members' rates, and exist as banking industry organizations that foster education, legislation, and the dissemination of economic and regulatory information among their members, regulators and the public through a range of forums, including regular meetings and publications."[75] The California Court of Appeal concluded that "the facts [were] overwhelmingly consistent with the legitimate dissemination and use of information, not conspiracy in the antitrust sense."[76] The court observed that "the trade association defendants presented undisputed evidence that they did not have or set interest rates," and "[s]ince liability can only be predicated on fostering and encouraging a bank conspiracy for which no reasonable inference was raised," concluded that the trial court properly granted summary judgment to the trade association defendants.[77] In so ruling, the Court of Appeal in *Biljac* explained that "[i]n general, trade association activities tend to promote competition and are lawful."[78] Moreover, the court recognized that the antitrust laws permit the dissemination of information through trade associations.[79]

Two years later the District Court of Minnesota in *The Five Smiths, Inc. v. Nat'l Football League Players Ass'n*,[80] analyzed the sufficiency of allegations in a complaint in order for a plaintiff to withstand a trade association's motion to dismiss. In *Five Smiths*, the National Football League and its member clubs asserted that the defendant, the National Football League Players Association ("NFLPA"), engaged in a conspiracy with players' agents to fix player compensation.[81] The complaint contained only one specific factual allegation of purportedly unlawful concerted action: "the player-agents, with the approval and assistance of the NFLPA, have regularly exchanged compensation information and information about current offers among themselves, in furtherance of the NFLPA's unlawful activity."[82]

In an attempt to avoid dismissal of their claim, plaintiffs argued that in addition to the allegation concerning the exchange of salary information, the complaint alleged that the defendants developed a price-fixing scheme to further the conspiracy.[83] The court held that plaintiffs' allegations were insufficient to state an antitrust claim as a matter of law and dismissed the complaint. The court reasoned that other than the allegation concerning the salary exchange, the complaint did not contain any specific facts that indicated "what acts the NFLPA took to fix prices, what agreements were entered into, with whom such agreements were made or how the goals of the conspiracy were accomplished."[84] The court rejected plaintiffs' argument that any allegations concerning the acts of the NFPLA were sufficient to support an allegation of concerted action or agreement between the association and the agents simply because the association is a "voluntary association of competing agents and players."[85] The court stated: "A trade association is not a 'walking conspiracy' of its members."[86] To the contrary, the mere exchange of information or relationships between alleged conspirators will therefore not support a conspiracy allegation.[87] In fact, "the exchange of price and other market information is generally benign conduct that facilitates efficient economic activity."[88]

Thus, a trade association can successfully defend itself against an antitrust conspiracy claim if it shows that the plaintiff failed to allege and demonstrate that the trade association engaged in concerted action, including that it knew of, participated in, or assisted with, the alleged conspiratorial conduct. However, the mere exchange of information among a trade association and its members, without more, will not support an antitrust conspiracy claim.

**Conclusion**

Trade associations advocate for public policies that affect their industries and members. As illustrated above, genuine lobbying activity of a trade association and its members is protected under the *Noerr-Pennington* doctrine. Counsel representing a trade association should be familiar with this doctrine because it may be applied to protect an association and its members from antitrust liability. It is equally important that counsel for a trade association be familiar with the fact that a trade association does not engage in an antitrust conspiracy merely because it gathers and disseminates non-commercially sensitive information on behalf of its members. The case examples discussed above illustrate the type of trade association activities courts deem protected by the First Amendment versus what activities constitute a "tipping point" for proof of antitrust violations.

**The Checklist**

As you periodically review your association's antitrust compliance program, consider the following sample list of action items and best practices for reducing the risk of a potential compliance failure, and managing the defense of antitrust litigation. This list is not exhaustive, and you should plan to supplement it as you identify additional items.

Preventative Measures

- Make sure the association has an up-to-date written antitrust compliance policy.
- Set up a schedule to review and update the policy on a periodic basis.
- Publicize the policy on the association website and in written materials distributed at association meetings.
- Implement web-based and face-to-face antitrust compliance training for association staff and members who participate in association meetings.
- Have counsel present at association meetings and remind attendees of the association's antitrust compliance policy at the beginning of all meetings.
- The association should prepare agendas in advance of its board of directors, committees and other meetings. Counsel should review the agendas, and other background materials distributed in advance of the meetings, to identify potential antitrust concerns.
- The association's meetings should follow the prepared agendas.
- Minutes of the meetings should be kept. The minutes should indicate whether antitrust counsel attended the meetings and reminded attendees about the association's antitrust compliance policy.
- Keep confidential minutes, agendas, background materials, and other documents containing discussion of proposed or actual public policy advocacy strategies, messages, and tactics. Remind recipients that association documents are confidential.
- Describe in writing (for example, on the association website) all of the association's public service activities, and the various ways in which it sponsors studies, surveys, academic research, and disseminates information that is not commercially sensitive to its members, regulators, legislators, and the public at large, including through its public policy advocacy and public service announcements.

Pretrial Litigation Management

- Determine whether the complaint contains specific factual allegations of conduct by the trade association and consider whether to move to dismiss the complaint.
- Determine whether the plaintiff's allegations amount to nothing more than an attack on the public policy advocacy efforts of the trade association and its members and consider whether to assert *Noerr-Pennington* immunity in support of a motion to dismiss (or whether it will be necessary to wait until a motion for summary judgment).
- Determine whether the plaintiff's allegations against the association concern activities involving petitioning foreign governments. Be sure to research cases in the applicable jurisdiction to determine whether the *Noerr-Pennington* doctrine may apply to immunize such activities.
- Include associational privacy and First Amendment as grounds for designating documents "confidential" under any stipulated protective order negotiated by the parties and approved by the court in the action.
- Analyze whether the associational privacy doctrine and First Amendment petitioning privilege protect documents responsive to plaintiffs' discovery requests from discovery and whether to file a motion for a protective order. At a minimum, identify those documents that should be designated "confidential" under the protective order.
- Solicit the views of lead counsel for the other defendants, and then take leadership of association discovery and litigation strategy issues and provide guidance to members of your association that are defendants in the action.
- Review court decisions in the relevant jurisdiction involving application of the sham exception to the *Noerr-Pennington* doctrine to anticipate possible arguments by plaintiffs.
- Demonstrate (on a motion to dismiss or summary judgment) that the association engages in legitimate trade association activities that are procompetitive as a matter of law. In particular, emphasize how the association disseminates information for the benefit of its members and the public, including by describing its academic and scientific research, public policy advocacy activities, and public service programs.
- Provide examples (on a motion to dismiss or summary judgment) of the association's public policy advocacy activities and explain that these activities are protected by the *Noerr-Pennington* doctrine.

If you review potential antitrust litigation discovery and liability issues early enough and become familiar with the particular activities of the association you represent, you may be able to more effectively defend your client, and even prevent some lawsuits before they are ever filed. ■

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**ENDNOTES**

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[1] U.S. Const., 1st Amendment. The First Amendment is applicable to the states by operation of the Fourteenth Amendment. *Id.*, 14th Amendment. *See also RRR Farms, Ltd v. Am. Horse Prot. Ass'n, Inc.*, 957 S.W.2d 121, 126-27, n. 4. (1997).

[2] *Ehlinger & Assocs. v. Louisiana Architects Ass'n*, 989 F. Supp. 775, 785 (E.D. La. 1998).

