

In This Issue

- *Supreme Court Announces Sherman Act Inapplicable To Vitamin Sales In Foreign Commerce Independent of Adverse Domestic Effects*
- *Back To The Sixties In Joint Venture Law --The Ninth Circuit Strikes Again*
- *Antitrust Division Is No Longer The Toothless Tiger - Leniency Program Expanded*
- *Judge Rejects Admissibility Of ALJ Rambus Decision In Infineon Litigation*
- *Update On Residency Match Programs - A Resort To Congress*
- *DOJ White Collar Crime Update*

Recent Activities*DOJ Antitrust Highlights**FTC Antitrust Highlights**FTC Consumer Protection Highlights**International Antitrust Highlights**FCC Antitrust Highlights*

SUPREME COURT ANNOUNCES SHERMAN ACT INAPPLICABLE TO VITAMIN SALES IN FOREIGN COMMERCE INDEPENDENT OF ADVERSE DOMESTIC EFFECTS

Supreme Court jurisprudence on the applicability of Sherman Act jurisdiction over foreign trade and commerce has a long history. In *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), Justice Holmes wrote that where the acts causing antitrust injury occurred outside the United States, the “universal rule” is that the character of an act as unlawful is to be determined by the law of the country where it was committed. *Id.* at 355-56. However, in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), the Supreme Court found jurisdiction over cartel activity in Mexico where it had anticompetitive effects within the United States.

The strict territorial interpretation of *American Banana* was further gutted by Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2^d Cir. 1945). In *Alcoa*, the Second Circuit, sitting as the court of last resort, held that the Sherman Act reached agreements made by foreign companies outside the United States “if they were intended to affect [U.S.] imports, and did affect them.” *Id.* at 444. This approach was generally affirmed by the United States Supreme Court in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). There, the Court found subject matter jurisdiction under the antitrust laws where the alleged activity of foreign reinsurers outside the United States produced a substantial effect within the United States.

In 1977, the Department of Justice adopted the position that the Sherman Act applied only to transactions that had a “substantial and foreseeable effect on U.S. commerce.” *United States Department of Justice Antitrust Enforcement Guidelines for International Operations* (1995), 4 Trade Reg. Rep. (CCH) ¶13,110 at 20,645.

In 1982, Congress stepped into the act. Motivated, arguably to articulate a uniform test for determining United States antitrust jurisdiction, in keeping with the *International Antitrust Guidelines*, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”). The FTAIA provides that the Sherman Act does not apply to conduct involving trade or commerce with foreign nations unless the conduct harms imports, domestic commerce, or American importers.

On June 14, 2004, the Supreme Court announced its opinion in *F. Hoffmann LaRoche Ltd., v. Empagran S.A.*, No. 03-724, a case that has been widely followed, due to its impact on the extra-territorial reach of the federal antitrust laws. Petitioners in the case filed a class action in the wake of the Justice Department’s prosecution of an alleged global price fixing and market allocation cartel in the bulk vitamins industry. Plaintiffs filed a class action on behalf of foreign and domestic purchasers of vitamins. The complaint accused foreign and domestic manufacturers and distributors of engaging in a price fixing conspiracy that raised the prices of vitamin products to purchasers not only in the United States, but abroad.

The district court granted a defense motion to dismiss the claims as to the foreign purchasers who were located in Ukraine, Australia, Ecuador and Panama, based upon the FTAIA. The domestic purchasers then transferred their claims to another pending suit.

On appeal, a divided District of Columbia Circuit ruled that the claims of the foreign

plaintiffs were within the FTAIA “domestic-injury” exception where “such conduct has a direct, substantial and reasonably foreseeable effect” on domestic or import commerce, and such effect gives rise to any Sherman Act claim. 15 U.S.C. Section 6a (2000). On a writ of certiorari, the Supreme Court vacated the Court of Appeals opinion, and remanded. Writing for six members of the Court, Justice Breyer held that the domestic-injury exception of the FTAIA does not apply where the anticompetitive price fixing activity, while causing domestic antitrust injury, also independently causes separate foreign injury to foreign purchasers. Justice Breyer concluded that the domestic injury exception does not apply where a plaintiff’s claim rests solely on independent foreign harm, and does not flow substantially from injury to domestic commerce.

The opinion assumed independent domestic and foreign effects, and did not address the foreign plaintiffs’ alternative argument that domestic and foreign effects were linked. The D.C. Circuit did not consider domestic effects and, accordingly, the Supreme Court vacated and remanded the case for consideration of this issue, if properly preserved.

Justice Breyer explained that the FTAIA creates a general rule that the Sherman Act does not apply to foreign commerce. However, there are exceptions for conduct that “significantly harms imports, domestic commerce, or American exporters.” Congress first laid down a general rule placing all foreign commerce activity outside of the reach of the Sherman Act. The statute then asserts antitrust jurisdiction, provided that the conduct

significantly affects U.S. commerce and has an effect of the kind that antitrust law considers harmful.

Before considering the scope of the domestic-injury exception to FTAIA, Justice Breyer emphasized that the Court's decision was based upon the assumption that while the price-fixing conduct significantly and adversely affected customers within and without the United States, the adverse foreign effects were independent of any domestic effects. As part of its analysis, the Court engaged in an extended discussion of comity. It recognized that the Court ordinarily will construe ambiguous statutes to avoid unreasonable interference with the foreign authority of other nations, including the antitrust regime of these nations. Where the anticompetitive effects on foreign purchasers who purchased goods abroad are independent of anticompetitive effects within the United States, there is no reason for United States antitrust jurisdiction to trump the antitrust regimes of the foreign countries, whose citizens are asserting claims under the antitrust laws. Justice Breyer cited with approval amicus briefs filed by Germany, Canada, Japan and others. The briefs argued that to permit independently injured foreign plaintiffs to pursue private treble damage remedies would undermine the antitrust enforcement policies of these countries, by diminishing foreign firms' incentive to cooperate in amnesty programs. The lure of treble damages to foreign plaintiffs would devalue the amnesty process, as treble damage exposure would decrease the likelihood of amnesty seekers coming forward to claim the reward of reduced foreign country penalties.

Justice Breyer distinguished *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), *United States v. National Lead Co.*, 332 U.S. 319 (1947), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), as cases where the United States as a plaintiff, had rights to broader relief than private plaintiffs.

A briefing schedule has been issued from the D.C. Circuit and a decision may be handed down this winter. Stay tuned.

For more information, please contact Don Hibner at (213) 617-4115 or dhbner@sheppardmullin.com.

