

ANTITRUST 2009: A PRIMER

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I. INTRODUCTION

This paper is a primer on the status of the legal environment in the antitrust arena. Its general nature and the summary approach are intentional, as this represents the inaugural presentation to be made by the newly-minted Antitrust and Trade Regulation SLG within DRI's Commercial Litigation Committee.

In this paper, I have focused on 3 key areas. First, we take a quick look at the issue of antitrust enforcement in the era of President Obama. Will President Obama's promise of renewed vigor for antitrust regulatory enforcement result in increased enforcement activity from the Federal Trade Commission and the Antitrust Division at the Department of Justice? Nearly all of the experts believe that it will. What does that mean for antitrust practitioners in this particular area?

Second, we take a quick look at what is already happening outside of the Beltway. State Attorneys General have become increasingly litigious, both on behalf of the State and on behalf of the State's consumers as *parens patriae*. Private antitrust litigation is also on the rise. What is going on out there and how might it affect you? We survey the playing field.

Third, we take a quick look at the key antitrust decisions handed down by the United States Supreme Court in past three years. The Supreme Court has shown a renewed interest in antitrust, granting certiorari on key issues like pleading standards for § 1 claims under the Sherman Act, whether the rule of reason applies to the review of vertical retail price maintenance agreements, whether certain securities offerings are exempted from the antitrust laws, and whether “price-squeeze” claims may be brought under § 2 of the Sherman Act. Is this a sign of more decisions to come? What is next?

II. WHAT’S HAPPENING IN WASHINGTON DC

A. ANTITRUST ENFORCEMENT IN THE ERA OF OBAMA

President Obama campaigned on the message of “change” and promised to bring a renewed regulatory approach to Wall Street and the financial sector in response to the current “meltdown” of the U.S. economy. One of the areas in which we will most certainly see “change” is the antitrust enforcement efforts of the Federal Trade Commission and the Department of Justice.

While campaigning, Senator Obama declared that “We’re going to have an antitrust division in the Justice Department that actually believes in antitrust law. We haven’t had that for the last seven, eight years.” Senator Obama presented a written report to the American Antitrust Institute in response to their request to all candidates which outlined his position on antitrust issues, including his approach to civil and criminal enforcement efforts and his criticism of how same had been handled by the Bush administration. *See* <http://www.antitrustinstitute.org/> (“AAI Report”). Senator Obama opined that the “current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century.” *See* AAI Report, ¶4. Without question, Senator Obama promised a renewed approach to antitrust enforcement, including his promise to “step up review of merger activity and take effective action to stop or restructure these mergers that are likely to harm consumer welfare.” *See* AAI Report, ¶6. He pledged vigorous enforcement in this area in noting that “between 1996 and 2000, the FTC and DOJ together challenged on average more than 70 mergers per year,” but “from 2001 to 2006, the FTC and DOJ on average only challenged 33 [mergers per year].” *See* AAI Report, ¶4. Mr. Obama was particularly harsh in his criticism of the Bush administration’s failure to bring any monopolization cases, saying that “My administration will ensure that insurance and drug companies are not abusing their monopoly power through unjustified price increases – whether on premiums for the insured or on malpractice insurance rates for physicians.” *See* AAI Report, ¶9.

During the campaign, Senator Obama also promised to take “aggressive action . . . to ensure that firms, wherever located, that collude to harm American consumers are brought to justice.” Among other things, Senator Obama expressed concern about the XM/Sirius merger, which he said might “give the

new firm excessive market power or unduly limit the choices consumers have for satellite-radio content.” He also expressed concerns over the proposed DHL/UPS joint venture, suggesting that “At the very least, the DOJ should examine whether having two competitors in a fairly concentrated market act as partners would have anticompetitive effects.”

In his response to the American Antitrust Institute, Senator Obama targeted the healthcare, pharmaceutical and insurance industries, promising increased antitrust enforcement in these sectors of the economy. *See* AAI Report, ¶¶ 8-9. Because of other key reforms proposed in the healthcare arena, it is likely that healthcare antitrust enforcement will get immediate attention. He stated that “lax enforcement of healthcare mergers” has had decidedly anti-competitive effects and has harmed consumers. *See* AAI Report, ¶5. Tying in to his other proposed reforms in the healthcare arena, Senator Obama was pointed in his allegation that branded pharmaceutical companies were blocking generic drugs from the marketplace. In particular, he directly criticized “reverse payment” settlements aimed at blocking generic drugs from the marketplace, pledging to “ensure that the law effectively prevents anticompetitive agreements that artificially retard the entry of generic pharmaceuticals on the market, while preserving the incentives to innovate that drive firms to invent life-saving medications.” *See* AAI Report, ¶8. Previous efforts by Congress to address “reverse payment” settlements have failed, and the Supreme Court has twice recently denied certiorari to review this issue on appeal.