[3] WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK (2006) § 8:8 at 812; *see also California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (extending *Noerr-Pennington* doctrine to judicial and adjudicatory actions).

[4] *Pennington*, 381 U.S. at 670. *See also Horsemen's Benevolent and Protective Ass'n, Inc. v. Pennsylvania Horse Racing Comm'n*, 530 F. Supp. 1098, 1109 (E.D. Pa. 1982).

[5] *Noerr,* 365 U.S. at 129.

[6] *Id.* at 132.

[7] *Id.* at 135.

[8] *Id.* at 136.

[9] *Pennington*, 381 U.S. at 660-61.

[10] *Id.* at 670.

[11] *Id.*

[12] 405 F.3d at 884.

[13] *Id.* at 879-80.

[14] *Id.* at 881-82.

[15] *Id.* at 883-84.

[16] *Id.* at 884, citing *Pennington*, 381 U.S. at 670.

[17] 601 F. Supp. 892 at 895-96, 898, *aff'd per curiam* 786 F.2d 202 (4th Cir. 1986).

[18] *Id.* at 898.

[19] *Id.* at 908.

[20] *Id.* at 912.

[21] *Id.* at 910.

[22] *Id.* at 910-11.

[23] *See, e.g., Ehlinger & Assocs.*, 989 F. Supp. at 784-85 (finding that state action and *Noerr-Pennington* doctrines precluded associations' liability on antitrust claims); *Christian Mem'l Cultural Center, Inc. v. Michigan Funeral Directors Ass'n,* 998 F. Supp. 772, 778 (E.D. Mich. 1998) (defendant trade association and its director's legislative and administrative lobbying protected under *Noerr-Pennington* doctrine); *RRR Farms*, 957 S.W.2d at 131 (affirming trial court's decision in favor of defendant association based on *Noerr-Pennington* doctrine); *Massachusetts School of Law at Andover, Inc. v. Am. Bar Ass'n*, 937 F. Supp. 435, 444-46 (E. D. Pa. 1996), *aff'd* 107 F.3d 1026 (3d Cir. 1997) ("Publication of an association's views, without more, is protected speech" and "Such expression is protected under the First Amendment and cannot be the basis for Sherman Act liability."); *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1321 (E.D. N.Y. 1996) (lobbying activities of associations protected under *Noerr-Pennington* doctrine); *King v. Idaho Funeral Serv. Ass'n*, 862 F.2d 744 (9th Cir. 1988) (association's activities protected by *Noerr-Pennington* doctrine); *Horsemen's Benevolent and Protective Ass'n*, 530 F. Supp. at 1110 ("The members of the [jockey's] Guild, in the exercise of their First Amendment rights of association and to petition the government, may jointly submit a proposal to increase jockey fees to the Horse Racing Commission."); *First Am. Title Co. of South Dakota v. South Dakota Land Title Ass'n*, 541 F. Supp. 1147 (D. S.D. 1982), *aff'd* 714 F.2d 1439 (8th Cir. 1983) (allegation against association of land title abstractors violated Sherman Act by engaging in litigation and attempts to influence enactment of statutes barred by *Noerr-Pennington* doctrine).

[24] *Noerr*, 365 U.S. at 144.

[25] 499 U.S. at 380 (emphasis in original).

[26] *Id.* at 367-69.

[27] *Id.* at 380-81 (internal quotations and citations omitted; emphasis in original).

[28] *Id.* at 381 (emphasis in original).

[29] *Id.* at 380 (emphasis in original).

[30] *California Motor Transport*, 404 U.S. at 508.

[31] *Id.* at 509.

[32] *Id.*, citing *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755 (9th Cir. 1970).

[33] *Id.* at 513.

[34] *Id.* at 515-16.

[35] *Id.* at 516.

[36] *Wilk v. Am. Med. Ass'n*, 895 F.2d 353, 357 (7th Cir. 1990), citing *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

[37] 895 F.2d at 355.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 357.

[41] *Id.* at 358.

[42] *Id.*

[43] 914 F. Supp. at 818-19.

[44] *Id.* at 819.

[45] *Id.* at 823.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* (citation and quotations omitted.)

[50] *Friends of Rockland Shelter Animals, Inc. v. Mullen*, 313 F. Supp. 2d 339, 344 (S.D. N.Y. 2004) ("The only case that even arguably supports [the position that the doctrine does not apply to petitioning a foreign government] is *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.* wherein the court held that the *Noerr-Pennington* doctrine does not apply when the defendant petitions a foreign government. *Occidental Petroleum* appears, however, to be the minority view.").

[51] 694 F.2d at 1360.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 1362.

[58] *Id.* at 1364.

[59] *Id.* at 1366.

[60] *Id.*

[61] *Id.*

[62] *See Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 256 F. Supp. 2d 249, 266 (S.D. N.Y. 2003) ("lobbying of foreign governments, whether performed at home or abroad, is protected from antitrust liability under *Noerr-Pennington*."); *Amarel v. Connell,* 102 F.3d 1494, 1520 (9th Cir. 1997) ("Plaintiffs also accused defendants of petitioning State Department officials and Korean officials in an effort to influence rice exports to Korea. In our view, defendants' efforts to influence various American and Korean officials - from State Department officials to members of Congress - was legitimate private action in response to defendants' suspicions of bribery. The *Noerr-Pennington* doctrine shields from antitrust liability efforts to influence legislators and members of the executive branch.").

[63] 331 F.Supp. at 95, *aff'd per curiam on other grounds*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

[64] 331 F. Supp. at 107.

[65] *Id.*

[66] *Id.* at 107-08.

[67] *Id.* at 108 (citation omitted). Likewise, in *Australia/Eastern U.S.A. Shipping Conference v. U.S*, 537 F. Supp. 807, 812 (D.C. Cir. 1982), the United States District Court for the District of Columbia noted that "the first amendment was not intended to protect the right to petition foreign governments."

[68] *Id.* at 108.

[69] *Id.*

[70] 268 U.S. at 584-85.

[71] *Id.* at 585.

[72] 218 Cal. App. 3d at 1416-17.

[73] *Id.* at 1430.

[74] *Id.* at 1432.

[75] *Id.* at 1434.

[76] *Id.* at 1433.

[77] *Id.* at 1435.

[78] *Id.* at 1430.

[79] *Id.*, quoting *Maple Flooring*, 268 U.S. at 584. *See also Aguilar v. Atlantic Richfield Co.*, 92 Cal.

Rptr. 2d 351, 404 (2000), *aff'd Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826 (2001), is to the same effect: "There is a strong policy that disseminating competitive information, even pricing information, through trade association activities is condoned by antitrust law." (citation omitted.)

[80] 788 F. Supp. 1042 (D. Minn. 1992).

[81] *Id.* at 1044.

[82] *Id.* at 1046.

[83] *Id.* at 1047.

[84] *Id.* at 1048.

[85] *Id.* at 1049, n. 5.

[86] *Id.* at 1040, n. 5 (citations omitted).

[87] 788 F. Supp. at 1049, n. 5.