BACK TO THE SIXTIES IN JOINT VENTURE LAW - THE NINTH CIRCUIT STRIKES AGAIN

Joint ventures among competitors — “competitor collaborations” in a modern parlance — have enjoyed a somewhat favored status in antitrust circles in recent years. Although routinely condemned by the courts in the 1960s and 1970s, the rise of the so-called “Chicago School” led many courts to conclude that, so long as the two venturers had small market shares and the joint venture is a real integration of assets resulting in cost savings that could benefit consumers, the anticompetitive risks of such competitor collaborations may be outweighed by pro-competitive benefits. In some cases, joint ventures were also seen as a good alternative to mergers, which completely eliminated competition among the merging entities. This led to a rebirth of the ancillary restraint doctrine, first formulated by Judge Taft in the 1898 *Addyston Pipe* decision, whereby price and output restraints “ancillary” to a bona fide

joint venture were judged by the rule of reason rather than treated as *per se* illegal. All of this culminated in the issuance of the *FTC/DOJ “Competitor Collaboration Guidelines”* in April 2000. One of the basic principles underlying these *Guidelines* is that ancillary restraints otherwise *per se* illegal are subject to the rule of reason when they are “reasonably necessary” to an “efficiency enhancing integration of economic activity.” Rule of reason does not mean such restraints are lawful — just that market power, business justifications, and other competitive facts will be considered by the court evaluating the legality of the restraint.

For the second time in slightly over one year, however, the Ninth Circuit has held that an ancillary price restraint in connection with a legitimate joint venture is *per se* illegal. *Dagher v. Saudi Refining Inc.*, No. 02-56509 (9th Cir. 2004). *Dagher* was preceded by *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133 (9th Cir. 2003), where a joint venture to combine databases was formed by several realtor associations who then charged their members a set monthly fee. The Ninth Circuit found this to be unlawful price fixing. As in *Freeman*, the District Court in *Dagher* granted summary judgment for defendants reasoning, *inter alia*, that the price restraints were ancillary and reasonably necessary to the joint venture. In a 2-1 decision (the majority opinion was by Judge Reinhardt), the Ninth Circuit in *Dagher* held otherwise despite the fact that the joint ventures had been reviewed and cleared by the Federal Trade Commission and several state Attorneys General.

Dagher involved two joint ventures formed by Shell and Texaco to combine their refining and

marketing operations. The first was called Equilon Enterprises (“Equilon”), and it operated in the western United States where the combined market share of the two companies was 15%. The second joint venture was called Motiva Enterprises (“Motiva”), and operated on the East Coast. Defendant Saudi Refining Inc. (“SRI”) had an ownership interest in Motiva, and the combined market share of the three companies exceeded 25%. While the Shell and Texaco brands remained distinct, both in terms of chemical composition and targeted customers, the effect of the two joint ventures was to end competition between Shell and Texaco at the refining and marketing level. The combination of the refining and marketing assets of the two companies achieved a cost savings of approximately \$800 million, plus other long term efficiencies. Competition was to continue at all other levels, including crude oil exploration and production. Each company retained its ability to return to individual refining and marketing by mutual consent or, after five years time, by unilateral dissolution with two years advance notice. Thus, Equilon and Motive were the type of “efficiency enhancing integration of economic activity” usually encouraged by the antitrust laws.

In the reasonable belief that price is integral to any joint marketing arrangement, the agreements allowed Texaco and Shell to “unify” the pricing for both brands at Equilon and Motiva in a single individual. In essence, the price for the two brands would be coordinated in any given geographic area, much like what would have occurred anyway had Texaco and Shell completely merged their operations. It was this “unified” pricing that gave rise to the litigation — a class action brought on behalf of 23,000 Texaco and Shell

service station owners alleging price fixing — and which ultimately led the Ninth Circuit to reverse the District Court’s grant of summary judgment to Texaco and Shell and remand for the further proceedings.

In what now appears to be a smart tactical move, the *Dagher* plaintiffs disclaimed any antitrust violation based on the rule of reason, and instead asserted that this price restraint was unlawful under either a *per se* or “quick look” analysis. The Ninth Circuit began its opinion by emphasizing that price-fixing is the “quintessential” example of a *per se* violation, but noting that the issue with respect to legitimate joint ventures is whether the price fixing is “naked” (in which case it is illegal) or “ancillary” (in which case it is not). Citing the Supreme Court’s 1969 decision in *Citizen Publishing* as an example of where an amalgamation of restraints in connection with a newspaper joint venture was held to be *per se* illegal, it found that the Supreme Court’s later decisions in *Maricopa County*, *BMI*, and *NCAA* did nothing to undercut this basic rule.

Judge Reinhardt then turned to the issue of whether the unified price for both Texaco and Shell gasoline was “reasonably necessary” to further the legitimate aims of the joint venture, and found that it was not. Unified pricing, said the Court, was not necessary to achieve the cost savings or other efficiencies of the joint ventures. The Court rejected the two justifications offered by defendants — the first being that a joint venture must be able to set prices for its products and the second to prevent price discrimination under the Robinson-Patman Act. As to the latter, the Court found that Texaco and Shell gasoline were distinct products, and thus different prices

could be charged for the two products without risking a Robinson Patman violation. As to the former, the court stated that acceptance of that argument would permit companies that were formerly competitors to create joint ventures as “fronts” for price fixing.

The Court was quick to note, however, that the analysis would be “different” if the joint venture was formed to sell a “new” product, or they agreed to merge the product lines into one collective brand, or defendants had “independently” decided to charge the same price for both brands after conducting separate price analyses for each brand, or had defendants come forward with persuasive evidence that the setting of a single, fixed price was important to accomplishing the legitimate aims of the joint venture. Except for the last point, the Court did not explain how or why the other scenarios were “different” from a competition standpoint. Simply combining Shell and Texaco into a single “new” brand and then setting a single price for it, for example, would seem to be an artificial step which would not result in any more price competition than the present arrangement. It will be interesting to see what the District Court and the parties do with this language on remand.

Not surprisingly, the dissent (Fernandez, J.) simply focused on the fact that a bona fide joint venture should be able to set the prices of its own products without running afoul of the antitrust laws. He distinguishes *Citizen Publishing*, as well as the prior *Freeman* decision, on the basis that there the competing entities, not the joint venture entity, set the prices. He concludes by stating that the court has created an “exotic beast” which looks like a true business but, when it sets the price for

its own goods, it subjects its owners to antitrust liability and thus had the "tail of a liability scorpion."

The Court was unanimous in affirming the District Court's grant of summary judgment to SRI due to lack of plaintiffs' standing although the majority characterized the issue as a "close one." None of the plaintiffs had ever purchased any products from SRI or Motiva. While plaintiffs sought to get around this fact by showing that SRI was part of a national conspiracy through its participation in the Motiva joint venture, the Court found they failed to satisfy the "conscious commitment to a common scheme" requirement derived from *Monsanto* and in fact had "vigorously protested" the domination of the Motiva board by Shell and Texaco representatives.

