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**MEMBERSHIP CERTAINLY HAS ITS PRIVILEGES**

MAC is more than just something you purchase at McDonald's in big sizes, as many fans learned over the past few weekends while parked on the couch watching college football. The Mid-American Conference ("MAC") houses teams like Marshall, Toledo and Northern Illinois - schools that recently beat top-ranked Atlantic Coast Conference ("ACC"), Big 12 and Big Ten powerhouses. The fact that these "middle American" teams are not nationally televised on ESPN, Fox or ABC, except if they happen to be playing a more prominent Division I-A school, may result from illegal collusion. MAC teams are unable to participate in major post-season bowl games, unless one considers an appearance at the Motor City Bowl or the Holiday Bowl a major feat. After all, schools in conferences like the MAC only get the chance to play in the College Football Bowl Championship Series ("BCS") if they receive one of the two at-large berths.

This million dollar battle in the college football market has caught the attention of a few antitrust enforcers on Capitol Hill. Consequently, the House of Representatives recently took on the task of examining whether or not there are serious antitrust problems involved with the BCS system that could potentially exclude teams such as those in the MAC conference from major bowl game participation. In particular, the House Judiciary oversight committee is currently reviewing the antitrust laws as they apply to college athletics. A hearing was held early last month, which fostered much discussion about the anticompetitive aspects of college sports conferences.

This review was prompted, in part, by the University of Miami's announcement that it would be leaving the Big East Conference for the ACC beginning in 2004. Miami's decision to join the ACC stirred up the pot in college sports conferences. Some claimed that free movement between/among conferences would destroy the ability of some schools to compete in Division I-A football. Others charged that the most popular football programs have become money-driven entertainment profit centers that shortchange the academic interests of student athletes. In addition, opponents of the Miami switch claimed that the BCS was partially to blame for this ACC-Big East battle.

Under the BCS arrangement, six of the eight slots in the Fiesta Bowl, the Orange Bowl, the Rose Bowl and the Sugar Bowl are reserved annually for the

champions of the ACC, Big East, Big Ten, Big 12, Pacific-10 and Southeastern Conferences. The remaining two slots are open and may be filled by any Division I-A college football team. As a result, of the 56 bowl slots available to Division I-A college football teams, the BCS controls the four major and most lucrative bowl games, including the national championship game.

Originally, the BCS was established in 1997 to create a more objective basis for selecting a Division I-A college football national champion. Opponents of the system, however, contend that the BCS structure creates unfair disparities between BCS and non-BCS institutions. College football games, particularly post-season ones, generate hundreds of millions of dollars in annual revenue for Division I-A schools, mostly from exclusive television broadcast contracts. Thus, schools that are not members of one of the six BCS conferences are denied equal access to the same revenue from television broadcasts and national clout as those with membership privileges in the BCS.

According to Steve Young, a former NFL and Brigham Young University ("BYU") quarterback who testified at the September 4 congressional hearing, the BCS generated \$109 million in revenue during the 2002-2003 season. Of that, \$104 million went to 64 schools coming from BCS conferences, while only \$5 million was distributed to the remaining 54 schools in the five non-BCS conferences and independent institutions. Young testified that the \$5 million failed to pay for expenses at those schools, and he was told that non-BCS schools each lost an average of \$1 million in their football programs. Young was chosen to testify at the hearing on the Hill because he was the quarterback for the 1984 BYU football team, a member of the Mountain West Conference that was reluctantly voted No. 1

because none of the bigger football programs had a great season that year.

The projected revenue for the four 2004 BCS bowl games is \$90 million. It is estimated that only \$6 million of this amount will go to the 55 non-BCS Division I-A schools, whereas over \$80 million will go to the 62 BCS schools. Curiously, in the five year history of the BCS, no team from a non-BCS conference has played in a BCS bowl game. Hence, the House oversight committee's role is to examine whether the disparity in revenue affects the level of athletic talent non-BCS schools can recruit, resources for academic facilities and student aid, and potential coach salaries.

The Supreme Court has previously held that intercollegiate athletic programs and associations are subject to antitrust scrutiny. Intercollegiate athletic conferences are regional groupings of similarly-situated member institutions where athletes compete against other conference members. Opponents of the BCS system insist that the present system governing the Division I-A college football championship and the major post-season bowl pairings may be purposefully exclusionary and violate the antitrust laws. As mentioned above, college football generates millions of dollars in annual revenue, most of which is income derived from exclusive TV broadcasting rights. Profit generated by these football programs flows back to participating schools, bestowing on those institutions a wide range of pecuniary benefits.

Reportedly, the 63 BCS schools have earned approximately \$450 million since they began being BCS members five years ago, while the 53 Division I-A non-BCS schools have shared earnings of \$17 million. Opponents of the BCS system contend that the BCS has created a substantial financial gap between BCS and non-BCS schools. The gap exists despite the fact that the BCS and

non-BCS schools need each other in order for intercollegiate football to succeed. In fact, as evidenced by recent upsets of prestigious programs by smaller MAC teams, when BCS and non-BCS schools play against one another, they demonstrate that the schools are quite competitive.

Proponents of the BCS argue, however, that the value of the revenue derived from the BCS bowl games exists solely because of the BCS arrangement. TV networks, advertisers, corporate sponsors, and fans perceive the national championship game to be more valuable than any single bowl game alone that cannot guarantee a national championship arrangement. Such a system existed before the BCS was created to match the number 1 and number 2 teams in the nation in a traditional bowl game. In addition, these networks, advertisers, sponsors, and viewers perceive the other BCS bowl matchups involving highly regarded teams more exciting as well and are also willing to pay higher prices to air, advertise during, sponsor, or watch those games. Hence, proponents of the BCS arrangement argue that it is a new product that is highly valued by consumers of football.

By design, college football can be exclusive. Hence, it will be interesting to see how this battle - usually waged on a football field - plays out on Capitol Hill.

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## **ELEVENTH CIRCUIT HOLDS “REVERSE PAYMENTS” TO SETTLE INFRINGEMENT LITIGATION UNDER THE HATCH-WAXMAN ACT NOT *PER SE* ILLEGAL**

In a decision that puts it squarely at odds with the Sixth Circuit, the Eleventh Circuit has held that “reverse payments” to an alleged infringer to stay off the market

are not *per se* illegal under the antitrust laws. *Valley Drug Co., et al. v. Geneva Pharmaceuticals*, Case No. 02-12091 (11th Cir. September 15, 2003). *Valley Drug* is the latest of a series of decisions involving patent settlements triggered by the unique framework of the Hatch-Waxman Act. *Compare In re Cardizem* 332 F. 3d. 896 (6th Cir. 2003) (holding similar agreements *per se* illegal). This is an area that has also generated considerable enforcement activity by the FTC, including the agreement at issue in the *Valley Drug* case itself. See *In re Abbott Laboratories*, FTC Docket No. C3945.