[88] Id. at 1052-53 (citations omitted). A number of other cases have recognized that the antitrust laws permit the dissemination of information through trade associations. *See Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 864 (2001) ("motive, opportunity, and means to enter into an unlawful conspiracy . . . is not enough. Such evidence merely allows speculation about an unlawful conspiracy. Speculation, however, is not evidence."); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery*, 185 F.3d 606, 621-22 (6th Cir. 1999) (no conspiracy between association and its members because plaintiff failed to introduce evidence to exclude possibility that association acted independently); *Hilo v. Exxon* (C.D. CA, April 13, 1995) (regular contact between industry associations and members is not itself evidence of conspiracy); *Alvord-Polk v. Schumacher*, 37 F.3d 996, 1009 (3d Cir. 1993) (association's actions satisfy concerted action requirement only when taken in group capacity); *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n. 16 (1978) ("The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."); *Sugar Institute v. U.S.*, 297 U.S. 553, 598 (1936) ("dissemination of information is normally an aid to commerce."); *Maple Flooring*, 268 U.S. at 584 ("We do not conceive that the members of trade associations become such conspirators merely because they gather and disseminate information, such as is here complained of, bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses.").

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# ANTITRUST 101: SECTION 1 OF THE SHERMAN ACT

BY: JOHN H. MCDOWELL, JR.

This installment of Antitrust 101 is an x-ray snapshot of Section 1 of the Sherman Act. This article is an "x-ray" because it is designed to give the litigator only a glimpse of the skeleton of a section of a complex act. It is a "snapshot" because the law on even the skeletal points herein continues to evolve. Any analysis of a practice under Section 1 requires mindful attention to the current status of the law and trends that could influence or change the law.

The Sherman Antitrust Act of 1890, 15 USC § 1-7, continues to be the nucleus of antitrust jurisprudence. The Act has been interpreted in a great number of cases spanning its 116 year life and has affected every major industry in the United States during its long life. No words in antitrust law are better known than the backbone of Section 1:

Every contract, combination…, or conspiracy, in restraint of trade … is declared to be illegal.[1]

Not "every" restraint is illegal. Although the statute does not mention "reasonableness", only "unreasonable" restraints are illegal. *Compare Standard Oil. Co. of New Jersey v. United States*, 221 U.S. 1, 86 (1911), *with United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 327 (1897); *see also Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918). That determination of reasonable versus unreasonable restraint has fueled the most interesting debates in Section 1 cases.

**The Agreement**

Section 1 requires collective action. One entity cannot conspire by itself. Therefore, the initial focus in an analysis under Section 1 is finding an agreement between two economically distinct entities. For purposes of Section 1, an agreement does not include independent conduct.

How does one prove an agreement? The most common way is to prove an agreement through express evidence, either direct or circumstantial. This can be through contracts, corporate documents, rules of an association or standard-setting organization, witnesses ("we had an agreement between our company and another") or circumstantial evidence. The circumstantial evidence is that which shows a "conscious commitment to a common scheme designed to achieve an unlawful objective". *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U. S. 752, 768 (1984). Relevant evidence includes that which "tends to exclude the possibility" of independent conduct. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U. S. 574, 588 (1986).

Note that parallel conduct can suffice to prove the agreement: Do the seemingly independent actions of two parties so closely mirror or at least mimic each other that they may be considered an "agreement" for purposes of Section 1? The concept requires two showings: parallel conduct and "plus factors." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3rd Cir. 1999). The "plus factors" are the additional evidence needed to differentiate legal (independent) conduct from illegal (dependent) conduct. Illustrative "plus factors" include a suggestion of traditional conspiracy ("facilitating practices"), action against economic interests or motivation to conspire. These are used to illustrate a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto v. Spray-Rite Serv. Corp.*, 465 US 752, 768 (1984). Differentiating "parallel plus" conduct from independent action is the battleground of litigation and legal debate in this area. *See, e.g.*, *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1243 (3d Cir. 1993).

**The Prima Facie Case**

The elements of a Section 1 civil claim are: (1) Standing; (2) Antitrust Injury (The plaintiff must show its loss stems from the competition-reducing aspect of the defendant's behavior); (3) Causation; and (4) Damages.

The analysis of the unreasonable restraint usually proceeds through either the Rule of Reason, Per se Rule, or the Quick Look doctrine. The applicable test is found in considering both the practice and the statutory provision in question.

**The Rule of Reason**

The first question under the Rule of Reason Analysis is, does one or more of the parties to the agreement have the ability to harm competition? (Does the defendant pass the "market power gate"?) This can be shown through indirect proof of market share in a properly defined "relevant market." This can also be shown through direct proof of an increase in price or decrease in output without significant profit loss.

Second, does the restraint help more than it hurts? This is the balancing of the benefits. This entails weighing the pro competitive virtues

against costs (anti-competitive vices). So, is there a business justification? Does the restraint increase output? Does the restraint lower price? Does the restraint promote brand investment? "Yes" answers to these and other balancing questions on benefits to the market can tip the balance in favor of a finding of reasonableness of the restraint and against liability.

Third, can the benefits of the restraint be obtained without all of its costs? The inquiry is to explore whether a less restrictive alternative is available. See Board of Trade of City of Chicago v. United States, 246 U. S. 231, 238 (1918)

**The Per se Rule**

The per se rule applies against a restraint because of its predictable and pernicious anti-competitive effect. Such a restraint is presumed unreasonable, and no proof is required that the agreement in question is anti-competitive. Likewise, there is no further inquiry into the facts, the data, nor the economic theory relevant to the argument whether an agreement constitutes an unreasonable restraint of trade.

The categories of practices currently analyzed under the per se rule are as follows:

Horizontal Price Fixing - *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

Vertical Price Fixing - (Resale Price Maintenance—restrictions as to minimum price) *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

Horizontal Market Division - *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

Some Horizontal Boycotts where the conspirators possess market power – *Compare Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295-98 (1985) *with Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

Some Tying Arrangements limited to cases where the seller has market power - *Jefferson Parish Hospital Dist. No.2 v. Hyde*, 466 U.S. 2, 15-16 (1984); but note *Illinois Tool Works Inc. vs. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006), (the strong disapproval of tying arrangements has substantially diminished and there was no presumption of per se illegality of a tying arrangement in the patent context without proof of market power in the tying product market.)

**The "quick look" analysis avoids the outright condemnation under the per se rule as well as the detailed market or industry analysis required for determining anti-competitive effects under the rule of reason.**

**The "Quick Look"**

The traditional approach to the per se analysis is to not consider possible pro-competitive virtues, even when they are plausible. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609-10 (1972). The alternative approach is to take a "quick look" and scrutinize the restraints if the anti-competitive effects of the arrangement in question can be easily ascertained. If the effects can be easily ascertained, the "quick look" analysis is appropriate.

This analysis avoids the outright condemnation under the per se rule as well as the detailed market or industry analysis required for determining anti-competitive effects under the rule of reason. The "quick look" analysis has been applied in several situations using the above criteria. However, where it has not been applied is instructive. The Supreme Court refused to allow the "quick look" both as to rule of reason and as to per se cases. The Court ruled it is not per se illegal under Section 1 for a lawful, economically integrated joint venture to set the prices at which it sells its products, and therefore the "quick look" was not appropriate in that situation. *Texaco, Inc. vs. Dagher*, 126 S. Ct. 1276, 1277 (2006). The Supreme Court also determined the "quick look" rule of reason analysis was insufficient to allow dismissal of a case involving restrictions on price and quality advertising by members before a detailed determination of the likelihood of anti-competitive effects resulting from the restrictions. *California Dental Ass'n v. FTC*, 526 US 756, 769-70 (1999).

**Challenging Organizations**

Section 1 is used to scrutinize organizations. These include cooperative ventures, associations, and standard-setting organizations.