President Obama’s appointments to the key antitrust positions at the Department of Justice and the FTC have confirmed his promise to the American Antitrust Institute to “reinvigorate[d] antitrust enforcement.” His pick to head the Department of Justice’s Antitrust Division was Christine Varney. Ms. Varney is a former FTC commissioner known for her aggressive enforcement of antitrust laws in the healthcare industry. President Obama’s pick as Chairman of the FTC was Jon Leibowitz. Mr. Leibowitz is known for having pushed the FTC in the direction of increased antitrust enforcement and advocating for harsher civil penalties and remedies in the event of violation. Ms. Varney and Mr. Leibowitz signal a clear shift in the attitude of the new administration towards more vigorous and increased antitrust enforcement.

Antitrust practitioners should expect the FTC and DOJ under President Obama to step up their antitrust enforcement activity in the critical insurance, energy, healthcare and pharmaceutical sectors.

B. WHERE PRESIDENT OBAMA’S RUBBER MAY HIT THE ROAD: PENDING COMBINATIONS AND MERGERS THAT MIGHT FACE DOJ AND FTC SCRUTINY

Judge Robert Bork famously observed that competitors either make peace or they make war and suggested that regulators should focus primarily on those competitors that make peace while encouraging all firms to make war. If

President Obama is looking to make an early example of reinvigorated antitrust enforcement, he will likely look at proposed mergers within the industry making the most peace. Recently, no industry is making more peace than the big players in the pharmaceutical industry.

1. Healthcare: Big Pharma Consolidation

In the past several months, several major pharmaceutical mergers have been announced by and between some of the largest pharmaceutical firms in the world. Of the six companies involved, five were ranked among the top 20 pharmaceutical companies (by sales) in the world in 2008. The net effect is a restructuring and rearrangement of the pharmaceutical industry and the marketplace for pharmaceuticals.

The largest of these proposed mergers is between Pfizer, Inc. and Wyeth, Inc. This deal, first announced in January of 2009, is in the regulatory approval process before the FTC. Pfizer's offer to pay \$68 billion for Wyeth would result in the largest pharmaceutical company in the world. In 2008, Pfizer ranked first and Wyeth ranked tenth on the list of the largest pharmaceutical companies (by sales) in the world. The merged entity would dwarf the next closest company, GlaxoSmithKline, by more than \$20 billion. In early April of 2009, the Federal Trade Commission requested additional information from the companies in connection with its regulatory review.

In March of 2009, Schering-Plough Corporation and Merck & Co. announced that they were merging their pharmaceutical operations. Merck has agreed to pay \$32.6 billion to acquire Schering-Plough. In 2008, Merck ranked fifth and Schering-Plough ranked thirteenth on the list of the largest pharmaceutical companies in the world. The merged entity would surpass AstraZeneca to become the fourth largest pharmaceutical company in the world.

In March of 2009, Roche Investments USA Inc. and Roche Holding Inc. reached an agreement with the minority shareholders of Genentech, a biotechnology company that specializes in gene-based therapies. Roche will buy-out the minority shareholders of Genentech for \$95 per share for a total acquisition price of \$46.8 billion. Roche and Genentech have been in partnership since 1990 with Roche owning a majority of Genentech's stock but allowing the company to be run independently. That approach had been previously heralded as a model of how a big pharmaceutical company can effectively acquire a smaller company without losing the innovation and entrepreneurial culture that made the small company successful. In 2008, Roche was the eighth largest pharmaceutical company in the world. The merged entity would surpass Johnson & Johnson to become the seventh largest pharmaceutical company in the world.

All three mergers trigger regulatory review under the Hart-Scott-Rodino Act, 15 U.S.C. § 18a. The Pfizer/Wyeth merger is already under review as reported *supra*. The Merck/Schering-Plough merger and the Roche/Genentech

merger will soon be submitted to the FTC and DOJ for review. Collectively, these three proposed mergers will test the Obama administration's new approach to healthcare antitrust enforcement. As noted *supra*, President Obama offered some stinging criticism of the Bush administrations' *laissez faire* approach to merger review, particularly in the important healthcare sector. Whether that criticism was simply a campaign slogan or a sign of things to come will soon be known.