In reversing and remanding the lower court’s decision granting summary judgment in favor of plaintiffs on the grounds that such agreements were *per se* illegal, the Eleventh Circuit concluded that the *per se* finding was inappropriate because the settlement agreements did not exceed the exclusionary scope of the patents themselves. It further stated that payments from patentees to infringers to settle may be justified since, under the Hatch-Waxman Act, the alleged infringer has not yet caused the patentee any harm and the patentee does not have a damages claim to use as bargaining leverage. The fact that one of the patents at issue was held invalid did not dissuade the Eleventh Circuit from this conclusion since “exposing settling parties to antitrust liability for the exclusionary effects of a settlement reasonably within the scope of the patent merely because the patent is later declared invalid would undermine the patent incentives.” Slip Op. at p. 31.

The marketing and sale of pharmaceutical drugs requires the approval of the Food and Drug Administration (“FDA”). Under the Hatch-Waxman Act, 21 U.S.C. § 355(j), a generic manufacturer of a branded drug is exempted from infringement suits during the FDA testing process (35 U.S.C. § 271(e)(1)), but Congress also allowed extension of patent terms to

compensate patent holders for the loss of that right. The Hatch-Waxman Act requires the patentee to submit patent information for filing in the FDA Orange Book. The generic applicant must then "certify" to such patents prior to FDA approval. If the certification is under Paragraph IV - that the listed patent is either invalid or not infringed - the patentee has 45 days to file an infringement suit. If an infringement suit is filed, this delays FDA approval of the generic another 30 months, or until there is a court decision that the patent is either invalid or not infringed. The final wrinkle in this unusual statutory scheme is that the first generic to file a paragraph IV and successfully challenge the scope or validity of a patent is given a 180 day exclusivity period.

In a nutshell, the Hatch-Waxman Act permits infringement suits before the infringer has made any sales. Until that issue is resolved, other generics are effectively barred from market entry due to the 180 day exclusivity period granted the first one. This statutory framework thus creates a series of incentives for the patentee and the first generic to "settle" their lawsuit by payments from the patentee to the infringer to stay off the market, thereby creating a "bottleneck" that blocks entry by other generics. Unlike the usual settlement where a defendant pays a plaintiff, the payments here flow from the plaintiff to the defendant and hence the phrase "reverse payments".

In *Valley Drug*, the patent owner was Abbott Laboratories ("Abbott"), who manufactured a brand name drug named Hytrin. Abbott filed an infringement suit against the first generic, Geneva Pharmaceuticals, while another generic, Zenith, filed suit to delist Abbott's patents from the Orange Book, a suit in which Abbott counterclaimed for infringement. While the infringement litigation was pending, Abbott reached an agreement with Geneva whereby it would pay Geneva \$4.5 million monthly until one of several events

occurred, including one that Geneva obtain a court judgment that it did not infringe the patent. At about the same time, Abbott reached an agreement with Zenith to pay it \$6 million every three months in return, *inter alia*, for dismissal of the delisting litigation and Zenith's acknowledgement of the validity of each of its patents. Geneva also agreed not to transfer or otherwise give up its 180 day exclusivity right, and both agreed not to sell or distribute any pharmaceutical product with the same active ingredient as Hytrin, and not to aid others in challenging Abbott's patents. After the agreements were signed, the Geneva court found one of Abbott's patents invalid, a ruling later affirmed by the appellate court.

The District Court characterized these agreements as market allocation agreements between competitors, essentially allocating the entire market to Abbott, who then shared its monopoly profits with the other two companies. 164 F. Supp. 2d 1340 (S.D. Fla. 2000). Since market allocation agreements are *per se* illegal, the court granted plaintiff's summary judgment motion. *See also In re Cardizem* (affirming summary judgment in reverse payments case involving similar agreements).

In its September 15, 2003 decision, the Eleventh Circuit reversed and remanded the lower court's rulings. While it recognized that payments to competitors to exit or refrain from entering the market are generally *per se* illegal, this was the case where one of the parties owns a patent, and thus has a lawful right to exclude others. Since Geneva and Zenith agreed not to market infringing products only until the patent either expired or was held invalid, the agreements themselves were "no broader than the potential exclusionary effect of the [207] patent itself." Slip Op. at 25. The Eleventh Circuit stated that the district court failed to consider the exclusionary power

of the patent in its analysis, and so it reversed the lower court's *per se* condemnation.

The plaintiffs argued that, since one of the patents was declared invalid after the agreements were entered into, Abbott therefore never had any patent rights and thus the antitrust analysis need not consider the patent. The Eleventh Circuit rejected this argument, stating that the mere invalidity of the patent does not render the patent irrelevant to the antitrust analysis. It noted that the only circumstances in which the Supreme Court has held that patent immunity can be pierced is for enforcement of a patent with knowledge that it has been procured by fraud on the patent office under the *Walker Process* doctrine. Accordingly, a "good faith procurement furnishes a complete defense to the antitrust claim." Slip Op. at p. 29. The Eleventh Circuit further noted that imposing antitrust liability for the exclusionary effects of a settlement within the patent monopoly because the patent was declared invalid would "undermine patent incentives". *Id.*

Finally, the Eleventh Circuit rejected plaintiff's argument that the "reverse" nature of the payments themselves justified *per se* treatment. Citing *In re Ciprofloxacin*, 261 F. Supp. 2d. 188 (E.D.N.Y. 2003), it noted the "asymmetries" of litigation risk created by the Hatch-Waxman Act, and that one could not conclude here that the size of the payments alone meant the infringement suits lacked merit. Moreover, such payments may well be reasonable compensation to the generics for lost profits during the course of the litigation. The Eleventh Circuit noted that the Sixth Circuit took a contrary view in *Cardizem*, but again emphasized that the antitrust analysis cannot ignore the scope of the patent exclusion.

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## FTC WILL USE DISGORGEMENT AS A REMEDY FOR ANTITRUST VIOLATIONS

The FTC issued a unanimous policy statement on the use of monetary equitable remedies, such as disgorgement and restitution, in competition cases involving the Hart-Scott-Rodino ("HSR") Premerger Notification Act, the FTC Act and the Clayton Act. This basically means that the FTC will seek forfeiture of profits for antitrust violations under certain extreme circumstances. While it has long used this power in consumer protection cases, the FTC has rarely applied the remedy to antitrust matters, with some antitrust practitioners and scholars even questioning whether the FTC has the authority to seek disgorgement in antitrust cases at all.