Neither the majority nor dissenting opinions discuss, or even mention, the *FTC/DOJ Competitor Collaboration Guidelines*, and the majority narrowly applies joint venture/ancillary restraint law as it has developed in the *Guidelines'* other circuits over the past 20 years. See, e.g., *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986). This may be due to a justified abhorrence of price fixing generally, a point made repeatedly in the majority opinion. While it is certainly true that joint ventures can be used as "fronts" for price fixing, that is seldom the case, however, where there is a real integration of business operations as appears to be the case here. Likewise, the majority took a narrow view of when an ancillary restraint is "reasonably necessary" and virtually converted that term to "essential", a position at odds with the *Guidelines*, and

perhaps BMI, NCAA and other more recent joint venture decisions as well.

There is little doubt that, had the principles from the *Guidelines* and those decisions been followed, the unified price restraint would have been put in the rule of reason category, and then likely upheld due to lack of market power and other factors. This may be why the FTC and the state Attorneys General cleared Equilon and Motiva. In the meantime, however, price restraints that accompany joint ventures should be viewed with much skepticism, and safeguards adopted to avoid *per se* liability.

For more information, please contact Carlton Varner at (213) 617-4146 or cvarner@sheppardmullin.com.

ANTITRUST DIVISION IS NO LONGER THE TOOTHLESS TIGER - LENIENCY PROGRAM EXPANDED

On June 22, President Bush signed a bill (H.R. 1086), which includes the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 and formalizes essential elements of the Department of Justice's Corporate Leniency Program in antitrust investigations and prosecutions. The Act significantly increases the maximum penalties for criminal antitrust violations, offers financial incentives for corporate informers to blow the whistle on cartels, and detribles damages for corporations cooperating with federal investigations of cartel conduct.

The primary purpose of the legislation is to reduce the antitrust liability of standards development organizations ("SDO"s). Indeed,

Title I of the legislation amends the National Cooperative Research and Production Act ("NCRPA") of 1993 to provide that SDOs are subject to a rule of reason standard in any antitrust suit. Under the amended Act, SDOs engaging in standards development activity are authorized to notify the DOJ and the FTC of their activity to qualify for protection under the Act. See this month's *Sheppard Mullin Antitrust Review* *FTC Antitrust Highlights* at p. 12.

With regards to criminal enforcement of the antitrust laws, however, the law significantly increases the maximum prison sentences for antitrust violations to ten years from the current maximum sentence of three years and raises the maximum fine for individuals from \$350,000 to \$1 million. In addition, maximum fines for corporations that violate the Sherman Act are raised to \$100 million from the current \$10 million maximum.

Moreover, the law encourages corporations to cooperate with the DOJ regarding antitrust conspiracies by limiting the civil liability of corporations that take part in the DOJ's corporate leniency program. Under the existing program, the DOJ agrees not to criminally prosecute corporations that provide critical information about antitrust conspiracies, however, a major business disincentive associated with cooperation in a government investigation is that the company could be opening itself to civil litigation and treble damages. This legislation limits the exposure of corporations that help the DOJ investigate illegal cartels. In exchange for this limitation to civil liability, the corporations must pay restitution to private plaintiffs and assist the private plaintiffs with other antitrust lawsuits.

H.R. 1086 was passed by the House in June 2003, but the bill only included the provisions governing SDOs and the NCRPA. In November 2003, the Senate Judiciary Committee reported the bill with an amendment in the nature of a substitute. The amendment added the provision governing DOJ's leniency program as well as another provision focused on the Tunney Act. The Senate then passed the bill on April 2. The House on June 2 suspended its rules and concurred with the Senate's amendments to H.R. 1086. The legislation was presented to the White House on June 10, and the President signed the bill on June 22.

In summary, this law is expected to enhance the Antitrust Division's ability to prosecute illegal cartels. The increase in criminal penalties will bring antitrust penalties in line with those for other white collar crimes and will ensure that the penalties more accurately reflect the harm caused by illegal cartels. The detrebling provision of the Act also removes a major disincentive for corporations considering whether or not to submit amnesty applications. This law should make the Antitrust Division's Corporate Leniency Program even more effective and provides businesses with incentives to cooperate in government investigations.

For more information, please contact Andre Barlow at (202) 218-0026 or abarlow@sheppardmullin.com.

JUDGE REJECTS ADMISSIBILITY OF ALJ RAMBUS DECISION IN INFINEON LITIGATION

On June 2, Judge Robert E. Payne of the the U.S. District Court for the Eastern District of Virginia ruled that Administrative Law Judge ("ALJ") D. Michael Chappelle's Initial Decision

in the FTC's administrative litigation against Rambus, Inc. was to be excluded as inadmissible hearsay in Rambus' patent infringement suit against Infineon Technologies, AG under Federal Rule of Evidence 802. *Rambus v. Infineon, et. al.*, Civ. Action No. 3:00cv524. According to Judge Payne's memorandum opinion, the Fourth Circuit had previously ruled that ALJ decisions are potentially admissible under the hearsay exception for "public records" contained in Fed. R. Evid. 803(8)(C). See *Zeus Enters., Inc. v. Alphin Aircraft, Inc.*, 190 F.3d 238 (4th Cir. 1999). However, according to Judge Payne, because the ALJ's decision in the *Rambus* case was a preliminary administrative finding that was currently undergoing *de novo* review by the full Commission, it lacked the "trustworthiness" needed to meet the "public records" hearsay exception.

Rambus first sued Infineon and other semiconductor chip manufacturers, alleging infringement of patents relating to the development of synchronous digital random access memory (or "SDRAM") technology. These same SDRAM patents owned by Rambus were also at the heart of the FTC's administrative lawsuit. FTC staff alleged in its 2002 complaint that Rambus had withheld its ownership of and application for key SDRAM and related technology patents that later became incorporated into standards promulgated by the Joint Electron Device Engineering Council ("JEDEC") of the Electronics Industry Association. After the standards were promulgated, semiconductor manufacturers began implementing their technical requirements. Rambus then requested royalties from manufacturers who

implemented the JEDEC standards, and then filed patent infringement suits against those manufacturers who did not agree to license Rambus' SDRAM patents. The FTC alleged, among other things, that Rambus' failure to disclose its ownership of SDRAM and related technology patents and enforcement of its patent ownership rights constituted unlawful monopolization of the SDRAM market. After an extensive trial, ALJ Chappelle dismissed the FTC's complaint and issued an Initial Decision that spanned over 340 pages and contained numerous technical findings of fact on February 17 of this year. Subsequently, FTC staff appealed the Initial Decision to full Commission, which is in the process of a *de novo* review, with oral arguments currently scheduled for September 21 of this year.