The analysis of cooperative ventures focuses on whether they are legitimate or sham. Are they pro-competitive? Do they create a product or service? Do they entail risk sharing? Do they include integration? A "yes' answer to these questions makes it more likely the venture will survive antitrust scrutiny. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U. S. 752 (1984); *see also Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 8-11 (1st Cir. 1979).

If an association promotes information gathering and sharing but cannot be used for cartel or boycott then it will most likely survive antitrust scrutiny. *California Dental Ass'n v. FTC*, 526 U.S. 756, 773-777 (1999).

The analysis for a standard-setting organization is whether it presents an

opportunity for pro-competitive virtues versus an opportunity for exclusion. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01, 506-09 (1988); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 569-571 (1982); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 658-660 (1961).

**Vertical Restraints**

The scrutiny of vertical restraints depends on the nature of the restraint. Most vertical restraints (agreements between a manufacturer and wholesalers or between a wholesaler and retailers) are reviewed under a rule of reason analysis. Non-price restraints are analyzed under the rule of reason. Maximum price restrictions are also analyzed under the rule of reason. State Oil v. Khan, 522 U.S. 3, 17 (1997). A single buyer's decision to buy from one seller rather than another is also analyzed under the rule of reason. *NYNEX Corp. v. Discon, Inc.*, 525 U. S. 128, 135 (1998). In general, joint venture activity is also subject to rule of reason analysis. *Texaco, Inc. v. Dagher*, 126 S. Ct. 1276, 1277 (2006).

Keep in mind, however, that minimum price restrictions continue to be analyzed under the per se rule. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 406-408 (1911).

**Conclusion**

As thought and perception evolve with respect to the practices that make business more efficient versus merely predatory, so will the law interpreting the powerful mandate of Sherman Act §1. ■

**ENDNOTES**

[1] The full text is as follows: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by find not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 15 U.S.C. § 1.

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# BUNDLED REBATES: A TEMPORARY BLIP ON THE ANTITRUST RADAR

*(cont'd from p. 1)*

It did so by creating an innovative discount program where big box retailers would earn discounts by exceeding 3M's target threshold in each of six different six product categories. Miss just one target, and the retailer would lose discounts across all categories. Retailers, who were unwilling to risk the loss of these discounts, refused to mix and match competitors by using 3M for some categories, like Post-It® notes, and others, like LePage's, for transparent tape. Since LePage's could not economically reimburse retailers for its lost discounts on both tape (which it produced) and also Post-It Notes (which it did not), LePage's sales rapidly declined. In addition, 3M also individually negotiated volume discounts with the large retailers, which supposedly incentivized them to purchase exclusively from 3M. Collectively, these "bundled rebates" and "*de facto* exclusives" threatened LePage's viability, prompting it to successfully seek protection from the federal courts.

But *LePage*'s reverberations goes far beyond the $68 million treble damages awarded in that case. By putting at risk the long-standing pricing practices of virtually every consumer goods manufacturer, *LePage's* succeeded in driving fear through the hearts of large firms everywhere. Now, almost every effort to compete for business by offering unique discount packages or "programs" can be challenged as an unlawful "bundle" or a "*de facto* exclusive." This gives fringe firms lacking economies of scale or an attractive product an alternative forum: Rather than compete in the market place, they can compete in the courtroom.

But is it really so easy to prevail? For now, with the law so in flux, it very well may be. The Supreme Court has expressly decided not to close the door on these claims just yet. When 3M sought certiorari, the Supreme Court asked for the Solicitor General's views and then followed his request that the Court stay its hand while the lower courts feel their way through the morass of big firm pricing practices. *See* Brief for United States as Amicus Curiae, 2004 WL 1205191 (May 28, 2004) (urging the "the Court [to] deny the petition for a writ of certiorari and allow the lower courts an opportunity to refine and clarify the application of Section 2" since the "the applicability of the *Brooke Group* approach to this business practice would benefit from further judicial and scholarly analysis"). The result is a mix-mash of lower court decisions – now too numerous to cite here – reaching conflicting results.

But in the end, it will be economics that once again drives a stake through a new-found proliferation of questionable antitrust claims and closes the Pandora's box that *LePage's* opened. This is despite a pervasive "big is bad" mentality that drove the result in *LePage's* and understandably wins juries' hearts to this day. For what could be wrong with holding a dominant firm liable when it "punishes" and "retaliates" by withdrawing huge rebates from customers who do not bend to its will (by refusing to purchasing exclusively from the monopolist)?

The problem is that what constitutes "punitive" and "retaliatory" conduct is in the eyes of the beholder. Competitors know "punitive" conduct when they see it: It is anything that causes them to lose a sale, lower a price, or reduce their margins. Customers know it: It is anything that forces them to pay more than their "target" price. Juries know it: It is anything memorialized in inflammatory ails. The "Big, Bad" Monopolist knows it too: It is any conduct that makes no economic sense. (And certainly anything that helps it make a buck, makes economic sense).

But judges cannot so easily condemn conduct that others may characterize as "unfair." Nor can they approve – or condemn – conduct just because the monopolist benefits from it. Courts need clear standards that govern ***when*** inflammatory, retaliatory, or punitive conduct crosses the line and actually ***harms*** competition.

What should be clear is that harm to competitors is not enough. Firms might be as justly rewarded for harming a competitor as sanctioned for it. The antitrust laws love it when a firm – large or small – is "harmed" by having to lower its prices just to maintain its share of the market. This

> ***Right now is perhaps the most plaintiff-friendly time to bring a monopolization claim, thanks to the LePage's decision, which purports to illegalize "program pricing" and individually-negotiated volume discounts.***

is the essence competition, not the antithesis of it. Similarly, a big firm that competes for – and wins – exclusivity does so by paying for it, which is just another way of saying that it lowered prices for increased sales. What is wrong with that?

Paying money to exclude rivals, or conditioning rebates and discounts on "screw[ing] your competitor," as Microsoft was accused of doing, are – as the *Le Page's* court characterizes them – agreements with "strings attached," to be sure. But as Judge Easterbrook, one of the nation's leading antitrust jurists, explained, "competition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress." *Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661 (7th Cir. 2004) (Easterbrook, J.).

**Two key questions govern: (i) does the financial incentive exceed the firm's incremental profits; and (ii) do these agreements restrict rivals' elasticity of supply.**

But this is not a pro-defense article, seeking to convince all readers that monopolists should be left alone to price how they please. Rather, there are clear, objective, and unmistakable ***economic*** tests for determining when a monopolist's price concessions, volume discounts, or bundled rebates cross the line.

These tests can be reduced to following two necessary and sufficient conditions for holding a monopolist liable for "attaching strings" to favorable prices: (i) Does the financial incentive used to garner additional business exceed the firm's profits on that business; ***and*** (ii) do these agreements drive rivals from the market (or otherwise restrict the elasticity of its rivals' supply)? These two tests – the "profitable incremental volume" test and the "recoupment" test – constitute a modified form of the Supreme Court's *Brooke Group* test for predatory pricing. But it has been altered to focus on bundling and exclusive dealing by ensuring the ***proper*** allocation of financial incentives to the products where the alleged foreclosure occurred.

How do we know whether these are the right two questions and that there are no others? Let's take the first question. Suppose a monopolist tells its customer that "if you purchase products from my competitor for even 1 of 100 SKUs (or products), I will withdraw every cent of promotional support you receive." Punitive? Certainly. Disproportionate? Probably. Retaliatory? Maybe. But anticompetitive? Not necessarily.