2. IBM/Sun Merger

One of the biggest non-healthcare mergers looming on the horizon (at least at the time of the writing of this article) is the potential merger of International Business Machines Corp. ("IBM") and Sun Microsystems Inc. ("Sun"). IBM's tender offer, reported to be \$9.40 per share for a total purchase price of approximately \$7 billion, would result in a combined company with a significant market position in several key computing sectors. Most notably, the two companies jointly represent approximately 65% of the market for Unix-based servers, and 42% of the computer server market overall. Additionally, the combined companies would control nearly 100% of the market for tape-based data storage devices, suggesting that a spin-off of that unit would be a likely prerequisite to DOJ or FTC approval. IBM is already facing antitrust litigation from certain competitors challenging its dominance in the mainframe market because of its close to total control of the market for tape-based storage devices. The acquisition of Sun is likely to raise additional concerns on that front.

If the Obama administration wants to send an enforcement signal outside of the healthcare arena, it may have an early opportunity to do so with this proposed merger. Many antitrust experts are predicting that IBM would have a very difficult time getting clearance for the merger, both in the United States and the European Union, because of overlapping product lines that result in substantial market share. Concerns over regulatory scrutiny altered the terms of the proposed deal, with Sun agreeing to roughly a \$1 per share discount in order to get IBM to promise to move forward even if the deal is challenged by the FTC and DOJ, and even if these regulators force some divestitures. News of the prospective deal sent Sun's shares soaring 71% in early 2009, following a disastrous 2008 that saw Sun's shares plunge 79%. Were the merger to be abandoned, Sun's stock would likely take a severe hit in market trading.

Of course, any challenge to the deal will also be affected by other political pressures on the Obama administration to revive a failing economy, and according to many of those most familiar with the deal, there are legitimate concerns over the potential failure of Sun without an IBM "bailout." While it is rumored that the combined company will have to eliminate up to 10,000 employees in redundant positions, the failure of Sun would result in substantially more unemployment at a time when the Obama administration is desperately attempting to stem the tide of rising unemployment.

III. WHAT'S HAPPENING OUTSIDE OF WASHINGTON DC

Beyond the federal regulation of big mergers and acquisitions, there is plenty antitrust litigation going on throughout the country, both in terms of private actions and actions brought by State Attorney Generals.

A. ANTITRUST NUTS AND BOLTS: A REVIEW OF THE LEGAL FRAMEWORK

1. The Sherman Act

Section 1 of the Sherman Antitrust Act provides that “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 declared to be illegal.” 15 U.S.C. § 1. Section 2 provides that “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with another person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony” 15 U.S.C. § 2.

The Sherman Act was enacted in 1890 to curb and oppose the combination of entities that could potentially harm competition. In particular, the Sherman Act sought to attack monopolies and cartels that artificially controlled different markets. The term “antitrust” is derived from the predominant method of concealing cartels and monopolies at the turn of the 20th Century – trusts. The Sherman Act’s reference to trusts resulted in United States competition policy being dubbed “antitrust.” Interpretation of the Sherman Act has attempted to prevent the artificial raising of prices by restriction of trade, supply and competitors.

2. The Clayton Act

The Clayton Antitrust Act was passed in 1914 and was intended to supplement and expand the prohibitions set out in the Sherman Act. The Clayton Act prohibits, among other things, price discrimination, 15 U.S.C. § 13, exclusive dealings and tying arrangements, 15 U.S.C. § 14, and limits mergers and acquisitions when same result in an adverse effect on competition, 15 U.S.C. § 18. The Clayton Act also provided a private right of action “to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws,” including those previously enacted in the Sherman Act. 15 U.S.C. § 15(a).

3. Robinson-Patman Act

Price discrimination prohibitions were strengthened and expanded with the adoption of the Robinson-Patman Act of 1936, which amended the price

discrimination statute under the Clayton Act. 15 U.S.C. § 13. Generally, the Robinson-Patman Act prohibits the sale of goods in a manner that discriminates in price to equally-situated distributors when the effect of such sales is to reduce competition.

4. Federal Trade Commission Act

The Federal Trade Commission Act of 1914 established the Federal Trade Commission and empowered it with regulatory authority over unfair trade practices. 15 U.S.C. § 41 *et seq.* The Commissioners of the FTC are appointed by the President and serve staggered, 7-year terms. *Id.* The Act outlaws unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45. The Act also empowers the FTC to investigate any judgments against domestic corporations for violation of federal antitrust law, or to otherwise investigate domestic corporations for same at the direction of the President or Congress. 15 U.S.C. § 46 (c) and (d). The Act was amended in 1994 with the adoption of the International Antitrust Enforcement Assistance Act giving the FTC the power to conduct investigation of possible violations of foreign antitrust laws.