In its longstanding litigation with Rambus, Infineon filed a *motion in limine* on March 15 of this year to exclude ALJ Chappelle's Initial Decision as inadmissible hearsay. Currently, Infineon's own antitrust defense to the patent infringement claims plays a role in the eventual outcome of the case. Although Rambus claimed that the decision was a "public record" and entitled to that exception from the hearsay rule, Infineon claimed — and Judge Payne agreed — that the unique status of the opinion as a preliminary report was too prejudicial to admit as evidence in the case. According to Judge Payne, the Initial Decision was preliminary in nature, based on a reading of the FTC's own rules, and case law in the Fourth Circuit and other jurisdictions. Moreover, the Initial Decision was currently subject to *de novo* review by the full Commission, which impeded on its "trustworthiness" as evidentiary proof. In addition, because findings of the Initial

Decision were against FTC staff — and not Infineon — there was no party against whom the decision was being sought to be admitted. Therefore, according to Payne, Infineon “was not a party to the FTC proceeding and had no ability to participate in it,” which also added to the other factors mitigating against the Initial Decision’s “trustworthiness.” Memorandum Opinion Regarding Motion In Limine to Exclude FTC ALJ Opinion, June 2, 2004.

Judge Payne then stated that even if the Initial Decision were admissible under the “public records” exception in Fed. R. Evid. 803(8)(C), its prejudicial effect would most likely outweigh its probative value. Therefore, according to Judge Payne, it should also be excluded pursuant to Fed. R. Evid. 403. Because Infineon did not have access to the full text of the Initial Decision (as it was redacted before public release) or the evidence underlying it, Infineon’s ability to disprove the Initial Decision’s weight would be substantially undercut.

On the West Coast, private antitrust litigation ensues. Rambus has now sued Infineon, Micron Technology, Hynix Semiconductor, and Siemens AG in California state court, alleging antitrust violations of the Cartwright Act and Section 17200. According to Rambus’ complaint, which was filed on May 5, the named defendant semiconductor manufacturers conspired to exclude Rambus and its RDRAM (or “Rambus DRAM”) technology from the market. Rambus alleges in its complaint that the defendants formed the SynchLink Consortium with other industry participants primarily for the purpose of not only developing alternatives to RDRAM, but more importantly, to convince industry

participants to boycott adoption of RDRAM technologies. Interestingly, Rambus has elected not to allege violations of the Sherman Act or other federal antitrust statutes — but has opted to allege violations of California’s statutory counterparts.

For more information, please contact June Casalmir at (202) 218-0027 or jcasalmir@sheppardmullin.com.

UPDATE ON RESIDENCY MATCH PROGRAMS – A RESORT TO CONGRESS

On April 8, Congress approved a bill that makes it clear that medical matching programs — designed to place resident physicians in resident programs with little or no competition — do not violate the antitrust laws. The legislation, H.R. 3108, describes the National Resident Matching Program (“NRMP” or “Match”) as a “highly efficient, pro-competitive and long-standing process” that “has effectively served the interests of medical students, teaching hospitals, and patients for over half a century.” Moreover, Congress’ findings describe the Match as “an integral part of an educational system that has produced the finest physicians and medical researchers in the world.” Such legislation, which confirms that the antitrust laws do not prohibit sponsoring, conducting or participating in graduate medical matching programs like the NRMP, would certainly seem to vitiate plaintiffs’ case in *Jung v. Ass’n of American Medical Colleges* (*Jung v. Ass’n of American Medical Colleges*, D.D.C., No. 02-0873 (PLF), 2/11/04). That class action alleges a conspiracy among a number of medical organizations and medical centers to eliminate competition in the recruitment, hiring, and employment of resident physicians in an

apparent attempt to depress their wages (See *Sheppard Mullin's April Antitrust Review* – Volume 2, No. 4). Dr. Jung and two other former or current medical residents brought the Section 1 Sherman Act case in May of 2002. But plaintiffs maintain that the retroactive antitrust exemption will have no effect on the pending antitrust lawsuit filed by medical residents. Their counsel describes the legislation as being “secretly added to unrelated Congressional legislation at the last minute and passed by the Senate without public debate or compliance with normal lawmaking procedures.”

For more information, please contact Olev Jaakson at (202) 218-0021 or ojaakson@sheppardmullin.com

DOJ WHITE COLLAR CRIME UPDATE

The Antitrust Division obtained another guilty plea from a white collar criminal in the New York area.

New York Roofing Company and Its President Plead Guilty to Bid Rigging and Fraud Charges

On June 29, 2004, the Department of Justice announced that Waterblock Roofing and Sheetmetal Inc. (“Waterblock Roofing”) and its president, Walter J. Vivenzio, pleaded guilty to bid rigging and conspiracy to commit mail fraud in connection with a kickback scheme involving roofing contracts in the Albany, New York area.

According to the charges, from sometime in 1995 until approximately May 2002, the defendants and unidentified co-conspirators engaged in a conspiracy to rig bids and allocate roofing contracts awarded by the General Electric Company’s Waterford, New York facility (“GE Waterford”), the Albany Medical Center, and other purchasers of roofing products and services in the state of New York. In particular, Waterblock Roofing, through Vivenzio, paid at least \$70,000 in kickbacks during the conspiracy period to an unidentified maintenance manager at GE Waterford. These kickbacks, which were derived from fraudulent overcharges on Waterblock Roofing’s bids and quotes to GE Waterford, were to ensure all contracts for roofing products and services awarded by GE Waterford would go to Waterblock Roofing. The conspiracy to commit mail fraud charge resulted from the use of the U.S. mails to convey the fraudulently inflated invoices and the payments thereof.

The prosecution of Waterblock Roofing and Vivenzio is being handled by the Antitrust Division’s New York Field Office, with the assistance of the Federal Bureau of Investigation.

For more information, please contact Robert Magielnicki Jr. at (202) 218-0029 or rmagielnickijr@sheppardmullin.com.