YOU SIMPLY HAVE TO DO THE MATH! What if the lost profits on that one SKU dwarfs any promotional payment the monopolist withdraws? Suppose, for example, the lost SKU carried a invoice price of $100 and a variable cost of $50, yielding $50 profit for each unit. Economists – not generally known for agreeing on anything – will uniformly say that, in a perfectly competitive environment, a producer should be willing to rebate up to $50 per unit off the invoice price in order to secure the business. So, if this SKU is a big seller – say 100,000 units a year – no one would argue that a monopolist should be permitted to ***increase*** its promotional funding by $5 million – the difference between the price of the product and the variable cost – in order to get this business.

Nor should it matter whether this $5 million comes in the form of a $5 per unit price reduction, a fixed rebate of $5 million for all of the products (*i.e.*, exclusivity), or a promotional support payment to be allocated across all 100 SKUs (*i.e.*, a bundled rebate). *LePage's* would suggest that the latter two types of offers – where the monopolist is paying for exclusivity or providing "bundled rebates" – are anticompetitive. But economically, all of these offers are the same and the law should treat them as such.

Similarly, just as there is no harm to competition from offering to increase promotional payments by $5 million to obtain this one SKU, there should be no concern about withdrawing $5 million if that SKU is lost. While it is easy to characterize a withdrawal of funds as "punitive" or "retaliatory," it is the same, mirror-image financial incentive as an increase. It makes no difference whether the $5 million is offered on top of some pre-existing amount if new business is added or whether the $5 million is deducted from some pre-existing amount when that piece of business is withdrawn. In either case, the seller is making the same offer: "I'll pay $5 million to guarantee the sale of this one SKU. Deal or no deal?"

If the customer takes the deal, then it essentially gets that product at cost. If it does not, the customer has obviously decided that the rival's offer is better than the monopolist's. Either way, it is the optimal competitive result. And far from discouraging competition, this kind of so-called "strings attached" offer is the very mechanism by which prices are forced down to competitive levels. Indeed, regardless of form, such an offer not only makes economic sense for the monopolist, but an "equally efficient producer" could – and would – match the offer. Because a low-cost niche competitor could beat the behemoth despite the "bundle," competition would be well served if courts stayed out of the competitive struggle.

Only when the financial incentive is so large that it exceeds the monopolist's incremental profits can it conceivably cross the line into

anticompetitive territory. If, for example, instead of offering $5 million in promotional payments, a monopolist offered $10 million (again, to secure 100,000 additional units invoiced at $100 each), then the monopolist would be effectively giving this product away for free. A smaller, but equally efficient rival would not be able to match that offer. And putting aside externalities, the only reason the monopolist would have for "hurting itself" (by selling this specific product below cost) would be to prevent future competition from the rival, something antitrust law clearly forbids.

This "Profitable Incremental Volume" Test takes us most of the way home. But it doesn't get us there entirely. Simply offering a financial incentive that exceeds the value of the incremental business is not enough to show harm to competition. Just as in any predatory pricing scheme, consumers benefit in the short term through lower prices. Customers are only hurt if, in the next negotiating season, they face fewer choices and have to pay higher prices that outweigh the benefits of the prior deal. But this can only occur when rivals exit the market, allowing the monopolist to recoup its investment in below-cost pricing.

If smaller, but more nimble, rivals can find ways to succeed in the face of price bundling and de facto exclusives, they will continue to exert a strong competitive constraint on the market. Indeed, what could be better than perpetually forcing monopolists to price at their costs? And even if a rival's future is dim, it is still constrains the monopolist. For no monopolist can remain one for long if it doesn't beat competitive offers. Only when the rival is wiped from the face of the earth (and the earth then salted to prevent its future re-emergence) can the monopolist sit back and relax. Thus, courts should only discourage these "strings attached" offers if the smaller rival can prove that the monopolist's low-ball (*i.e.*, below cost) offers threaten to put it out of business (or otherwise restrict rivals' long-run elasticity of supply). This is the second necessary and sufficient condition for finding a monopolist guilty of abuse. The requirement itself stems from *Brooke Group* and was present in *LePage*'s.

By following this simple two-step process, courts can be confident in their ability objectively separate plaintiffs who were "blacklisted" from the market by predatory, economically irrational conduct from lazy, competitively impotent, but more litigious ones that struck out in the marketplace. ■

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## ENDNOTES

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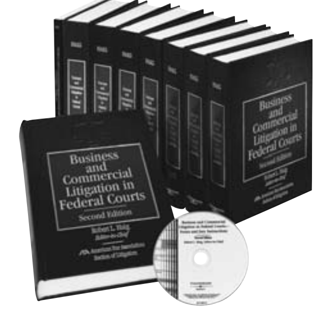
Business and Commercial Litigation in Federal Courts

EDITED BY ROBERT L. HAIG



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# JUDICIALLY NOTICED

The only thing that never changes is change itself. This old chestnut holds true for the antitrust community, where legislators, enforcement agencies, litigators, counselors and courts must adapt to international market forces, new business methods and technologies, and ever-evolving economic theories to explain these changes. While it cannot be said that courts always lead the charge, they certainly create the legal boundaries governing the way firms may operate. Judge's statements -- even obiter dicta -- serve as the "clay" that litigators mold to advance their clients' interests. To that end, the editors devote this space to a selection of some particularly noteworthy antitrust opinions from our nation's judiciary in the past three months. If you run across any unique or novel pronouncements of antitrust law from the jurisdictions in which you practice, please forward them to us at AntitrustLitigator@abanet.org and we may include them in a future version of "Judicially Noticed."

- *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690 (7th Cir. 2006).

In a stunning reversal of current trends, Judge Easterbrook held that a ***25% market share*** may suffice to establish "market power." This is because the defendant's low share itself "does not demonstrate that [it] lacks power to make significant price increases without substantial loss in sales." The holding is a curious mixture of past and present. It obviously embraces the "critical loss" analysis used in modern merger analysis. But in a throwback to earlier days, Judge Easterbrook also evoked the precedential power of *Philadelphia National Bank*, which blocked a merger with shares considered low by today's standards. Nevertheless, while some may be shocked by his broad view of "dominance," Judge Easterbrook held true to form by finding no "exclusionary" conduct alleged.

- *Schor v. Abbott Labs.*, 457 F.3d 608 (7th Cir. 2006).

In *Schor*, Judge Easterbrook struck again in granting a motion to dismiss:

> "We appreciate the potential reply that it is impossible to say that a given practice 'never' could injure consumers. A creative economist could ***imagine*** unusual combinations of costs, elasticities, and barriers to entry that would cause injury in the rare situation…. But just as rules of *per se* ***illegality*** condemn practices that almost always injure consumers, so antitrust law applies rules of *per se* ***legality*** to practices that almost never injure consumers."

Judge Easterbrook then put another nail in the "monopoly leveraging" coffin, a theory whose heyday has long past. *Verizon Comm. Inc. v. Trinko, LLP*, 540 U.S. 398 (2004) ("to the extent the Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred."). In dismissing plaintiff's ***bundling*** claim, Judge Easterbrook expressed skepticism of the theory, which is "just a predatory-pricing variant ***without the intellectual discipline of that doctrine***." The court noted that "[t]he problem with 'monopoly leveraging' as an antitrust theory is that the practice cannot increase a monopolist's profits," invoking the logic of the "one monopoly profit" doctrine.