5. Hart-Scott-Rodino Act

The Hart-Scott-Rodino Act of 1976 required certain notice and filings to be made with the FTC and DOJ before certain mergers, acquisitions and tender offers can close. 15 U.S.C. § 18a. Hart-Scott-Rodino requires pre-merger notification and a 30-day waiting period to give the FTC and DOJ a chance to assess the effect of the proposed transaction on competition and to determine whether the proposed transaction violates U.S. antitrust law. The agencies can request additional information and additional time to review this information during this waiting period. The filing requirement is triggered by the size of the proposed transaction (in terms of the value of the stock acquired, with the original trigger being \$200 million, now adjusted for inflation to \$260.7 million), and in some cases, a combination of the size of the proposed transaction (originally between \$50 million and \$200 million, now between \$65.2 million and \$260.7 million) and the amount of the parties' annual net sales or total assets (essentially, if one has \$100 million in sales or assets and the other \$10 million, now adjusted to \$130.3 million and \$13.0 million, respectively). *See Revised Jurisdictional Thresholds for Section 7A of the Clayton Act*, 74 Federal Register No. 8 (January 13, 2009).

B. Walking Through a Sherman Act § 1 Example

In order to state a claim under § 1 of the Sherman Act, a plaintiff must show that the defendants “(1) engaged in a conspiracy (2) that restrained trade (3) in a particular market.” *Spectators’ Communication Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001).

Certain potential restraints of trade are judged more harshly than others. Beginning with the Supreme Court's landmark decision in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), different types of combinations and conspiracies received different levels of judicial scrutiny. When the type of restraint at issue is highly likely to cause harm to competition, it is considered *per se* illegal and no proof of harm to competition is required. Some of the restraints typically reviewed through a *per se* analysis would include horizontal price-fixing agreements, certain group boycotts, and geographical market divisions. Other types of restraint are not considered as ominous, and no adverse effect on competition will be presumed. Instead, in those cases, plaintiffs have to demonstrate harm to competition in order to make their *prima facie* case.

A necessary ingredient of any § 1 conspiracy is a showing of concerted action on the part of the defendants. See *Monstanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). To establish concerted action, the plaintiff must present "evidence that reasonably tends to prove that the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 768. Stated differently, "[t]here must be evidence that tends to exclude the possibility of independent action." *Id.*; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) ("[A]t the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently."). Concerted action may be shown by either direct or circumstantial evidence. *Monsanto Co.*, 465 U.S. at 764; *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 762 (5th Cir. 2002). Direct evidence of concerted action "is that which 'explicitly refer[s] to an understanding' between the alleged conspirators," while circumstantial evidence requires additional inferences in order to support a claim of conspiracy. *Viazis*, 314 F.3d at 762 (quoting *Southway Theatres, Inc. v. Ga. Theatre Co.*, 672 F.2d 485, 493 n. 8 (5th Cir. 1982)).

Circumstantial evidence of a conspiracy in restraint of trade must be strong in order to survive summary judgment, because "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Courts considering § 1 cases "will not draw inferences to support a claim that makes no economic sense; such a claim will require unusually persuasive evidence to withstand summary judgment." *Spectators' Communication Network*, 253 F.3d at 219-20; *Matsushita*, 475 U.S. at 587, 106 S. Ct. 1348 ("[I]f the factual context renders respondents' claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."). In addition, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588, 106 S. Ct. 1348. In sum, a plaintiff can survive summary judgment only if it "show[s] that the inference of conspiracy is reasonable in light of the competing inferences

of independent action or collusive action that could not have harmed” the plaintiff. *Id.*

One of the recent cases I handled that deals with concerted action involved an internet cyber-squatter and the casino industry in the Tunica County, Mississippi area. *See, Tunica Web Advertising, Inc. v. Barden Mississippi, LLC, et al.*, 2005 WL 3488499 (N.D. Miss. 2005), *reversed and remanded* 496 F.3d 403 (5th Cir. 2007). Tunica County, Mississippi is the third largest gaming destination in the United States, trailing only Las Vegas and Atlantic City. There are nine casino properties in the Tunica County, Mississippi area.

The plaintiff was a cyber-squatter who registered a number of internet web sites that would be of interest to the Tunica County, Mississippi casino industry and the local economic development and tourism organizations. After failing to sell the website to any one or more of the casinos, the plaintiff next attempted to sell internet advertising on these sites to the industry by making an offer to the local trade group, to which all nine of the casinos belonged. That offer was rejected by the casino’s trade group. Plaintiff then brought a Sherman § 1 horizontal group boycott/refusal to deal case. Certain group boycotts and concerted refusals to deal can be *per se* violation of the Sherman Act’s restraint of trade provision.