RECENT ACTIVITIES

DOJ ANTITRUST HIGHLIGHTS

- On June 30, the U.S. Circuit Court of Appeals for the District of Columbia approved the landmark antitrust settlement Microsoft Corp. negotiated with the DOJ's Antitrust Division, setting aside objections by the state of Massachusetts that sanctions in the agreement were inadequate to protect competition. The decision is a significant victory for Microsoft and the DOJ as the appeals Court ruled that the settlement was in the public's interest. Indeed, the Court of Appeals applauded provisions of the complex settlement agreement that permit computer makers to hide Microsoft's built-in Web browser software in favor of those made by Microsoft's rivals, while cautioning that an alternative proposal from Massachusetts to require Microsoft to remove parts of its software from the dominant Windows operating system could hurt consumers by leading to a confusing world with different versions of Windows. The agreement was approved in November 2002 by U.S. District Judge Colleen Kollar-Kotelly and was aimed at providing consumers more choices by, among other things, helping rivals develop competing software on computers running Windows. The settlement decree provisions expire in 2007. Though the Court found that the settlement agreement is still in the public interest, the judge and DOJ lawyers have acknowledged that one of the disputed settlement's most important provisions which compels Microsoft to license some of its technology to its rivals is not working.
- On June 24, R. Hewitt Pate, Assistant Attorney General in charge of the Antitrust Division, released a statement regarding the Standards Development Organization Advancement Act of 2004 ("SDOAA"), which was signed into law on June 22. The SDOAA amends provisions of the National Cooperative Research and Production Act of 1993 ("NCRPA") to extend the same protections to standards development organizations ("SDO"s). The NCRPA affords certain antitrust protections to joint ventures participating in joint research, development, and production. Mr. Pate said that the SDOAA relieves SDOs from certain antitrust concerns and facilitates the development of pro-competitive standards. See article on p. 6 of this issue of the Antitrust Review for more details.
- On June 23, DOJ's Mr. Pate issued a statement after President Bush signed into law H.R. 1086, which includes the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. The Act increases the maximum Sherman Act corporate fine to \$100 million, the maximum individual fine to \$1 million, and the maximum Sherman Act jail term to 10 years. The Act also enhances the incentive for corporations to self-report illegal conduct by limiting the damages recoverable from a corporate amnesty applicant, that also cooperates with private plaintiffs in their damage actions against remaining cartel members, to the damages actually inflicted by the amnesty applicant's conduct. Mr. Pate's statement indicated that this law will greatly enhance one of the Division's core missions, its anti-cartel enforcement program. He also said that the increase in criminal penalties will bring antitrust penalties in line with those for other white collar crimes and will ensure the penalties more accurately reflect the harm inflicted by cartels. Moreover, he stated that the detrebling provision of the Act removes a major disincentive for companies that are considering whether or not to submit amnesty applications. In summary, Mr. Pate said that the Division's Corporate Leniency Program will become even more effective and the enhanced enforcement measures provided for by the Act will aid in the continued successful detection, prosecution, punishment, and deterrence of cartel activity, further protecting competition.

RECENT ACTIVITIES

DOJ Antitrust Highlights (Continued)

- On June 22, DOJ's Mr. Pate issued a statement as the government rested its case in the Oracle trial. According to Mr. Pate, the Antitrust Division provided the court with compelling evidence that Oracle's acquisition of PeopleSoft would be anticompetitive; the result of this merger would be higher prices, less innovation, and fewer choices for businesses, government agencies, and other organizations that rely on human resource and financial management enterprise software; and the witnesses and Oracle's own internal documents demonstrate that there are only three companies that sell the software products that large enterprise customers demand—Oracle, PeopleSoft and SAP. In addition, Mr. Pate claimed that the Antitrust Division demonstrated that entry is difficult and that Microsoft was not a likely entrant.
- On June 3, the Antitrust Division issued a statement after the closing of its investigation into Movielink, a joint venture formed by five major movie studios - Sony (Columbia-TriStar Pictures), Warner Bros., MGM, Paramount and Universal - to provide video-on-demand services, as the investigation did not indicate that the joint venture was anticompetitive. The investigation focused on whether formation of the joint venture facilitated collusion among the studios or decreased their incentives to license movie content to competing video-on-demand providers. The Antitrust Division considered several theories of competitive harm but ultimately determined that the evidence did not support a conclusion that the structure of the joint venture increased prices or otherwise reduced competition in the retail markets in which Movielink competes. The Division noted, however, that it will continue to monitor activity in these emerging markets as part of its ongoing enforcement of the antitrust laws.

For more information on any of these activities, please contact Andre Barlow at (202) 218-0026 or abarlow@sheppardmullin.com.

FTC ANTITRUST HIGHLIGHTS

- On June 25, the Commission announced and made public the June 21, 2000 initial decision of Administrative Law Judge ("ALJ") D. Michael Chappell that held that Kentucky Household Goods Carriers Association ("Kentucky Association"), a group of affiliated intrastate movers, had engaged in horizontal price-fixing in violation of the FTC Act. The FTC alleged that the Kentucky Association members participated in a continuing combination and conspiracy to fix rates charged by motor common carriers for the intrastate transportation of property within the Commonwealth of Kentucky. The ALJ also ruled that the Kentucky Association's conduct was not protected by the state action doctrine, because the state had not actively supervised the Association's rate-making activities. Judge Chappell accordingly ordered relief appropriate to barring such conduct in the future, including "action to cancel or withdraw existing tariffs," and for the Kentucky Association to "cease and desist from developing tariffs that contain collective rates for the intrastate transportation of property and related services, goods, or equipment," within 120 days.
- On June 22, 2004, President Bush signed into law H.R. 1086, which includes the Standards Development Organization Advancement Act of 2004 (the "Act"). This Act amends provisions of the National Cooperative Research

RECENT ACTIVITIES

FTC Antitrust Highlights *(Continued)*

and Production Act of 1993, which affords certain antitrust protections to joint ventures engaged in research, development, and production, to extend the same antitrust protections to standards development organizations (“SDO”s) while those organizations are engaged in standards development activity. The Act states that the term SDO does not include parties participating in the SDO. The Act provides that the antitrust rule of reason applies to SDOs while they are engaged in standards development activities, and provides special rules for attorneys’ fees in any antitrust case challenging a SDO’s standards development activity. The rule of reason and attorneys’ fees provisions of the Act automatically apply to all SDOs covered by the Act. The Act also provides SDOs with the opportunity to limit their antitrust liability for standards development activities to actual, as opposed to treble, damages. SDOs must file a proper notification with the FTC and the DOJ to obtain the liability limiting protections provided by the Act. Proper notifications should include the following information:

1. Be filed not later than 90 days after the date of the enactment of the Act, or 90 days after commencing a standards development activity engaged in for the purpose of developing or promulgating voluntary consensus standards;
2. Disclose the name of the SDO and its principal place of business;
3. Provide documents showing the nature and scope of the standards development activity;
4. Contain one copy of all documents submitted to the FTC and two copies of all documents submitted to the DOJ; and
5. Be delivered to the FTC and DOJ.

Any SDO may file additional notifications as are appropriate to extend the protections to standards development activities that are not covered by the initial filing or that have changed significantly since the initial filing. Promptly after receiving a proper notification, the FTC or the DOJ will publish a notice in the Federal Register that identifies the SDO and describes its standards development activities in general terms. The FTC or the DOJ will make the notice available to the filing SDO before publishing it in the Federal Register. Notifications may be withdrawn before publication in the Federal Register; however, no SDO will receive the liability limiting protections of the Act if its notification is withdrawn before publication. To facilitate publication in the Federal Register, SDOs may provide the FTC and the DOJ with a draft notice. In addition, SDOs should provide the name and contact information of the person or persons authorized to approve the proposed notice.

- On June 22, in a surprise decision, the Commission by unanimous vote (Commissioner Pamela Jones Harbour recused) closed its investigation into the proposed merger of RJ Reynolds Tobacco Holdings, Inc. (“RJR”) and British American Tobacco p.l.c.’s U.S. subsidiary Brown & Williamson (“B&W”). In closing the investigation, Chairman Muris, along with Commissioners Swindle and Leary, issued a joint statement explaining the decision. A separate concurring statement was issued by Commission Thompson.