However, the FTC made it clear on July 31, 2003, when it issued its policy statement that affirms disgorgement as a viable option in antitrust prosecutions when the violation is clear, when the remedial payment can be calculated, and when the use of the power will aid consumers. The FTC also points to examples where disgorgement has been used in the past. The Commission sought and received monetary disgorgement in two relatively recent cases, the first involving alleged illegal anticompetitive conduct by Mylan Labs, Inc. (*FTC v. Mylan Labs, Inc.*, No. 1:98CV03114 (TFH), D.D.C. Feb. 9, 2001) and the second involving alleged HSR violations by the Hearst Trust (*FTC v. The Hearst Trust*, No. 1:01CV00734 (TJP), D.D.C. Nov. 9, 2001). In both matters, the FTC staff allegedly found evidence of egregious conduct used to purposely violate the antitrust laws.

Therefore, despite the policy statement, corporate executives should not expect to see disgorgement demands in every antitrust prosecution. The Commission's statement makes clear that the FTC would only use disgorgement as an enforcement tool in

exceptional cases or cases that clearly violate the antitrust laws. The FTC will more than likely continue to rely on more familiar remedies.

The Commission statement reiterates that HSR violations and illegally consummated mergers are both subject to disgorgement. This means that corporate counsel and executives should be wary of the risks associated with consciously violating the HSR rules and merger laws.

The Commission identifies three factors that will be considered in determining whether to seek disgorgement. First, disgorgement is an appropriate remedy for clear violations of the antitrust laws. A clear violation occurs when a reasonable party would expect the conduct to be illegal at the time it occurs. Conduct that only appears illegal in hindsight is insufficient to warrant disgorgement, as the key purpose of the disgorgement remedy is to remove the incentive to commit violations by demonstrating to the potential violator that unlawful conduct will not be profitable. The purpose would not be served if disgorgement was used in situations that balance anticompetitive harm with procompetitive benefits. Second, there must be a reasonable basis for calculating the amount of remedial payment. However, in calculating the amount of ill-gotten profits arising from an anticompetitive merger, the FTC statement indicates it will not require so much precision in calculating such profits that the agency effectively forecloses using disgorgement as a remedy. Third, the FTC will consider the value of seeking monetary relief in light of other remedies available, including private actions and criminal proceedings. Thus, disgorgement is appropriate when private litigation is unlikely to fully compensate victims or when antitrust violators are in a position to keep their illegal gains.

In summary, the FTC is sending a message to corporate counsel and executives that the risks of violating the antitrust laws are higher with disgorgement as a new potential remedy for exceptional cases.

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### **FTC CHARGES SOUTH CAROLINA BOARD OF DENTISTRY FOR DEPRIVING CHILDREN OF PREVENTIVE DENTAL CARE**

In a move to restore competition to the provision of preventive dental services to low-income children in South Carolina, the FTC filed an administrative complaint against the South Carolina State Board of Dentistry (the "Board") on September 12, 2003. The complaint alleged that actions by the Board restrained competition and limited the delivery of preventive dental services to school-aged children in South Carolina. The FTC challenged a regulation passed by the Board that prohibited provision of cleaning, sealant, fluoride, and other preventive oral health care by a licensed dental hygienist in a school setting unless the patient had been examined by a dentist within the previous 45 days and a treatment plan had been established.

According to the administrative complaint, the regulation promulgated by the Board sought to reinstate restrictive artificial barriers on the provision of preventive dental care services in schools that had been rejected by the South Carolina General Assembly in 2000. In 1988, in an effort to increase the delivery of preventive dental care to children, South Carolina enacted a law permitting dental hygienists to provide preventive services in schools. This law,

however, only permitted hygienists to provide these services if the patient had been examined by a dentist within the previous 45 days, and the dentist authorized the procedure. As a result, the 1988 law did not significantly increase the delivery of preventive dental services to children in South Carolina.

Recognizing that requiring an examination and approval by a dentist limited the ability of hygienists to provide oral health care services, South Carolina amended its law in 2000 by dropping these requirements. Under the new South Carolina law, a child would be able to receive preventive dental care in school if the child's parents provided written permission.

After the revision of the law, the Board, via an emergency regulation, reinstated the restrictions that the General Assembly had removed. Although the emergency regulation was for a limited duration and has subsequently lapsed, the Board continued to assert that preventive dental care in schools could only be provided by a hygienist where a licensed dentist has seen the patient and provided a treatment plan.

The Board is comprised mainly of dentists practicing in South Carolina and regulates both dentists and dental hygienists in the state. The administrative complaint makes clear that the FTC views the Board's action as an attempt to artificially insulate dentists from competition by hygienists for services that hygienists are licensed and qualified to provide. In its complaint, the FTC is seeking an order requiring the Board to cease and desist from imposing the requirement that a dentist must see the patient and approve the treatment before a hygienist may provide preventive dental services in a school setting.

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## **FTC CHAIRMAN LAUDS LAUNCH OF GENERIC PAXIL ALTERNATIVE**

On September 11, FTC Chairman Timothy Muris issued a public statement that celebrated the Apotex Corporation's launch of its generic equivalent to the brand name drug Paxil. Paxil is manufactured by GlaxoSmithKline plc ("Glaxo"), and is a widely-used anti-depressant that works by inhibiting and balancing certain chemicals in the brain linked to depression, obsessive-compulsive disorder and other mental disorders. Apotex announced the launch of its 10mg, 20mg, 30mg and 40mg doses of paroxetine hydrochloride tablets on September 8.

While it is slightly unusual for the FTC to make this type of public statement, Apotex's launch of its Paxil generic equivalent was the direct result of the FTC's active role in challenging actions that the agency believed to be abusive of the FDA's generic drug approval process, as initially set out by the Hatch-Waxman Act in 1984. As mentioned in the second article of this *Antitrust Review*, under the Hatch-Waxman Act, for every patent listed in the FDA's Orange Book, potential manufacturers of generic equivalents for the drug can file for approval to market their generic therapeutic equivalents to the patented drug if they can certify that these equivalents do not infringe on the patent in question. However, if the patent owner initiates patent infringement litigation against such a generic manufacturer, the FDA must automatically delay its approval of that generic manufacturer's product for 30 months after the patent holder first received notice of the generic manufacturer's FDA application, unless before that time the patent expires or a court holds it to be invalid or not infringed.

In July 2002, the FTC issued its *Generic Drug Entry Prior to Patent Expiration* study that identified specific

Orange Book-listed patents the agency believed may have been improperly listed as a basis for a 30-month stay of generic equivalent approval. The study specifically identified five Orange Book patents listed for Paxil that resulted in prohibiting the FDA from approving any generic equivalent to the popular anti-depressant for 65 months.

In October 2002, the FDA published a proposed rule-making proceeding to eliminate multiple 30-month stays identified in the FTC's study as being harmful to consumers. In June 2003, the FDA published its final rule that limits the delay of FDA approval of a generic equivalent to a *single* 30-month period for any brand-name drugs. The final rule also confirmed that certain types of patents - "product-by-process" patents - can only be listed in the Orange Book if the product being claimed is a "novel" one.

According to Chairman Muris' statement, Glaxo requested that the FDA de-list three of its Paxil patents from the Orange Book shortly after the issuance of the final rule. The FDA then granted Apotex its approval to market its Paxil equivalent.