The federal district court granted summary judgment in favor of the defendants and against the plaintiff, holding that the defendants’ refusal to purchase internet advertising from the plaintiffs was not a group boycott or a joint refusal to deal. Instead, the district court concluded that the decision was the result of an independent business decision made by each of the defendants. Defendants had also argued that a group denial of a joint offer should not be treated as a concerted action under the Sherman Act. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (holding that joint actions of parent company and wholly-owned subsidiary are not subject to § 1 liability because the parent and subsidiary have “a complete unity of interest”); VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1477, at 315-16 (2d ed. 2003) (noting that action of trade associations, in some situations, be treated as actions of a single entity).

The district court’s decision was reversed on appeal by the Fifth Circuit, which held that fact issues existed as to whether the casino operators engaged in concerted action. *Tunica Web Advertising v. Tunica Casino Operators Ass’n*, 496 F.3d 403, (5th Cir. 2007). While acknowledging that the joint rejection of the joint offer was not itself evidence of concerted action, the Court held that other evidence had been presented which, standing alone, created a material issue of fact. *Tunica Web Advertising*, 496 F.3d at 410-11. The Fifth Circuit also held that the company was not required to be a direct competitor of at least one defendant casino operator for the company to establish that the casino operators committed a *per se* violation under the Sherman Act. *Tunica Web Advertising*, 496 F.3d at 414-15. That issue was remanded to the district court for further determination.

C. PRIVATE ACTIONS

Private antitrust and consumer protection actions are being pursued in a number of critical areas. A few seen most recently in my State follow:

Vitamins: Following the guilty pleas entered by certain defendants in Europe, consumers brought suit under § 2 of the Sherman Act against the major vitamin manufacturers and sellers under state antitrust statutes and consumer protection statutes alleging a horizontal price-fixing conspiracy in the worldwide vitamin market. *See, e.g., Carder v. BASF Corp.*, 919 So. 2d 258 (Miss. Ct. App. 2005).

Caskets: The dominant casket manufacturer in the U.S. has a long-standing policy of refusing to sell caskets to any reseller other than a licensed funeral home operator. The plaintiff was a wholesaler of caskets who challenged the manufacturer under § 1 of the Sherman Act. In an unreported decision, the U.S. District Court for the Southern District of Mississippi granted summary judgment in favor of the manufacturer, holding that the manufacturer's longstanding policy was based on legitimate business reasons under a Rule of Reason analysis.

Car Tires: Consumers who bought automobile tires brought a horizontal price-fixing conspiracy case against all major domestic automobile tire manufacturers under § 1 of the Sherman Act. In an unreported decision, the United States District Court for the Southern District of Mississippi dismissed the suit based on the *Illinois Brick* indirect purchaser doctrine.

Telecommunications: Consumers have brought class action suits against the big telecommunications companies in the wireless industry for alleged price-fixing related to the cost of text messaging. These actions are brought under § 1 of the Sherman Act and section 4 of the Clayton Act.

Smokeless Tobacco: Consumers who purchased smokeless tobacco products brought a horizontal price-fixing conspiracy case against the major U.S. smokeless tobacco producer under state antitrust and consumer protection acts. Inspired by the Sixth Circuit's affirmance of the \$1.05 billion judgment in the *Conwood* case against U.S. Smokeless Tobacco, *certiorari denied* by the U.S. Supreme Court, these consumers brought indirect purchaser claims based on the same factual allegations, mainly concerning the placement of display racks, removal of competitor's racks, and other promotional materials at the point of sale. *See Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), *cert. denied*, *U.S. Tobacco v. Conwood Co.*, 537 U.S. 1148, 123 S. Ct. 876 (U.S. 2003).

D. STATE PARENS PATRIA ENFORCEMENT ACTIONS

State antitrust and consumer protection actions appear to be spiking as well, with increasing activism from the State Attorneys General. On this front, most of the actions being pursued blend traditional restraint of trade principles

with consumer protection statutes and many are launched against entire industries. This sometimes involves direct injury to the State or one of its agencies, or conversely, the State Attorney General is exercising his or her authority as *parens patriae*, literally translated as “parent of the country,” on behalf of the State’s consumers.

A couple of examples:

Medicaid Reimbursement: Throughout the country, the State Attorneys General have sued the pharmaceutical industry related to reimbursements made by Medicaid for prescription drugs. This litigation is known as the “Average Wholesale Price” litigation (the “AWP Litigation”) because the States have alleged that any reimbursement method that led to a payment in excess of actual average wholesale prices is a violation of state antitrust and consumer protection laws. The first adverse jury verdict in an AWP case was obtained by the State of Alabama against AstraZeneca in February of 2008 (\$215 million). Another adverse jury verdict (\$114 million) followed in favor of the State of Alabama against GlaxoSmithKline and Novartis in July 2008. These Medicaid fraud cases are also currently proceeding in 22 other states, including Arizona, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Mississippi, Montana, Nevada, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, Wisconsin, and certain counties in the State of New York.