RECENT ACTIVITIES

FTC Antitrust Highlights *(Continued)*

In their joint statement, the Chairman and two Commissioners said that while the RJR/B&W merger would combine two of the larger marketers of cigarettes in the United States, “[b]ased on an intensive investigation . . . we do not believe that the transaction is likely substantially to lessen competition in the U.S. market for cigarettes.” The Commission based this conclusion on the fact that B&W plays an increasingly minor role in the U.S. cigarette market and that there is no market in which – and no brands for which – B&W and RJR are each others’ closest competitors. In addition, according to the statement, there is no other basis for a case using a theory of unilateral effects, and the transaction is unlikely to facilitate or enhance coordinated interaction among the major manufacturers in the U.S. cigarette market. “Accordingly,” they wrote, “we have concluded that this transaction is unlikely to harm consumers.” “Because in our view this merger is unlikely to lead to substantial lessening of competition in any relevant market, we have closed this investigation,” the Chairman and Commissioners wrote in concluding their statement.

In his concurring statement, Commissioner Mozelle W. Thompson wrote separately to express his concerns about the potential susceptibility of the relevant market to coordinated interaction.

- One June 10, the Commission received a petition to reopen and modify the final decision and order in the 2003 transaction relating to Nestle Holdings Inc.’s (“Nestle”) acquisition of Dreyer’s Grand Ice Cream Holdings, Inc. (“Dreyer’s”). Respondents Nestle and Dreyer’s petitioned the FTC on behalf of Cool Brands International, Inc. (“CoolBrands”), the Commission-approved divestiture buyer. Through its confidential petition, both Nestle and Dreyer’s requested that the Commission reopen and modify the final order to amend certain provisions of the existing agreements with CoolBrands, as well as to allow CoolBrands and Dreyer’s to enter into a new “Co-Pack Agreement” for the divested product that will last for an additional 12 months. In addition, the respondents have requested that the public comment period be eliminated.
- On June 7, the Commission announced that a Roswell, New Mexico-based independent physicians’ practice association and two of its employees agreed to settle FTC charges that they orchestrated agreements among Southeastern New Mexico Physicians IPA (“SENM”) members to fix prices and to refuse to deal with health plan payors except on collectively agreed upon term. Such agreements resulted in increased health care costs in the geographic market. The proposed consent order bars the SENM and its employees from engaging in similar actions in the future. SENM is a nonprofit association with 68 physician members. Its members represent 73 percent of all physicians independently practicing in and around Roswell. The FTC’s complaint states that SENM members refused to deal individually with payors. Instead, two SENM employees negotiate price and other contract terms with health plans that wish to contract with SENM physician members.

According to the FTC’s complaint, proposed contracts with health plans are presented to SENM’s Managed Care Contract Committee and Board of Directors for approval. If the contract is approved, the general membership votes on whether or not SENM should accept it. The FTC’s complaint states that the respondents have orchestrated collective agreements among physician members on fees and other terms and have refused to deal with health plans that resisted their terms. The FTC charges that SENM’s anticompetitive conduct has raised the cost of health care in

RECENT ACTIVITIES

FTC Antitrust Highlights (Continued)

the Roswell area and violated the FTC Act. The proposed consent order prohibits the respondents from entering into any agreement between physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal or not deal with payors; (3) regarding the terms upon which any physician deals with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement in which the respondents are involved. The proposed order prevents SENM and its representatives from negotiating with any payor on behalf of SENM or any SENM member, and from advising any SENM member to accept or reject any term of dealing with any payor, for a period of three years. The order also requires the respondents to notify the Commission for a period of three years before entering into any arrangement to act as a messenger or agent on behalf of any physicians with payors regarding contracts. Finally, the proposed order requires SENM to distribute the complaint and order to all physicians who have participated in SENM and all payors that negotiated, or indicated an interest in contracting, with SENM.

- On June 4, the Commission authorized the filing of a joint amicus brief with the DOJ in *Jackson Tennessee Hospital Co.*, No. 04-5387 (6th Cir.). This case concerns several defendants, including a public hospital district; an affiliated corporation that, together with the district, operates a hospital in Jackson, TN; and the Tennessee Blue Cross/Blue Shield organization. The plaintiff is a private corporation that owns and operates a competing hospital, and contends that the defendants entered into a series of anticompetitive agreements that violated Sections 1 and 2 of the Sherman Act by precluding doctors and managed care organizations from doing business with the plaintiff. In issuing its ruling, the district court granted the defendants' motion to dismiss the case, based on the state action doctrine. The court based its ruling on whether "the anticompetitive effects are the logical and foreseeable result of the broad authority to own, operate, and manage hospitals and other health care facilities that [two Tennessee statutes] conferred upon private act hospital authorities such as the District."

According to the joint FTC/DOJ brief, the district court failed to follow existing case law governing the state action doctrine with respect to anticompetitive conduct. Specifically, the brief contends that the court improperly concluded that the district was exempt from antitrust enforcement because the state had given it broad authority, comparable to that of private firms, to operate and manage health care facilities. The brief further states that: (1) the state action doctrine protects subordinate state entities from liability under federal antitrust laws only when they act pursuant to state policy to displace competition with an alternative means of advancing the public interest; (2) the district court erred in holding conduct exempt from the Sherman Act in the absence of a state policy to displace competition; and (3) the district court's erroneous state action analysis has potential serious consequences, including the potential to undercut state policy as well as federal law.

- On June 2, the Commission authorized the filing of a joint amicus brief with the U.S. Department of Justice in *3M Company v. LePage's Inc.*, No. 02-18625, a case before the U.S. Supreme Court. The case concerns a jury verdict from the Third Circuit Court of Appeals regarding 3M's use of a "bundled rebate" program. Specifically, LePage's initially sued 3M alleging that 3M's use of a "bundled rebate" program in the marketing and sale of transparent tape constituted exclusive dealing under Section 1 of the Sherman Act and Section 3 of the Clayton Act and monopoly

RECENT ACTIVITIES

FTC Antitrust Highlights (Continued)

maintenance and attempted monopolization under Section 2 of the Sherman Act. The jury found for 3M on the exclusive dealing counts, but for plaintiff LePage's on the Section 2 counts. The district court dismissed the Section 2 attempt count, but entered a judgment on the monopoly maintenance count. On appeal, a divided panel of the Third Circuit initially reversed; however, the court subsequently took the case en banc and affirmed the district court. 3M then filed a petition for certiorari.

In their joint brief, submitted at the request of the Supreme Court, the FTC and DOJ recommended that the Court deny the petition. According to the brief's conclusions, as explained in detail in its text, "The United States submits that, at this juncture, it would be preferable to allow the case law and economic analysis to develop further and await a case with a record better adapted to development of an appropriate standard." The Commission vote authorizing the amicus brief was 4-0-1, with Chairman Timothy J. Muris recused. Apparently the Court agreed; *certiorari* was denied on June 30. The \$68 million trebled verdict in favor of LePage's stands.