The FDA's approval of Apotex's generic Paxil equivalent is significant not only because it allows Apotex to compete with Glaxo, but speeds up the FDA approval process for other generic manufacturers of Paxil equivalents. Under the Hatch-Waxman Act, Apotex has a 180 day period of exclusivity as the only FDA-approved manufacturer of its generic Paxil equivalent. However, other manufacturers of generic Paxil equivalents can then enter the market after that exclusivity period ends. The result, according to the FTC's study, is increased competition and lower prices for consumers.

Chairman Muris' statement regarding Apotex's launch of its generic Paxil equivalent lauded the FDA for "promoting the timely approval of low-cost generic alternatives," but also stated that the launch was "immediate and tangible evidence that the FDA rule is working to accelerate generic drug competition." Rest assured that the FTC will not only be monitoring the prices in the Paxil/paroxetine market, but will enthusiastically continue its policy goal of promoting competition in various pharmaceutical markets.

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## CONTROVERSY OVER NEW MEDIA RULES CONTINUES

On September 3, 2003, the U.S. Court of Appeals for the 3rd Circuit in Philadelphia issued a stay on the implementation of the new media ownership rules adopted by the Federal Communications Commission ("FCC") in June 2003. The order was issued the day before the new rules were to take effect.

The case, brought by the Prometheus Radio Project, a public interest group, was heard in the 3rd Circuit by lottery and brought the FCC's plans to implement the new rules to a screeching halt. After lifting the summer's freeze on assignment and transfer applications in August, the Court's ruling sent the FCC and its staff scurrying to re-freeze the applications in order to reimplement the old application forms and old rules. By mid-September, the old forms were back online and in use while the case was being heard in Philadelphia.

Meanwhile, the Senate returned from August recess bent on expressing its displeasure with the new rules.



On September 16, the Senate voted 55-40 to overturn the new ownership rules. Now, however, the resolution faces two hurdles. First, it must pass the House, which is unlikely given the House Republican leadership's continued warnings that the resolution is dead on arrival. Second, the Bush Administration issued an unambiguous veto threat in early September. The Senate vote falls well short of the two-thirds necessary to override a presidential veto. The political gamesmanship will continue while the case winds its way through the 3rd Circuit.

So, as it stands now, the new media ownership rules adopted in June are not in effect. The FCC is evaluating license transfer applications under the old rules, while the case is on appeal. In fact, the FCC has already approved a major media merger under the "new-old" rules, by issuing an order permitting Univision Communications Inc. to complete its acquisition of Hispanic Broadcasting Corp.

The controversy surrounding the new rules seems to be taking its toll on Chairman Michael Powell. Rumors continue to circulate that he is planning to resign. Late in September, President Bush issued a statement of support for the Chairman and the new media rules. As any veteran Washington political observer will tell you, a statement of support for a political appointee is a sure-fire sign that the end is near. The long, humid DC summer has taken its toll.

It is likely that new media rules, in some form or fashion and at some point in the future, will be adopted and implemented - perhaps under the guidance of a new FCC Chairman.

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## WHITE COLLAR CRIME CONTINUES AS A PRIORITY FOR THE ANTITRUST DIVISION

The Antitrust Division continues to send a strong message to corporations and corporate executives engaged in price-fixing and market allocation schemes. In fact, recent investigations of the carbon products industry and the wholesale distribution industry have resulted in guilty pleas and indictments for both offenses.

### Four Former Executives of UK Corporation Charged With Obstructing Price-Fixing Investigation of the Carbon Products Industry

Ian P. Norris, former Chief Executive of Morgan Crucible Company plc ("Morgan"), and Robin Emerson, a former marketing employee for Morganite Electrical Carbon Ltd., both residents and citizens of the United Kingdom, were indicted by a federal grand jury in Philadelphia on September 24, 2003 on charges of conspiracy to obstruct justice and of corruptly persuading others to destroy or conceal documents to prevent their use by the grand jury. Norris was also charged with witness tampering. Two other individuals, Jacobus Johan Anton Kroef, a Dutch citizen and resident of the Netherlands, and F. Scott Brown, a U.S. citizen and former Global President of Morgan Advanced Materials and Technology, Inc., a U.S. subsidiary of Morgan, were also charged with obstructing the grand jury investigation of a conspiracy by Morgan to fix the price of various carbon products sold in the United States and elsewhere. Kroef was charged with witness tampering. Brown was charged with aiding and abetting in the destruction of documents to prevent their use by a grand jury. Both Kroef and Brown have agreed to plead guilty.

According to the indictments, the co-conspirators created a task force to search through Morgan's files to remove and conceal or destroy any documents or records that they found reflected the pricing agreement the company had with its competitors. According to the charges, the co-conspirators also prepared a "script" for the co-conspirators to follow in the event that they were questioned during the course of the investigation. This "script" falsely characterized the price-fixing meetings as joint venture meetings and deliberately omitted any references to the pricing discussions held with competitors. The indictments charge that the "script" was given to competitors who participated in the price-fixing agreement with instructions that they follow the script to try to convince the Antitrust Division to close its investigation and prevent the investigation in the United States from spreading to the European antitrust authorities.

In addition, the indictments also alleged that in order to prepare themselves for questioning by investigators, the Morgan co-conspirators conducted a rehearsal at which they were questioned and cross-examined about the events described in the false "script." During the rehearsal, Norris expressed his concern that certain Morgan employees involved in the price-fixing conspiracy might disclose the truth to investigators, and thereafter implemented a plan to separate these employees from the company before they were questioned, either by having them retire or making them consultants.

Both Norris and Emerson are charged with conspiring to obstruct justice in violation of 18 U.S.C. § 371, which carries a maximum penalty of five years imprisonment and a \$250,000 fine, and concealment or destruction of documents in violation of 18 U.S.C. § 1512(b)(2)(B), which carries a maximum penalty for an individual of 10 years imprisonment and a \$250,000 fine. In addition,

Norris is charged with witness tampering in violation of 18 U.S.C. § 1512(b)(1), which carries a maximum penalty for an individual of 10 years imprisonment and a \$250,000 fine. Kroef was charged with witness tampering in violation of 18 U.S.C. § 1512(b)(1), which carries a maximum individual penalty of 10 years imprisonment and a \$250,000 fine. Brown was charged with concealment or destruction of documents in violation of 18 U.S.C. § 1512(b)(2)(B) and 18 U.S.C. § 2(a), aiding and abetting, which carries a maximum penalty for an individual of 10 years imprisonment and a \$250,000 fine.

The Department's prosecution of these four individuals is the latest to arise out of a multi-year investigation into suspected price-fixing in the carbon products industry. In November 2002, Morganite, Inc. of Dunn, North Carolina, pled guilty and was sentenced to pay the statutory maximum fine of \$10 million for its role in the price-fixing conspiracy. Morgan also pled guilty to obstruction of justice and was sentenced to pay the statutory maximum fine of \$1 million.