- *Nicsand, Inc. v. 3M Company*, 457 F.3d 534 (6th Cir. 2006).

In contrast to *Schor*, the Sixth Circuit took a plaintiff-friendly view of dominant firm pricing, concluding that an excluded competitor had standing to challenge 3M's (a now alleged recidivist) practice of pricing to obtain "de facto" exclusivity. Competition was injured, the court said, because the practice restricted plaintiffs' elasticity of supply. "[I]t was no longer able to take advantage of economies of scale, either in its purchases of raw materials or in its own production processes."

The court rejected the argument that 3M's scheme was economically irrational. It did agree with 3M that, just as manufacturers have no incentive to create a downstream monopoly (see *Schor* above), retailers have no incentive to help a manufacturer maintain its monopoly. Thus, as a *general* matter, "distributors will not acquiesce to the establishment of an upstream monopoly, and the establishment of a monopoly cannot be the purpose of the exclusive dealing." But "one important caveat" destroyed that argument. When there is a "series of exclusive dealing arrangements" among many retailers, the argument breaks down because retailers "may fall victim to a collective action problem."

- *Champagne Metals v. Ken-Mac, Inc.*, 458 F.3d 1073 (10th Cir. 2006).

As in *Nicsand*, the Tenth Circuit similarly rejected pleas that it would be irrational to break the law. Reversing summary judgment in a horizontal boycott case, the court noted that "economic rationality" arguments will fall on deaf ears if there is "direct evidence" that a conspiracy is afoot. "[W]hen evaluating direct evidence …, we need not worry whether such an agreement would have been a rational one" because "antitrust law does not … save defendants who have clearly, though foolishly, conspired." The court suggested that economic rationality arguments apply only when "the plaintiff makes out a case based ***solely*** on circumstantial evidence," although it expressly declined to decide whether rationality is relevant if there is only "weak direct evidence." Instead, it rejected defendants' rationality argument on the merits. Defendants claimed that, because the market was fragmented, keeping out one more entrant would serve no purpose. Making short shrift of this, the court noted that "it is perfectly rational for a group of established firms to attempt to keep an ***aggressive*** competitor out of the market." ■

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Authored by Colin R. Kass and Micah N. Hildenbrand of Kirkland & Ellis LLP.

# KNOCKOUT? – TWO NEW CHALLENGERS THREATEN THE DEPARTMENT OF JUSTICE'S STATUS AS UNDISPUTED KING OF THE ANTITRUST RING

BY SCOTT ABELES

There is little question regarding whose punch has historically packed the biggest wallop in the antitrust ring: the Antitrust Division of the United States Department of Justice ("DOJ"). With a wave of its hand, it grants a pass to those mergers of which it approves. With the back of its hand, it brushes aside the rest, who like "tomato can" boxers of yesteryear are forever relegated to grumbling "I coulda been a contender." As for its criminal role, with a mere flex of its biceps, the DOJ extracts cooperation agreements, guilty pleas, and billions in fines from alleged price-fixers, who seldom have the spirit to put up a full-fledged fracas. While neither alone (the FTC also enforces civil antitrust laws), nor undefeated, the DOJ casts an imposing shadow over antitrust, and generally gets its way.

DOJ's status as antitrust's heavyweight champ brings with it competing concerns. Its status as law firm to probably the most formidable client on earth, the United States government, provides it with tremendous power, while potentially subjecting it to political influence, as well. This status, power, and influence, in turn, can give rise to what some perceive to be (and are now challenging, as discussed below) arbitrary decision making. The very same status, however, also provides DOJ with a degree of immunity, under Separation of Powers principles. Separation of Powers dictates that DOJ's prosecutorial decisions are exclusive to it, and cannot be infringed by other branches. Generally speaking, under Separation of Powers principles, DOJ can be as arbitrary as it pleases in matters of prosecutorial discretion, with the lone check being voters, not judges.

So how does one prevent politics from sneaking the equivalent of "brass knuckles" into what should be a fair fight based on the facts and the law? Congress, though not free from political persuasion itself, may be one mechanism, and indeed has tried to provide an answer through use of the courts, which may be another.

Two recent cases – the *Stolt-Nielsen* case and the Baby Bell merger cases – address these concerns, raising questions as to the *real* extent of DOJ's discretion in both the merger approval, and criminal settlement contexts, as well as the ability of other branches to control that power. For litigators, these cases are worthy of special attention, as they will either limit DOJ's authority or broaden its discretion.

On September 6, 2006, a federal grand jury indicted Stolt-Nielsen S.A. ("Company") for violations of the Sherman Act, capping a long, smashmouth pre-indictment rumble. The Company had been assisting DOJ prosecutors pursuant to an agreement under the Corporate Leniency Program (providing amnesty for confession and cooperation), until the government claimed that the Company had continued its alleged anticompetitive activity longer than first represented. DOJ canceled the agreement, and announced its intent to file charges. Before indictment, the company sued to enforce the agreement and enjoin the impending action.

The District Court sided with the Company, finding that DOJ could not, without judicial sanction, unilaterally withdraw a grant of

conditional leniency. The federal judiciary – not DOJ – would decide prior to indictment whether one of the parties had breached the agreement. In essence, the court held that even the government must abide by its agreements, and cannot resort to unilateral, unchecked "self-help."

The Third Circuit reversed, however, holding that because the executive branch "has exclusive authority and absolute discretion to decide whether to prosecute a case," enjoining future indictments was impermissible. Despite the DOJ's written commitment "not to bring any criminal prosecution" against the Company, the Third Circuit concluded that the amnesty agreement only protected against *conviction*, not indictment and trial. Notably, the Third Circuit deferred the critical underlying question of whether the immunity agreement had been breached. Free to indict, DOJ moved forward with its prosecution. On October 30th, the Supreme Court denied certiorari over the Third Circuit's reversal of the district court.

DOJ's move came on the heels of another big brawl, featuring onetime blood enemies DOJ and AT&T together on the *same* side. This one kicked off in October 2005, when DOJ released its consent agreements in the "Baby Bell Merger" cases, allowing each to proceed with modest divestiture requirements. In July 2006, Judge Emmett Sullivan, overseeing joint Tunney Act proceedings, surprised the participants by proclaiming he was not yet convinced the mergers were in the "public interest." Such a finding is required by the Tunney Act, which was amended recently to provide for increased judicial scrutiny of consent decrees. No one was more taken aback than DOJ, which has historically viewed itself as the very embodiment of the "public interest" when it comes to promoting and protecting competition.

Judge Sullivan further observed that DOJ had produced no evidence – affidavits, declarations, or expert reports – in support of its position that the divestitures were sufficient to maintain competition. He was therefore compelled to issue a bombshell request for briefing on issues relating to (1) the competitive effects of the mergers; (2) the sufficiency of DOJ's evidence; and (3) his authority to address such issues and to modify the Consent Decrees, as necessary. Most interestingly, Judge Sullivan seemed to indicate that, at least on the surface, DOJ was abdicating its role as protector of competition. He noted, given the arguable reconstitution of the old Ma Bell monopoly apparently under way in the telecom sector, that "through the eyes of a layperson, the mergers, in and of themselves, appear to be against public interest given the apparent loss in competition … [W]hy isn't that the case?" *See* Order in *United States v. SBC and AT&T*, No. 03-2512 (D.D.C. July 7, 2006).