For more information on any of these activities, please contact Robert W. Doyle, Jr. at (202) 218-0030 or rdoyle@sheppardmullin.com.

FTC CONSUMER PROTECTION HIGHLIGHTS

- On July 2, the FTC announced a Memorandum of Understanding between the agency and law enforcement agencies in the U.K and Australia that provides for the sharing of information between the U.S. and those countries in order to prevent illegal spam emails. According to the Memorandum, the agencies will also promote attendance at an October 2004 conference that will gather law enforcement authorities from around the world to discuss spam-related enforcement techniques and approaches.
- On June 29, the FTC announced a settlement with an Arizona company, Vector Direct Marketing, LLC, and its principals who are alleged to have falsely advertised a private do not call "service." According to the FTC's complaint filed on February 2, 2004, the defendants allegedly sold the so-called service for \$399, and promised that the service would safeguard customer's identity from unscrupulous telemarketers. According to the complaint, customers often received little more than a \$34.95 screening device. The settlement prohibits the defendants from making false representations to consumers about their financial information, and from billing their accounts without prior authorization. The order bars the defendants from violating the FTC's Telemarketing Sales Rule, based on their past abusive phone-collection practices, and subjects them to a financial penalty of nearly \$811,000 (suspended due to the defendant's inability to pay).
- On June 24, the FTC announced that it has charged Smart Inventions, Inc., a California-based direct response TV company, and its Chief Operating Officer, Jon D. Nokes, with making false and unsubstantiated claims that the

RECENT ACTIVITIES

FTC Consumer Protection Highlights (Continued)

company's "Biotape" product effectively reduces severe pain. The complaint, filed in the Central District of California, also alleges that the defendants falsely claimed that the product is superior to over-the-counter pain relief products. The defendants have advertised Biotape directly to consumers on a number of cable channels. Biotape developer, Darrell Stoddard, featured in the Biotape infomercial along with the infomercial host Kevin Trudeau – also is named as a defendant.

- On June 24, the official national "Do Not Call" registry celebrated its one-year anniversary. As of June 18, 2004, 62 million phone numbers have been registered and only 428,000 possible violations have been reported, with about 200 companies having more than 100 consumer complaints filed against them. According to a recent Customer Care Alliance survey, sixty percent of the consumers surveyed said they had registered, and 87 percent of those registered report receiving fewer calls, an estimated decrease of 24 calls per month.
- On June 23, BCP Director Howard Beales testified before the Subcommittee on Competition, Infrastructure, and Foreign Commerce of the Senate Commerce Committee that the privacy and other related risks of downloading peer-to-peer ("P2P") software should be disclosed more prominently to consumers. According to Mr. Beales, the potential downloading of "spyware" in addition to the P2P software programs are not as well-disclosed as they should be. Although Mr. Beales stated that reviewed disclosure statements on the Web sites of ten of the most popular P2P file-sharing software programs do not appear to make false or misleading claims about consumers' privacy and other risks, P2P program distributors should provide more risk information about their products. Mr. Beales stated that FTC staff will work with the industry to improve disclosure statements. An FTC publication, "File-Sharing: A Fair Share? Maybe Not" provides tips for consumers about the risks of file sharing, and is available at <http://www.ftc.gov/bcp/online/pubs/alerts/sharealrt.htm>.
- On June 21, the FTC settled claims that Prince Lionheart, Inc., a manufacturer of baby products, and its president, Thomas E. McConnell, lacked adequate substantiation with respect to advertising claims that the company's "Love Bug" product protected babies from mosquitoes. The device appears to look like a toy and is designed to clip onto a baby stroller, and was claimed to work by duplicating the wingbeat of the dragonfly, which was supposed to ward off mosquitoes. The proposed consent agreement announced today prohibits the respondents from making false or unsubstantiated claims relating to any electronic mosquito repellent product using sonic or ultrasonic technology and requires the manufacturer to have adequate substantiation for any claim about the benefits, performance, or efficacy of any consumer electronic product they market.
- On June 21, the FTC hosted a workshop on privacy and other issues surrounding the use of radio frequency identification technology. Presentations from the workshop and other materials can be found at the FTC's website at <http://www.ftc.gov/rfidworkshop/>.

For more information on any of these activities, please contact June Casalmir at (202) 218-0027 or

jcasalmir@sheppardmullin.com

RECENT ACTIVITIES

INTERNATIONAL ANTITRUST HIGHLIGHTS

- On June 21, the Australian Competition and Consumer Commission (“ACCC”) closed the investigation of Qantas’ frequent flyer program and concluded that there was insufficient evidence to establish a breach of the Trade Practices Act 1974. The investigation began after the ACCC received consumer complaints that there was an inadequate disclosure of terms and conditions relating to the restrictions placed on award seat availability. Flyers also complained that they were unable to redeem their points for award flights to a destination of their choice on dates and at times of their reasonable choosing. The ACCC acknowledged that these consumers may not have been aware that availability of Award seating was limited. However, Qantas agreed to bolster the implementation of future changes—including increased access to award flights and more transparency and certainty of travel for frequent flyers. The carrier also announced the launch of an online search function to facilitate members’ search for preferred award seat availability. Further, Qantas noted that its actions have been directed at making available more award seats for frequent flyers and improving transparency about the operation of the program.
- Around June 4, Wall Street was abounded with news that both domestic and foreign telecommunications companies were on the rebound and a long-awaited shakeout among networking equipment makers was rapidly approaching. Industry giants like Alcatel SA, Lucent Technologies Inc. and Nortel Networks Corp. all signaled a belief that demand for their products was picking up after four years of spending freezes. All of the aforementioned companies have spent the past few years slashing costs while weathering cutbacks and bankruptcies among their customers. As a result, Wall Street believes the time is right for consolidation among telecom companies, especially since most telecom companies have completed restructurings. These restructurings have come at a time when telecom companies are buying less equipment yet the number of companies supplying that technology has changed little.
- On June 3, SABMiller plc, the world’s No. 2 brewer, abandoned the race for Harbin Brewery Group Ltd., China’s oldest and fourth-largest brewer, opting instead for a \$124 million gain by selling its 29.07% stake of the brewery to rival bidder Anheuser-Busch Cos., the world’s No. 1 brewer. The decision by SABMiller, ends a month-long drama featuring the first-ever competitive bidding for a mainland Chinese company. SABMiller will sell its stake in Harbin for \$211 million to Anheuser-Busch. Earlier in the week, Anheuser-Busch had unveiled a plan to trump SABMiller by 30% with a general offer valuing Harbin at \$718 million.
- The European Commission (“EC”) confirmed on June 1 that it was holding settlement talks with Coca Cola in an effort to resolve an antitrust dispute. The EC also said, however, that it had not ruled out the possibility of taking legal action against the soft drink maker if negotiations failed. For the past four years, the EC has been investigating complaints that Coca Cola gives retail stores rebates in exchange for high-profile displays of all of its products, while competing soft drink makers get less prominent positioning in stores. It has received complaints from competitors, including Pepsi, that Coca Cola is using a dominant position and rebates to ensure its products get high profile display in stores. The EC is also looking into Coca Cola’s policy of offering discounts on purchases that cover several brand products.