### **New York State Periodical Distributor Pleads Guilty To Market Allocation Charges**

On September 26, 2003, Empire New Corporation ("Empire") of Buffalo, New York was charged in a two-count felony case in the U.S. District Court in Syracuse, New York. The case charged that Empire participated in a conspiracy to suppress and eliminate competition in the wholesale distribution of magazines, other periodicals and books in Western New York State from January 1999 to mid-2000. In addition, Empire was charged with participating in a conspiracy to eliminate competition for the contract to supply magazines, other periodicals and books at the Pittsburgh International Airport between March 1999 and mid-2000. Under the plea agreement, Empire is cooperating in the ongoing investigation into violations of antitrust laws and other related criminal laws

in the wholesale magazine distribution industry. As a wholesale distributor, Empire receives magazines, other periodicals and books directly from publishers and national distributors and then distributes them to retailers for sale to the general public.

According to court papers, Empire and another wholesale distributor carried out the market allocation scheme by engaging in discussions regarding the allocation of markets agreeing in those discussions to allocate markets, and then withdrawing from servicing some customers for the purpose of implementing the agreed-upon market allocations for wholesale distribution of magazines, other periodicals and books in Western New York State. Empire is also charged with participating in a conspiracy to suppress and eliminate competition by agreeing to refrain from wholesale distribution of magazines, other periodicals and books at the Pittsburgh

International Airport in Western Pennsylvania in exchange for another wholesale distributor not expanding its market share in Buffalo, New York, the home territory of Empire.

Empire's charge of violating Section One of the Sherman Act carries a maximum fine of \$10 million per count for a corporation. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by victims of the crime, if either of those amounts is greater than the statutory maximum. The Empire charges are the result of an ongoing investigation of the wholesale magazine distribution industry conducted by the Department's Cleveland Field Office.

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## **RECENT ACTIVITIES**

### **DOJ ANTITRUST HIGHLIGHTS**

- On September 29, the Antitrust Division reached a settlement with Alcan Inc. that requires Alcan to divest Pechiney S.A.'s aluminum rolling mill in Ravenswood, West Virginia, if Alcan's pending \$4.6 billion tender offer for Pechiney is successful. The deal has already been approved in Europe subject to conditions that included a requirement that Alcan divest certain Alcan or Pechiney aluminum rolling mills in Europe. The Antitrust Division alleged that the acquisition, as originally proposed, would have substantially lessened competition in the development, production, and sale of brazing sheet, an aluminum alloy used in fabricating radiators, oil coolers, heaters, and air conditioning units for motor vehicles. The Division also alleged that Alcan's acquisition of Pechiney would reduce the number of major North American manufacturers of brazing sheet from four to three, and increase the prospect of future cooperative brazing sheet price increases to the detriment of consumers. According to the complaint, Alcan is a recent entrant into the brazing sheet market in North America. Its entry has sparked an intense competitive rivalry, and resulted in lower prices and higher quality. Therefore, the settlement agreement resolves the Division's competition concerns, as the divestiture of Pechiney's mill will preserve competition for brazing sheet sold in North

## RECENT ACTIVITIES

### DOJ Antitrust Highlights (CONTINUED)

America. The Antitrust Division cooperated closely with the European Commission and the Canadian Competition Bureau in its review of this transaction. The deal is expected to be completed in late November 2003.

- David L. Whitt of Little Rock, Arkansas was charged with wire fraud in connection with a kickback scheme used to defraud a Troy, Michigan audio-visual company on September 29. The charge resulted from Whitt's alleged participation in a scheme in which an executive of a Troy audio-visual company solicited and received kickbacks from vendors seeking to do business with the Troy audio-visual company in exchange for the executive's support in obtaining contracts with the company. Through the scheme, the Troy company executive allegedly obtained or sought to obtain more than \$2.5 million in kickbacks. According to the charge, between June 5, 2000 and July 6, 2000, Whitt placed, or caused to be placed, one or more telephone calls to facilitate and to ensure the wiring of \$18,000 from a vendor located in the Eastern District of Michigan to Pennsylvania and ultimately to Arkansas. The charge resulted from an ongoing federal antitrust investigation of anticompetitive conduct in the video duplicating and replicating industries. The investigation is being conducted by the Antitrust Division's Cleveland Field Office with the assistance of the Detroit office of the FBI.
- On September 18, Rhône-Poulenc Biochimie S.A. ("RP Biochimie"), a subsidiary of the French-based pharmaceutical company, Aventis S.A., agreed to plead guilty and pay a \$5 million fine for participating in a conspiracy to fix prices and allocate customers. The company allegedly fixed prices and allocated customers for pharmaceutical grade methyl glucamine, a chemical used to slow the rate at which dyes disperse throughout the body during x-rays and other medical imaging procedures. On the same day, Eric Descouraux, the company's former sales and marketing director for active pharmaceutical ingredients, was indicted for his role in the same conspiracy. According to the Division, employees of RP Biochimie met annually in Europe over a nine-year period with representatives from a competitor to agree on the prices each would charge their customers worldwide. The conspirators allegedly exchanged sales and customer information in order to monitor and enforce adherence to the agreed-upon prices and allocation of customers.
- On September 16, the Antitrust Division reached a settlement with General Electric Corporation ("GE") resolving the Division's competitive concerns and allowing the company to proceed with its acquisition of Instrumentarium. GE agreed to divest two Instrumentarium OYJ businesses: (1) its Spacelabs patient monitor business and (2) its Ziehm C-arm business. Without the required divestitures, the acquisition would have lessened competition in the sale and development of important medical devices such as critical care monitors and mobile C-arms. Critical care patient monitors are medical devices used by hospitals and other healthcare facilities to measure and display the vital physiologic signs of patients in serious medical condition. Mobile C-arms developed for basic surgical and vascular procedures are full-size, fluoroscopic x-ray machines that provide continuous, real-time viewing of patients during those procedures. According to the complaint, GE and Instrumentarium are two of only a few competitors that provide these

## RECENT ACTIVITIES

### DOJ Antitrust Highlights *(Continued)*

important medical devices to healthcare providers and have competed head to head on price, product features and service. The divestitures will preserve competition.