Vitamins: Following the guilty pleas entered by certain vitamin manufacturers in Europe, a number of States brought suit against all vitamin manufacturers and sellers under state antitrust statutes, most of which mirror their federal counterparts. The suits allege a horizontal price-fixing conspiracy in the worldwide vitamin manufacturing market. *See, e.g., Hood ex rel. State v. BASF Corp.*, 2006 WL 308378 (Miss. Chancery Court, Jan. 17, 2006) (petition for interlocutory appeal denied by the Mississippi Supreme Court in an unreported decision).

Software: Following the Department of Justice, many State Attorneys General brought suit against Microsoft for alleged monopolization, attempted monopolization, and tying violations under the Sherman Act related to Microsoft’s bundling of its operating system and internet web browser. *See U.S. v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 1999), *aff’d in part, rev’d in part, and vacated*, 253 F.3d 34 (DC Cir. 2001), *cert. denied*, 534 U.S. 952, 122 S. Ct. 350, 151 L. Ed. 2d 264 (2001); *Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp. 2d 537 (S.D. Miss. 2006).

III. RECENT SUPREME COURT JURISPRUDENCE

Antitrust practitioners have seen a renewed interest in antitrust from the United States Supreme Court. Several significant cases have been granted certiorari in recent years. The following are a sample of some of the key decisions.

- A. *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (May 21, 2007).

The Plaintiffs in *Twombly* represented a putative class of subscribers of local telephone and/or high speed internet services. Bell Atlantic and the other “Baby Bells” are known as Incumbent Local Exchange Carriers (ILECs). Their competitors in these markets are known as Competitive Local Exchange Carriers (CLECs). The Plaintiffs’ complaint alleged that Bell Atlantic and the other ILECs conspired to restrain trade by engaging in parallel conduct in these service areas to inhibit the growth of the upstart CLECs by agreeing to refrain from competing against one another. Specifically, Plaintiffs complained about the ILECs’ common failure to pursue purportedly attractive business opportunities in contiguous markets. The only detailed factual allegation made to support the conspiracy was a statement by one ILEC’s CEO that competing in another ILEC’s territory “might be a good way to turn a quick dollar but that doesn’t make it right.” *Twombly*, 127 S. Ct at 1961-1962.

The District Court dismissed the complaint under Rule 12(b)(6) concluding that parallel business conduct allegations, taken alone, do not state a claim under § 1 of the Sherman Act, and noting that the plaintiffs must allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions. *Id.* at 1963. The Second Circuit reversed, holding that plaintiffs’ parallel conduct allegations were sufficient to withstand a motion to dismiss because the ILECs failed to show that there is no set of facts that would permit plaintiffs to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence. *Id.*

The Supreme Court granted certiorari “to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.” *Id.* The Court then reversed and remanded, holding that in order to state a § 1 claim, plaintiffs must allege “enough factual matter (taken as true) to suggest that an agreement was made,” *id.* at 1965. The Court distanced itself further from the “no set of facts” pleading standard espoused in *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), and held that an allegation of parallel conduct accompanied by the mere assertion of conspiracy, without more, will not suffice. *Twombly*, 127 S. Ct. at 1974-1975.

- B. ***Leegin Creative Leather Products, Inc. v. PSKS, Inc.***, 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (June 28, 2007).

Leegin Creative Leather Products designs, manufactures, and distributes leather goods and accessories, including the popular “Brighton” brand-named products. PSKS is a retailer who operates a women’s apparel store in Lewisville, Texas called Kay’s Kloset. Kay’s Kloset buys from many different manufacturers and began purchasing Brighton products from Leegin in 1995. In 1997, Leegin adopted a new policy in which it refused to sell to retailers that discounted Brighton goods below suggested prices. Thereafter, Kay’s Kloset began discounting Brighton products. Leegin discovered these discounts and ceased selling Brighton products to Kay’s Kloset. PSKS then sued Leegin under § 1 of the Sherman Act for alleged price-fixing.

The jury returned a verdict for PSKS and the trebled award, with attorney’s fees, resulted in a judgment of \$3,975,000. *Leegin*, 127 S. Ct. 2710-2712. On appeal to the Fifth Circuit, Leegin did not dispute that it had entered into vertical price fixing agreements with retailers. Instead, Leegin argued that the rule of reason should have been applied to those agreements, thus allowing them to put on evidence of “procompetitive justifications for Leegin’s pricing policy.” *Id.* at 2712. The Fifth Circuit rejected this contention and affirmed. *Id.*

The Supreme Court granted certiorari “to determine whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful.” *Id.* The Supreme Court reversed and remanded, holding that “the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints.” *Leegin*, 127 S. Ct. at 2720.