*DOJ's status as antitrust's heavyweight champ brings with it competing concerns… how do you prevent politics from injecting the equivalent of "brass knuckles" into what should be a fair fight?*

The question itself is provocative, calling forth images of AT&T's "glory days," when it monopolized this nation's telecommunications network. No two people out of earshot could talk, let alone hold a conversation, without paying tithe to AT&T, leading DOJ and the district court to bust the company into seven smaller pieces. With his question, Judge Sullivan also signaled that, while DOJ had long fancied itself Judge, Jury, and either Exonerator or Executioner when it came to matters relating to the public interest, *he* was the one donning the robes.

This was something new. Tunney Act proceedings have historically been little more than "kabuki dances" in which judges rubberstamp DOJ's proposals with a nod and a shrug. But in light of the outcry that followed DOJ's controversial Microsoft settlement, Congress amended the Act in 2004 and commanded judges to conduct real reviews of DOJ deals to protect against undue politicization of antitrust. This was in keeping with recent legislative history intended to strengthen judicial review, and older history undergirding the original act's purpose to stem the tide of "sweetheart" deals cut by the

Nixon-era DOJ. Despite this history, DOJ has fought "encroachment" onto its turf tooth and nail. After opposing entry into the case of every third party with views contrary to its own, it vociferously argued that expansion of the trial judge's traditional Tunney Act role beyond that of a potted plant would infringe on its role as the sole voice of prosecutorial reason. Forced to justify its allegations and conclusions, DOJ instead raised Separation of Powers concerns. It demanded that the Court limit its inquiry to the facts as presented in DOJ's filings; anything else, including Congressional intent to curtail DOJ's prerogatives, was irrelevant.

DOJ's position has validity, but only to a degree. The question is one of both statutory and constitutional interpretation. By statute, the Tunney Act *requires* that the court analyze "the impact of entry of such judgment upon competition in the relevant market ... from the violations set forth in the complaint." DOJ argued in its subsequent pleadings that in its *complaint*, it identified potential competitive problems in isolated geographic markets (single buildings) in which competition would be reduced from two providers to one, post-merger. Because the remedy mandated in its Proposed Final Judgment required divestitures of lines in the offending buildings identified, the remedy precisely fit the contours of the harm alleged (as one might fairly expect, given that the complaint and remedy were filed simultaneously). According to DOJ, that brings the Tunney Act court's inquiry to a close.

But not so fast. The "violations set forth in the *complaint*" in these cases are allegations that, without the required divestitures, the mergers would have violated Section 7 of the Clayton Act. Granted, the DOJ has a theory as to *why* the mergers violated Section 7, and in laying out its theory it defined markets and constructed a theory of competitive harm. But while, like any litigant with a gripe, DOJ is entitled to its theory, it is certainly an open question under the enhanced Tunney Act as to whether *legal theories* deserve deference. Indeed, one can analogize the issue to a district court reviewing a Motion to Dismiss under Rule 12(b)(6) – the court should take the *facts* alleged as true, but need not credit the legal theories or labels attached by counsel when reviewing the sufficiency of the pleading.

> *The question itself is provocative, calling forth images of AT&T's "glory days." No two people could talk without paying tithe to AT&T, leading DOJ to bust up the company.*

Thus, DOJ's argument that all facts and legal theories encompassed by the complaint should be taken as gospel when Judge Sullivan examines the sufficiency of the remedy appears to stretch the statutory language in a manner that may not do it justice. On the other hand, if the statutory language requires the reviewing court to look beyond DOJ's mere labels to determine whether the remedy adequately addresses competitive harm in the relevant market, then it may be constitutionally untenable under Separation of Powers precedent. It may be that underlying prosecutorial rationale along with the bare decision to prosecute is beyond congressional and judicial interference. But that question is not answered by DOJ's semantics-based argument.

How will these cases shake out? Prosecution of the newly filed Stolt-Nielsen case is under way, and the Company will no doubt offer the same evidence to the district court in a Motion to Dismiss on the deferred question of whether the government breached its amnesty agreement that earned the company a victory over DOJ in the first fight. The outcome will be reviewed by the Third Circuit, and, possibly, the Supreme Court down the line.

In the Baby Bell cases, briefing from the parties is proceeding, and the action has grown testy. At the latest hearing, Judge Sullivan accused DOJ of withholding "significant documents," and reaffirmed that he had no intention of "rubber-stamping" the merger and would only issue a ruling after a thorough, "independent review" of the evidence. When that will be is unknown. Still, the ruling could be favorable to the parties, if their evidence is sufficient. That would end the federal case, though states

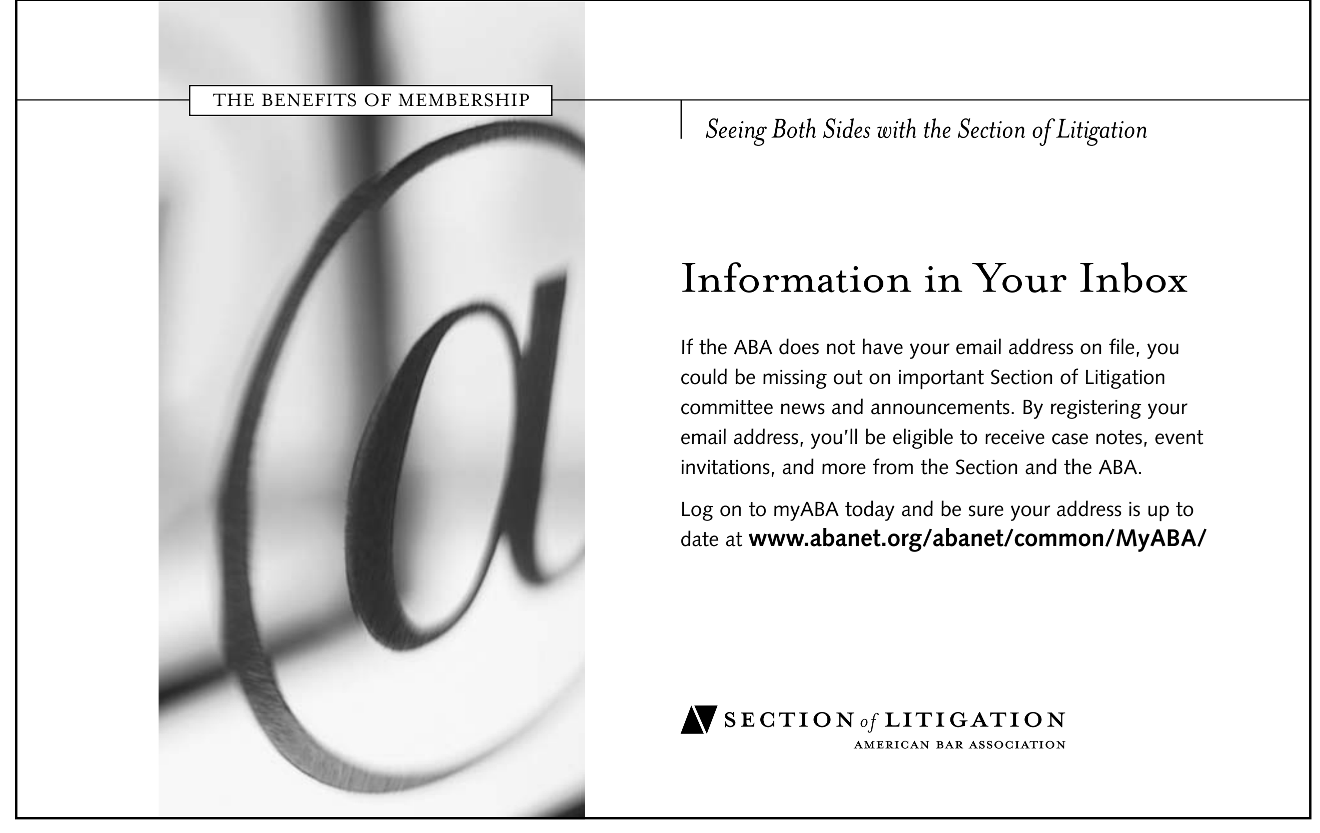
and private parties could conceivably challenge these mergers. Presence of these significant antitrust forces does provide support for the argument that if DOJ pulls its punches, others are potentially available to step into the ring and provide the necessary check, as the framers of the antitrust laws envisioned.