- On September 5, First Data Corp. and Concord EFS, Inc. announced that they have each certified substantial compliance to the Antitrust Division with its request for additional information pertaining to First Data's pending deal with Concord. The move starts a 30 day waiting period for the Division to determine whether to block the deal in court, to negotiate a settlement with the parties within 30 days or to allow the waiting period to expire without any modifications. If negotiations for a settlement agreement between the parties to the merger and the Antitrust Division intensify, the parties could extend the waiting period voluntarily. Reportedly, the Antitrust Division is investigating the combination of First Data's NYCE electronic fund transfer network with Concord's Star network. It has long been speculated that a divestiture of NYCE would resolve the Division's concerns, however, it is still not entirely clear whether a divestiture of NYCE would be enough to satisfy the Division.
- On August 27, the Division announced that three Fort Worth companies that own and operate retail automotive replacement glass stores were charged with participating in conspiracies to raise and maintain the prices of automotive replacement glass in the central North Texas and Lubbock areas of Texas. Windshield Sales and Service Inc., Windshield Sales & Service of Dallas Inc. and Mesquite Auto Glass Inc. were charged with conspiring with others in central North Texas from February 1998 until May 1998 to raise and maintain prices for the purchase of automotive replacement glass. Windshield Sales & Service Inc. was charged with conspiring with competitors to raise and maintain the prices of automotive replacement glass in the Lubbock area from March 1998 until May 1998. Automotive replacement glass is sold to retail customers for the replacement of windshields, side glass, back glass, and other types of automotive glass in pick-up trucks, passenger vehicles and other vehicles. The prosecution of these companies is the latest to arise out of an ongoing investigation into suspected price fixing in the windshield replacement glass industry.

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### FTC ANTITRUST HIGHLIGHTS

- On September 24, the FTC accepted a consent order requiring a group of surgeons in the State of Washington to refrain from colluding on prices in contract negotiations with health insurers. The effect of the alleged collusion was to increase health costs for patients in Yakima, Washington, according to the proposed Commission consent order.

## RECENT ACTIVITIES

### FTC Antitrust Highlights (*Continued*)

The parties to the proposed order include Surgical Specialties of Yakima, P.L.L.C. ("SSY") and two general surgical members, Cascade Surgical Partners, Inc., P.S. and Yakima Surgical Associates, Inc., P.S. The proposed order is designed to remedy SSY's allegedly anticompetitive collective-bargaining practices. SSY, a for-profit corporation founded in 1996, has 24 physician members practicing in five unrelated surgical specialties. The two general surgical practice groups are included in its membership. The FTC contended that SSY and the two general surgical members successfully coerced various health plans to increase the fees paid to the group's member physicians, thereby increasing the cost of medical care in the Greater Yakima area. Furthermore, the Commission alleged that SSY's members have continued to operate independent practices without significant clinical or financial integration. The Commission concluded, therefore, that the collusive negotiation of prices was not related to any efficiency-enhancing integration.

- On September 24, The FTC Premerger Notification Office posted on its website a notice relating to the correct language to use by HSR filers in their affidavits for non-801.30 acquisitions. The notice states that many HSR filers are using incorrect language. The Premerger Notification Office now urges filers to be certain that "affidavits assert that an agreement has been executed, and not simply that the filer is a party to an agreement, has entered into an agreement, or that pursuant to an agreement, an acquisition will occur." The FTC's Premerger Notification Office reminded filers that an incorrect or improper affidavit will delay start of the waiting and may prolong HSR review.
- On September 23, the FTC's State Action Task Force issued its State Action Report urging clarifications of the state action immunity doctrine. Chairman Muris established the Task Force in 2001 to examine the state action doctrine and in particular to review state action issues raised by FTC investigations and cases. The September 23rd Report calls for more rigorous application of the "clear articulation" and "active supervision" requirements of the state action doctrine.
- In an FTC advisory opinion issued on September 23, the FTC's Bureau of Competition permitted the Bay Area Preferred Physicians ("BAPP") to establish a "messenger" arrangement to minimize costs associated with contracting between physicians and health plans and other third-party payors. BAPP is a non-profit mutual benefit society formed by six county medical societies in seven adjacent counties in the San Francisco Bay area. BAPP's proposal involved establishing a physician network to create new contracting opportunities between medical society physician members and third-party payors in Northern California. A non-physician employee of BAPP will act as a "messenger" to convey payor offers to physician members and to communicate to payors which BAPP member will accept the payor's offer. BAPP will execute and administer a contract only if 50 percent or more of the physicians accept the payor's offer. Most importantly, BAPP's proposal indicated that it will neither negotiate price or price-related terms on behalf of physician members nor facilitate horizontal agreements among the physicians in responding to the payor's offer. BAPP also agreed not to disclose to its members who accepted a contract with any payor. Though the Bureau of Competition

## RECENT ACTIVITIES

### FTC Antitrust Highlights (Continued)

indicated that BAPP's proposed administration of contracts could, in some instances, constitute an information-sharing device, on balance it did not appear to constitute an unlawful price agreement or to be designed to foster anticompetitive action by member physicians.

- On September 23, the Commission announced its acceptance of a proposed consent order that would allow the proposed \$1.89 billion acquisition by DSM N.V. ("DSM") of Roche Holding AG's Vitamin and Fine Chemical Division, provided DSM divests its phytase business to BASF AG within 10 days of the consummation of the transaction. DSM and Roche are in strategic alliances that produce and market phytase. Phytase is an enzyme added to poultry and swine feed to promote digestibility of phosphorous and other nutrients that are vital to livestock production. According to the FTC, without the consent order requiring divestiture, the DSM/Roche transaction would lead to DSM being part of alliances that supply over 90 percent of the \$150 million phytase market world-wide. The Commission believes that BASF, the acquirer of DSM's divested phytase assets, is well positioned to immediately become an independent competitor in the phytase market. BASF, as an existing alliance partner of DSM, is already responsible for marketing and selling DSM's phytase enzyme and has knowledge of DSM's research, development and manufacturing efforts related to phytase and can assume these responsibilities immediately. The FTC asserts that BASF poses no separate anticompetitive concerns as a purchaser of the phytase assets.
- On September 17, the FTC issued an administrative complaint against a group of Texas physicians, charging that they unlawfully restrained competition that increased the cost of health care to consumers in the Fort Worth area. The FTC complaint alleges that the North Texas Specialty Physicians ("NTSP") violated federal law by negotiating agreements among its participating physicians on price and other terms, by refusing to deal with payors except on collectively agreed-upon terms, and by refusing to submit payor offers to participating physicians unless the terms complied with NTSP's minimum fee standards. NTSP, a non-profit corporation funded through fees paid by participating physicians, is composed of approximately 600 physicians. A physician may participate in NTSP-payor contracts by granting NTSP the authority to arrange for his or her services to be provided to consumers covered by the payors. The Commission's complaint asserts that almost all of NTSP's participating physicians participate in some non-risk contracts, for which NTSP has sought to negotiate and has often obtained higher fees and other more advantageous terms than its individual physicians could obtain by negotiating individually with payors. The FTC also alleges that NTSP discourages payors and participating physicians from negotiating directly with one another. Furthermore, it charges that none of NTSP's negotiating practices significantly increase efficiency because its participating physicians are not integrated in ways that would increase the quality and reduce the cost of health care in the Fort Worth area.
- On September 9, the FTC announced it had settled charges that South Georgia Health Partners, L.L.C. ("SGHP"), a physician-hospital organization ("PHO"), its five owner PHOs, and three associated physicians' independent practice

## RECENT ACTIVITIES

### FTC Antitrust Highlights *(Continued)*

associations ("IPAs") illegally entered into agreements to fix physician and hospital prices and to refuse to deal with third-party payors except on collectively agreed-upon terms. The Commission alleged that the collusive conduct of SGHP and the other respondents (PHOs and IPAs) harmed consumers in a region encompassing more than 550,000 people by causing physician and hospital prices to rise and denying consumers the benefit of unrestrained competition among providers of health care. The current order bars SGHP, the owner PHOs and the IPAs from engaging in similar anticompetitive conduct in the future. SGHP's membership consists of 15 hospitals (with approximately 2300 staffed beds) and approximately 500 physicians. SGHP operates in a very large section of southern Georgia. Each of the PHOs and IPAs are based in areas throughout southern Georgia. SGHP's physician members represents about 90 percent of all physicians practicing in the area.