- C. ***Pacific Bell Telephone Company d/b/a AT&T California v. Linkline Communications, Inc.***, ___ U.S. ___, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (February 25, 2009).

AT&T owns certain infrastructure and facilities needed to provide “DSL” service, a method of connecting to the internet at high speeds over a telephone line. As a concession to the FCC in connection with a merger, the FCC requires AT&T to provide wholesale DSL transport service to independent firms at a price no greater than the retail price of AT&T’s DSL service. Linkline and the other plaintiffs are internet service providers that compete with AT&T in the retail DSL market in California. Plaintiffs lease certain facilities from AT&T in connection with their DSL service. Plaintiffs asserted in their complaint that AT&T violated § 2 of the Sherman Act, asserting that AT&T unlawfully “squeezed” their profit margins by setting a high price for the wholesale DSL transport service it sells and a low price for its own retail DSL service. *Linkline*, 129 S. Ct. at 1114-1115.

The central issue in the case was whether the Supreme Court’s decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004), which held that a firm with no

antitrust duty to deal with its rivals has no obligation to provide those rivals with a “sufficient” level of service, also bars a “price-squeeze” case when the parties are required to deal by another federal agency (here, the FCC). The District Court held that *Trinko* did not bar “price-squeeze” claims under these facts. *Linkline*, 129 S. Ct. at 1116. The Ninth Circuit affirmed. *Id.*

The Supreme Court granted certiorari “to resolve a conflict over whether a plaintiff can bring price-squeeze claims under § 2 of the Sherman Act when the defendant has no antitrust duty to deal with the plaintiff.” *Id.* at 1116-1117. The Court reversed and remanded, holding that: (1) a price-squeeze claim may not be brought under § 2 when the defendant has no antitrust duty to deal with the plaintiff at wholesale, *id.* at 1119; (2) where there is no duty to deal at the wholesale level and no predatory pricing at the retail level, a firm is not required to price both of these services in a manner that preserves its rivals’ profit margins, *id.* at 1119-1120; (3) institutional concerns counsel against recognizing price-squeeze claims, which would require courts to simultaneously police both the wholesale and retail markets, *id.* at 1120-1122. The Court remanded without granting plaintiffs’ request for an instruction to the District Court to grant leave to amend their complaint to assert “predatory” pricing under *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993). *Linkline*, 129 S. Ct. at 1122. Instead, the Court raised new concerns over the sufficiency of plaintiffs’ pleadings in light of its decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-563, 127 S. Ct. 1955, 127 L. Ed. 2d 929 (2007). *Linkline*, 129 S. Ct. at 1123.

D. ***Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.***, 549 U.S. 312, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (Feb. 20, 2007).

Ross-Simmons operates a sawmill in the State of Oregon. Weyerhaeuser also operates sawmills in the State of Oregon. Ross-Simmons asserted in their complaint in this matter that Weyerhaeuser drove it out of business by bidding up the price of sawlogs to a level that prevented Ross-Simmons from being profitable. Ross-Simmons asserted claims for monopolization and attempted monopolization under § 2 of the Sherman Act. *Weyerhaeuser*, 127 S. Ct. at 1072.

At trial, Weyerhaeuser offered a jury instruction which sought to apply to predatory-bidding claims the same elements of the test applied to predatory-pricing claims as espoused in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993). The District Court rejected the instruction and the jury returned a verdict against Weyerhaeuser. *Weyerhaeuser*, 127 S. Ct. at 1073. The Ninth Circuit affirmed, rejecting Weyerhaeuser’s argument that the *Brooke Group* standard should apply to predatory-bidding claims.

The Supreme Court granted certiorari “to decide whether the test we applied to claims of predatory pricing in *Brooke Group Ltd. v. Brown &*

Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) also applies to claims of predatory bidding.” *Id.* The *Brook Group* standard established what must be shown in order for a plaintiff to succeed on a claim of predatory-pricing under § 2 of the Sherman Act. Specifically, the plaintiff must show that (1) “the prices complained of are below an appropriate measure of its rival’s cost,” and (2) “the competitor had . . . a dangerous probabilit[y] of recouping its investment in below-cost prices.” *Id.* at 1074 (quoting *Brook Group*, 509 U.S. at 222, 113 S. Ct. 2578). Reasoning that the concerns over monopsony power on the demand side are no greater or lesser than monopoly power on the supply side, the Court found that “[p]redatory-pricing and predatory-bidding claims are analytically similar.” *Weyerhaeuser*, 127 S. Ct. at 1075-1076. The Court then reversed, vacated and remanded, holding that the test for predatory-bidding was the same as the test for predatory-pricing. *Id.* at 1078.