RECENT ACTIVITIES

International Antitrust Highlights (Continued)

- It was reported at the beginning of the month that Teva Pharmaceutical Industries Ltd. (“Teva”) of Israel and India’s Ranbaxy Laboratories Ltd. are two of many generic drug makers seeking acquisitions in Germany to tap into growing demand for cheaper medicine in Europe. Teva, the world’s largest maker of generic drugs, wants to expand its European sales force; Ranbaxy is looking for a German acquisition after buying a manufacturer in France this year. Germany, which is Europe’s biggest pharmaceutical market, has about 60 generic drug makers ranging from small, closely held companies to Stada Arzneimittel AG, with a market value of \$1.3 billion. Ranbaxy and Teva are vying with Switzerland’s Novartis AG and Germany’s Merck KGaA to expand in the \$62 billion global market for generic, lower-priced copies of drugs.

For more information on any of these activities, please contact Camelia Mazard at (202) 218-0028 or cmazard@sheppardmullin.com.

FCC ANTITRUST HIGHLIGHTS

- On June 30, the American Cable Association (“ACA”) announced its opposition to a proposed House amendment that would give satellite carriers an antitrust exemption to promote delivery of local-TV signals in rural markets. Sponsored by Reps. Rick Boucher (D-Va.) and Bob Goodlatte (R-Va.), the amendment is designed to allow EchoStar Communications Corp. and DirecTV Inc. to share scarce spectrum so that all 210 TV markets can receive their local-TV signals via satellite. But according to ACA president Matt Polka, the two direct-broadcast satellite (“DBS”) companies would use the exemption to gang up on the small independent cable operators his group represents. “Regardless of how an amendment is tailored to prevent unfair competition, our members know what to expect from DBS. That’s why the FCC and Department of Justice ruled that any combination of DirecTV and EchoStar would be against the public interest and would violate federal antitrust laws,” Mr. Polka said. “The solution for this issue lies in competition. Direct TV has already publicly committed to serving all 210 broadcast markets by 2008. Two companies (DirecTV and EchoStar) that have \$17 billion in combined annualized revenues do not need federal help to serve local markets.” The Boucher-Goodlatte amendment is expected to be offered during the week of July 5 in the House Judiciary Committee’s mark-up of the Satellite Home Viewer Extension and Reauthorization Act.
- On June 24, new media-ownership rules adopted a year ago by the FCC were overturned by a panel of the U.S. Court of Appeals for the Third Circuit in Philadelphia. While public-interest groups hailed the ruling as a victory over big-media consolidation, FCC chairman Michael Powell – who pushed for relaxing the ownership rules despite strong special-interest and political opposition – complained it would make it harder for the agency to place numerical limits on media ownership. “Today’s decision perversely may make it dramatically more difficult for the [FCC] to protect against greater media consolidation. It sets near-impossible standards for justifying bright-line ownership limits,” Mr. Powell said. Last June, the Republican-controlled FCC voted 3-2 along party lines to make it easier for one company to accumulate newspapers, TV stations and radio stations in the same market. But critics argued that the commission simply abetted media consolidation at the expense of the public interest. According to

RECENT ACTIVITIES**FCC Antitrust Highlights (Continued)**

FCC Democrat Jonathan Adelstein, “[T]he court largely undid what would have been the most destructive rollback of media-ownership protections in the history of American broadcasting.” The FCC’s new rules never took effect because the Third Circuit froze them in place one day before they would have become law. In the June 24 decision, the court continued the freeze while the agency crafts new rules consistent with its opinion. The FCC may ultimately choose to appeal the decision to the U.S. Supreme Court.

- According to an FCC news release, Chairman Michael Powell announced on June 14 that the Commission will strive to adopt a final order on local telephone competition rules as soon as possible. “My fellow Commissioners and I will promptly turn to writing a set of sound rules that ensure access to incumbent networks where competition is truly impaired,” said Mr. Powell. “I am committed to developing competition rules that comply with the court’s mandate and are faithful to the statutory objectives of the Telecommunications Act. Moreover, the Commission is prepared to consider interim, transitional protections to bridge the gap that exists in the period preceding adoption of our final rules. (...) Fair and sustainable competition is our goal and I am fully confident that consumers will reap the benefits,” added the Chairman. “Facilities-based competition brings the innovation and value that consumers demand. These new rules will also encourage increased investment in infrastructure that will continue to drive down prices for advanced services. In this interim period, I also strongly encourage carriers to find common ground through negotiation. Commercial agreements remain the best way for all parties to control their destiny.” BellSouth, Qwest, SBC, and Verizon had all sent letters to the Chairman, outlining their commitments not to raise rates for wholesale access at least until the end of the year. Said Mr. Powell, “[O]ur top priority is to ensure that consumers do not experience any disruption in service and to provide sorely needed stability in the marketplace.”

For more information on any of these activities, please contact Olev Jaakson at (202) 218-0021 or ojaakson@sheppardmullin.com

Antitrust Attorneys**Del Mar**

(858) 720-8900
Pamela J. Naughton
Elizabeth Balfour

Los Angeles

(213) 620-1780
James J. Burgess
Suzanne B. Drennon
Frank Falzetta
David R. Garcia
Andrea Hasegawa
Don T. Hibner, Jr.
Jane R. Langdell
Kathyleen A. O'Brien
Mark Riera
Michelle Sherman
Carlton A. Varner

Orange County

(714) 513-5100
Finley L. Taylor

San Diego

(619) 338-6500
James J. Mittermiller
Robert D. Rose
Timothy B. Taylor
Frank Polek

San Francisco

(415) 434-9100
Edward C. Duckers
Gary L. Halling
James L. McGinnis
Thomas D. Nevins
Neil Ray
Michael Scarborough
David D. Sohn
Mona Solouki

Washington D.C.

(202) 218-0000
Andre P. Barlow
M. June Casalmir
Robert M. Disch
Robert W. Doyle, Jr.
John R. Fornaciari
M. Roy Goldberg
Robert L. Magielnicki
Camelia C. Mazard

The Sheppard Mullin Antitrust Review is intended to apprise readers of noteworthy developments involving antitrust matters. The contents are based upon recent decisions, but should not be viewed as legal advice or legal opinions of any kind whatsoever. Legal advice should be sought before taking action based on the information discussed.

For further information, please contact:

Sheppard, Mullin, Richter & Hampton LLP

Antitrust and White Collar Defense Practice Group

Robert W. Doyle, Jr. at 202.218.0030 or rdoyle@sheppardmullin.com

www.sheppardmullin.com