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### FTC CONSUMER PROTECTION HIGHLIGHTS

- Judges Lee R. West of the U.S. District Court for District of Oklahoma and Edward W. Nottingham of the U.S. District Court for the District of Colorado have both ruled that the FTC's "Do-Not-Call" list prohibiting telemarketing calls is unconstitutional. The FTC has appealed both decisions, and Congress has enacted emergency legislation specifically providing the agency with the authority to create and administer the list. However, by not addressing telemarketing on behalf of charitable organizations, the government is attempting to bar one type of solicitation over another, a violation of the First Amendment, Judge Nottingham said. On September 26, the FTC said that it would appeal the decision, but according to legal experts, the constitutional issues may not be easily resolved. As the legal issues get sorted out, the Commission said consumers can continue to add their telephone numbers to the registry. For now, however, telemarketers are not required to comply. The Direct Marketers' Association has pledged that its members will voluntarily strive to comply with the list's requirements.
- On September 24, the FTC announced that Network Solutions, Inc. settled FTC charges that its deceptive marketing practices unlawfully tricked consumers into transferring their Internet domain name registrations to the company. The terms of the settlement permanently bar Network Solutions from misrepresenting that a consumer's domain name is about to expire or that the transfer of a domain name is actually a renewal. The order also requires the defendant to pay consumer redress pursuant to the terms of a previously settled class action lawsuit.
- America Online, Inc. ("AOL") and its subsidiary, CompuServe Interactive Services, Inc. ("CompuServe"), settled FTC charges on September 23 that they engaged in two separate unfair practices. The first allegation involved AOL's continuing to bill AOL Internet service subscribers after they asked to cancel their subscriptions. The other allegation



## RECENT ACTIVITIES

### FTC Consumer Protection Highlights *(Continued)*

involved the late delivery of \$400 rebates to consumers who signed up for CompuServe Internet service. Among other things, the proposed consent agreement requires the respondents to both promptly adhere to customers' cancellation requests and provide a reasonable basis for rebate time frames.

- On September 22, the FTC issued a Consumer Alert, "After a Disaster: Repairing Your Home," that warns consumers of potential "home repair rip-off artists" who may overcharge, perform shoddy work or skip town without finishing the job. After a natural disaster, the demand for qualified contractors usually exceeds the supply. And since many legitimate companies are thus booked for months, frustrated consumers do not take the necessary precautions when hiring contractors. The FTC alert, which is available at <http://www.ftc.gov/bcp/conline/pubs/alerts/dista1rt.htm>, offers several tips for such consumers seeking to repair their homes following a natural disaster.
- Certain Toronto-based telemarketers are banned from selling or telemarketing credit-related goods or services as part of a settlement with the FTC, as announced on September 22. The FTC charged several defendants, Beneficial Credit Services LLC, Platinum Express Benefits LLC and American Capitol Benefits LLC, and their principals, Viktor Golub, Armand Petrov and Golan Rabin, with targeting U.S. consumers with offers of guaranteed Visa or MasterCard credit cards with substantial credit limits for an advance fee. The FTC alleged that the defendants' practices violated the Telemarketing Sales Rule ("TSR") and the FTC Act. The settlement also prohibits the defendants from misrepresenting that, after paying a fee, consumers will, or are highly likely to, receive an unsecured major credit card. The order prohibits the defendants from future violations of the FTC Act and the TSR and requires the defendants to pay approximately \$190,000 for consumer redress. The settlement contains an avalanche clause that will trigger a \$6.4 million judgment if it is found that the defendants materially misrepresented their assets. The settlement also contains various recordkeeping provisions to assist the FTC in monitoring the defendants' compliance.
- On September 18, the FTC issued a Consumer Alert, "Fake Credit Report Sites: Cashing in on Your Personal Information," that warns consumers about the dangers of a high-tech scam known as "phishing." Some Web sites or unsolicited emails offering credit reports may be using these sites as a way to capture consumers' personal information. After stealing this information, they may sell it to others who may use it to commit fraud, including identity theft. The alert points out the precautions consumers should take when visiting sites or responding to email that offer credit reports.
- A proposed bill that would expand the investigative and enforcement authority of the FTC was examined on September 17 by a House subcommittee. The International Consumer Protection Act of 2003 would facilitate the exchange of information between the FTC and foreign governments during the investigation of cross-border fraud.

## RECENT ACTIVITIES

### FTC Consumer Protection Highlights (Continued)

The FTC would be able to provide and receive information, as the investigation warrants. Opponents, however, countered that the FTC already has broad investigative powers that can be applied to the cross-border concern.

- Consumers have registered more than 50 million phone numbers with the National "Do-Not-Call" registry, and in anticipation of the October 1 compliance requirements, nearly 5,000 telemarketers have purchased all or segments of the list, the FTC announced on September 17. Information about accessing telephone numbers and downloading files from the national registry is available at [www.ftc.gov/opa/2003/08/tmkraccessinfo.htm](http://www.ftc.gov/opa/2003/08/tmkraccessinfo.htm). Additional information is provided at [www.telemarketing.donotcall.gov](http://www.telemarketing.donotcall.gov), the telemarketer Web site. An updated chart showing the registrations for each state is available at [www.ftc.gov/opa/2003/09/030917dncstates.pdf](http://www.ftc.gov/opa/2003/09/030917dncstates.pdf).
- According to a September 17 FTC release, in an ongoing crackdown on cross-border con artists, the FTC and Canadian law enforcers settled two separate cases with operators who targeted senior citizens in cross-border lottery schemes. The settlements, which have been entered by the U.S. District Court in Seattle, bar both defendants from selling, promoting or participating in the sale of chances, tickets or shares of any foreign lottery or bond program in the future. Taken together, the settlements will return approximately \$1.9 million to consumers from assets seized by Canadian law enforcers working in conjunction with the FTC. One defendant was also charged under criminal statutes and will serve a six-year jail sentence for wire fraud.
- On September 4, the FTC announced that it had charged subprime lender Stewart Finance Company, its owner John Ben Stewart, Jr., and nine related companies, with violating federal lending laws, and has asked a U.S. District court to immediately halt their practices and order redress for consumers who were victims. Stewart Finance operates approximately 60 branch offices in Georgia, Louisiana, Missouri, Illinois, and Tennessee. The FTC alleges that Stewart Finance engaged in deception and other illegal practices to induce consumers to unknowingly purchase expensive add-on products to obtain costly refinance loans and to participate in a "direct deposit" program, which imposed additional fees. Along with its complaint, the FTC filed under seal a motion for a temporary restraining order.
- The FTC released a survey on September 3 showing that 27.3 million Americans have been victims of identity theft in the last five years, including 9.9 million people in the last year alone. According to the survey, last year's identity theft losses to businesses and financial institutions totaled nearly \$48 billion and consumer victims reported \$5 billion in out-of-pocket expenses. The agency also released a Commission report detailing its identity theft program since its inception.