E. ***Credit Suisse Securities (USA) LLC v. Billing***, 551 U.S. 264, 127 S. Ct. 2383, 168 L. Ed. 2d 145 (2007).

Billing and the other plaintiffs are a group of buyers of newly issued securities. Credit Suisse and the other defendants are the underwriting firms that market and distribute those issues. Plaintiffs brought suit under *inter alia* § 1 of the Sherman Act and § 2 of the Clayton Act complaining that the underwriters unlawfully agreed with one another that they would not sell shares of a very popular new issue to a buyer unless the buyer committed to buy additional shares of that security later at escalating prices, to pay unusually high commissions on subsequent security purchases, or to purchase other less desirable securities (the “tied product”). *Credit Suisse*, 127 S. Ct. at 2387.

The central question in the case at all levels is whether there is a “plain repugnancy” between the plaintiffs’ antitrust claims and federal securities law. *Credit Suisse*, 127 S. Ct. at 2387 (citing *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975) quoting *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350-351, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)). The District Court granted the underwriters’ motion to dismiss the complaint “on the ground that federal securities law impliedly precludes application of antitrust laws to the conduct in question.” *Credit Suisse*, 127 S. Ct. at 2389. The Second Circuit reversed. *Id.*

The Supreme Court granted certiorari to determine whether the federal securities laws are “clearly incompatible” with federal antitrust laws and therefore implicitly provide immunity from antitrust claims. *Id.* The Supreme Court reversed the Second Circuit, holding that the antitrust claims in question were “clearly incompatible” with the federal securities laws as applied in this context. *Id.* at 2397. The Court enumerated the following three factors to be used in making that determination: “(1) the existence of regulatory authority under the securities laws to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; [] (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting

guidance, requirements, duties, privileges, or standards of conduct[, and] . . . (4) the possible conflict affected practices [] lie squarely within an area of financial market activity that the securities law seeks to regulate.” *Id.* The Court summarily determined that the first, second and fourth factors were satisfied before engaging in a detailed analysis of the third factor to determine whether there is a “conflict that rises to the level of incompatibility” *Id.* at 2393. Concluding that “an antitrust lawsuit [based on these claims] would threaten serious harm to the efficient functioning of securities markets,” *id.* at 2396, the Court determined that “the securities laws are ‘clearly incompatible’ with the application of the antitrust laws in this context.” *Id.* at 2397.

F. ***Illinois Tool Works, Inc. v. Independent Ink, Inc.***, 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006).

Illinois Tool Works and its subsidiary Trident, Inc. manufacture and market printing systems that include three relevant components, two of which are patented (the printhead and the ink container) and a third that is unpatented (the ink). These printing systems are then sold to original equipment manufacturers (OEMs) who are licensed to incorporate them into printers that are sold to other companies. The OEMs agree that they will purchase their ink exclusively from Trident. Independent Ink developed an ink with the same chemical composition as the ink sold by petitioners, which can be used in Trident’s printer system. After Trident sued Independent Ink for patent infringement, Independent Ink sued Trident seeking a judgment of non-infringement and invalidity of Trident’s patents. Independent Ink also alleged that Trident and Illinois Tool Works engaged in an illegal tying and monopolization scheme in violation of § 1 and § 2 of the Sherman Act. *Illinois Tool Works*, 126 S. Ct. at 1284-1285.

The issue in this case is whether the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law. The District Court granted summary judgment on Independent Ink’s Sherman Act claims. *Id.* at 1285. In doing so, the District Court rejected that Trident and Illinois Tool Works “necessarily have market power in the market for the tying product as a matter of law solely by virtue of the patent on their printhead system, thereby rendering [the] tying arrangements per se violations of the antitrust laws.” *Id.* The Federal Circuit reversed the District Court’s decision on the § 1 claim as inconsistent with established precedent. *Id.*

The Supreme Court granted certiorari “to undertake a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements,” *id.*, and to examine “the validity of the presumption that a patent always gives the patentee significant market power” which gave rise to “the Court’s historical distrust of tying arrangements,” which in turn led to the Court’s *per se* treatment of tying arrangements under the antitrust statutes. *Id.* at 1288. In a complete about face, the Supreme Court recognized that “Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee.” *Illinois Tool*

Works, 126 S. Ct. at 1293. Reaching the same conclusion, the Court overturned entrenched precedent and held that “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.” *Id.*

V. CONCLUSION

Whether your practice is focused on defending mergers and acquisitions or private indirect purchaser litigation, the antitrust world promises to get only more interesting in the days ahead.

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