If there is an adverse ruling – an attempt by Judge Sullivan to impose further divestitures, a flat-out rejection of the application, or something else – the repercussions would be unclear. DOJ could certainly appeal to the D.C. Circuit, which famously rebuffed former D.C. federal Judge Stanley Sporkin's rejection of an earlier Microsoft Consent Decree in 1995 (years before the Tunney Act amendments). Or, theoretically, it could do nothing. Whatever the extent of judicial powers under the revamped Tunney Act, no court could force DOJ to prosecute the mergers in the first instance, which could go forward without DOJ challenge and, of course, the divestitures. But, given DOJ's pronouncement that without the divestitures, the mergers are not in the public interest, this "bob-and-weave" scenario is unlikely.

Whether the present challengers are contenders or pretenders to the heavyweight title remains to be seen. But it can surely be said that there is more uneasiness in DOJ's corner after some recent counter-punching from tenacious opponents.

**ENDNOTES**

* Scott Abeles is an associate at Kirkland & Ellis LLP. Scott specializes in antitrust, constitutional, and appellate litigation. The opinions herein do not necessarily reflect those of Kirkland & Ellis LLP, its attorneys or its clients.



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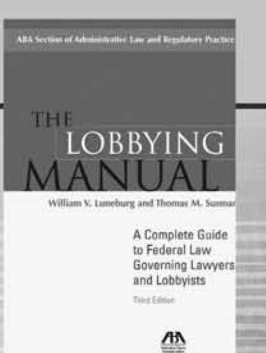


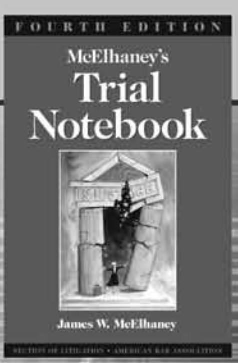


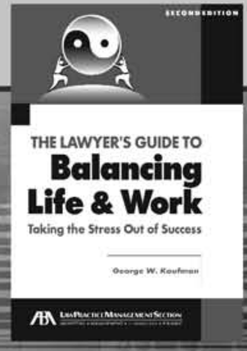

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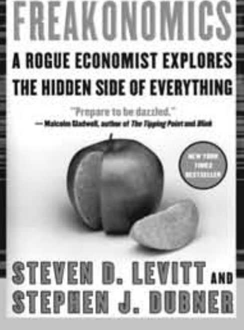


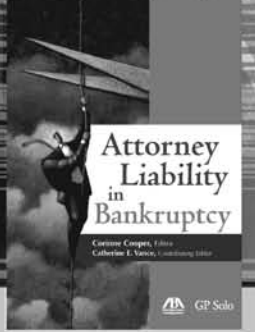


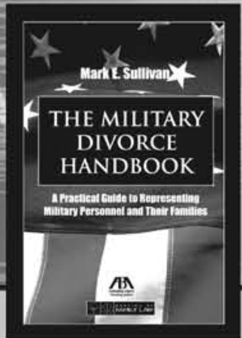


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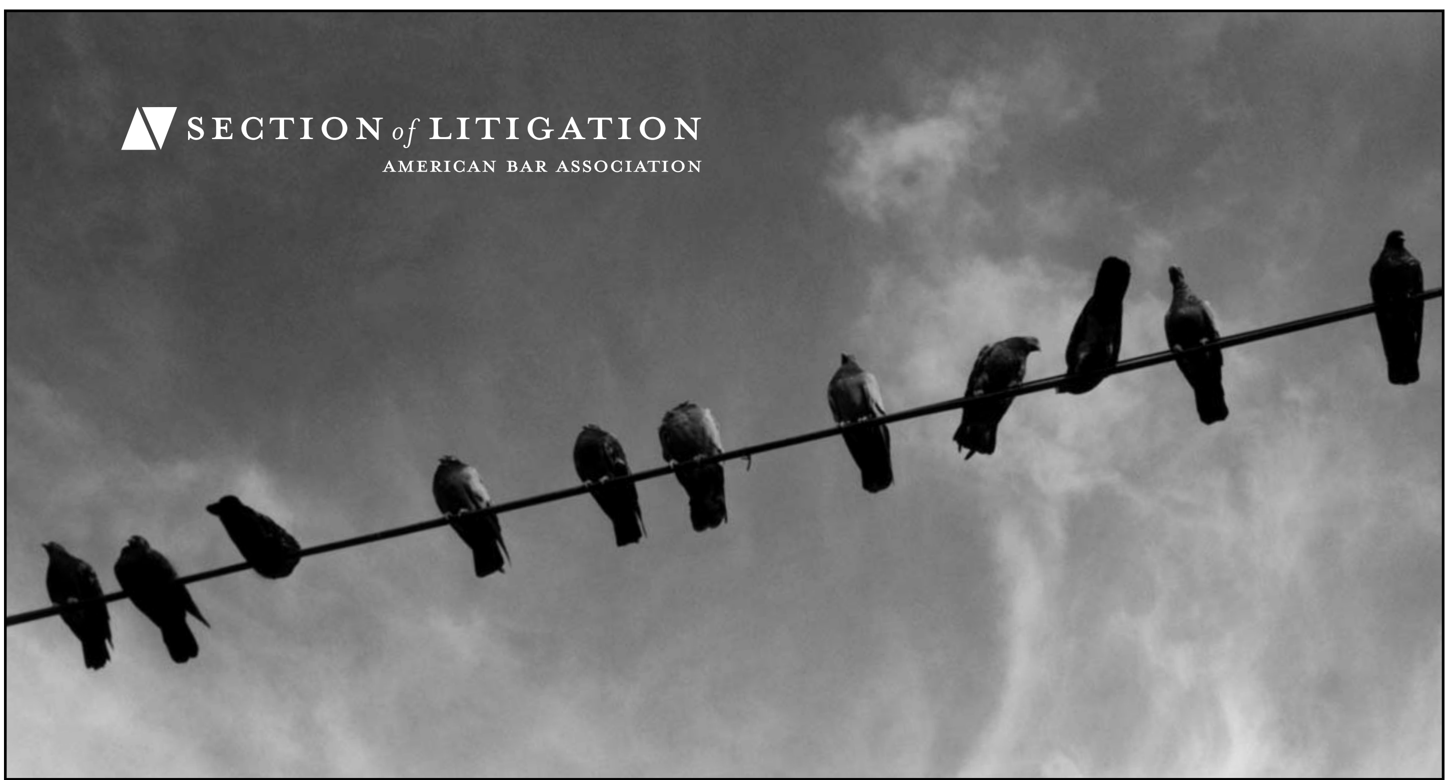


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