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## RECENT ACTIVITIES

### INTERNATIONAL ANTITRUST HIGHLIGHTS

- On September 19, the Australian Competition and Consumer Commission ("ACCC") announced its opposition to the acquisition of Loy Yang power station by a consortium of electricity companies. The Loy Yang power station is the largest energy provider for the state of Victoria, producing more than a quarter of the electricity used by 4.7 million people. A spokeswoman for Australian Gas Light Company, which leads the consortium, stated that the consortium had been given clear guidance that the ACCC was not going to accept its proposal. The consortium is considering the possibility of forcing the deal through using Australia's full formal merger clearance procedure. The Australian Gas Light Company is partnered in the \$2.26 billion bid for Loy Yang with the Tokyo Electric Power Company and the Commonwealth Bank. Loy Yang is \$3.5 billion in debt and says it will go into receivership unless a buyer is found. Recently, Malaysia's Genting Berhad, a company with interests in leisure, real estate, energy, and paper, announced a bid that the ACCC appears willing to clear.
- According to a temporary restraining order issued by the U.S. District Court for the Northern District of Illinois on September 9, a Canadian company that marketed business directories to small businesses across the United States must refrain from misrepresentations in its telemarketing activities. *FTC v. Datatech Communications, Inc.*, N.D. Ill., No. 03C 6249). Datatech Communications, Inc. allegedly used telemarketers calling U.S. small businesses to renew listings in a business directory, at times stating or implying that these were listings in a telephone directory. The defendants allegedly engaged in deceptive practices to persuade consumers to consent to these "renewals." Once consumers discovered that their company never previously purchased a directory listing from Datatech, it was very difficult for consumers to cancel the listings. In addition, the defendants carefully disguised the fact that they were not located in the United States, but were actually based in Quebec, Canada.
- On September 2, GE's \$2.2 billion purchase of Instrumentarium, the Finnish medical equipment maker, was approved by the European Commission. This was the highest profile European approval for GE since the Brussels regulator blocked its purchase of Honeywell in July 2001. In marked contrast to its veto of the \$42 billion Honeywell merger two years ago, the Commission reached an understanding with GE in the wake of a series of internal Commission reforms.
- The Russian government announced on August 26 that it had approved a \$6.15 billion deal signed by BP and the Tyumen Oil Company that will create a new oil producer and the largest multinational company in Russia. The deal is the single largest foreign investment in post-Communist Russia. The approval by Russia's Anti-Monopoly Policy Ministry comes as the Russian business world is beginning to regain confidence in the wake of a scandal involving Yukos, Russia's largest oil producer, and its top executive, Mikhail B. Khodorkovsky.
- On August 22, Italy's antitrust authority approved Telecom Italia SpA's \$13 million acquisition of wireless Internet service provider Megabeam Italia SpA on the condition that the two companies keep certain operations separate. This was the

## RECENT ACTIVITIES

### International Antitrust Highlights *(Continued)*

ninth probe from either Italy's Autorita Garante della Concorrenza e del Mercato or from European Union competition authorities that involved the former Italian state telecommunications monopoly. This deal should increase Telecom Italia's capacity - through its Internet subsidiary Tin.it - in Italy's growing wireless Internet sector. Hence, the authority reserved the right to revisit the wireless Internet sector in the future if it appears that Telecom Italia's dominance in the sector becomes problematic.

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### FCC ANTITRUST HIGHLIGHTS

- The October 1 implementation of the national "Do-Not-Call" registry has been put on hold by a federal district court. As mentioned in the Consumer Protection Highlights, District Judge Lee R. West's decision found that Congress had not granted the FTC authority to establish and enforce the registry, rather the authority had been granted to the FCC. While both the FTC and FCC have adopted do-not-call rules, the FTC took the lead on the registry. A separate challenge to the registry has been filed by the American Teleservices Association, challenging both the FTC and FCC rules. The cases are now pending in both Denver, Colorado and in the U.S. Court of Appeals for the 10th Circuit. Judge West's decision gave at least a temporary reprieve for telemarketers. On September 29, however, FCC Chairman Michael Powell announced that the Commission will take over the embattled national "Do-Not-Call" registry on October 1 in an attempt to circumvent the legal troubles obstructing the registry's administration by the FTC.
- In a September 21 filing with the FCC, DirecTV Inc. and News Corp. promised that, by 2008, the merged companies would carry all local TV stations in the country. Expanding local TV coverage will appease the National Association of Broadcasters demands that DirecTV provide local coverage to all 210 markets by 2006. A \$1 billion new satellite investment is necessary in order for complete local coverage. DirecTV believes that the investment and build out will take until at least 2008 to complete.
- The September 2003 FCC's order permitting Univision Communications Inc. acquisition of Hispanic Broadcasting Corp. faces a potential court challenge from activists led by the advocacy group, the National Hispanic Policy Institute. The Institute is opposed to the merger and believes that the FCC is using a double standard in evaluating Univision's interest in Entravision Communications Corp. The argument is based on the FCC's order, which stated that Univision exercised control over Entravision's TV business but not over its radio business and, therefore, the interest is relevant for one medium but not another. If a suit to block the merger is successful, Univision could be forced to divest HBC or perhaps sell its interest in Entravision.

## RECENT ACTIVITIES

### FCC Antitrust Highlights *(Continued)*

- MCI's expected emergence from bankruptcy in September was delayed by the continuing investigation based on charges from Verizon Communications and SBC Communications that MCI illegally routed calls to disguise the origins and avoid paying fees to the local carriers. AT&T filed a lawsuit in September that seeks damages based on the same charges. MCI is alleged to have routed calls through Canada and thereby shifted the expense of local carriers to AT&T when the calls were terminated. MCI countered by asking the bankruptcy judge to hold AT&T in contempt for filing a separate civil suit while the Chapter 11 bankruptcy case is still pending.

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