

  
SECTION OF

**ANTITRUST  
LAW**

Promoting Competition  
Protecting Consumers

# **Antitrust Update for the ABA Corporate Counseling Committee**

November 2011

# Discussion Outline

- Litigation Update
- Civil Agency Update
- Criminal Agency Update
- European Union Update

## **Litigation**

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Charles Wright  
(Presenter)

# **LITIGATION UPDATE**

# AT&T/T-Mobile: Much of Sprint's Complaint Disconnected



# AT&T/T-Mobile: Much of Sprint's Complaint Disconnected

- Sprint challenge: harm in several input markets
- Court analysis: antitrust standing
  - No standing to challenge output concentration
    - Sales to consumers
  - Standing to challenge merger-to-monopsony
    - Purchases of handsets, an essential input
  - No standing in purchase of roaming
    - Incompatible technology (one exception)
  - No standing in purchase of backhaul

# ***Apple v. Samsung***



**Vs.**



N.D. Cal. October 18, 2011

# *Apple v. Samsung*

- Parties asserted patent and trade dress claims
- Apple asserted antitrust claim, alleging Samsung defrauded standard-setting organization to have its patents incorporated into industry standard
- Court recognized theory
  - Intentionally false promise to SSO regarding licensing terms can amount to monopolization
  - Failure to disclose intellectual property rights to SSOs can amount to monopolization
- Found Apple had failed to plead with sufficient particularity

# Third Cir. Discredits Price-Fixing Claim against Financial Factors

- Bankrupt garment manufacturer sued “factors” [banks] who play role in arranging credit
- Information sharing claim: Factors shared forward-looking creditworthiness information
  - Mere exchange of information is not violation of Section 1 (but can facilitate a violation)
- Conspiracy claims: Agreed not to do business with plaintiff/worsened terms of financing
  - Insufficient allegations of agreement

*Burtch v. Milberg Factors*

2011 WL 5027511 (3rd Cir. Oct. 24, 2011)



# Ninth Circuit: *Parens Patriae* Case is not Class Action

- LCD price fixing cases by state AGs
- Filed in state court, removed by defendants
- Remanded to state court by Ninth Circuit
  - *Parens patriae* is not a class action under CAFA



*Washington v. Chimei Innolux Corp.*  
(9th Cir. Oct. 3, 2011)

# Motion to Dismiss under FTAIA: Denied

- Foreign Trade Antitrust Improvements Act
- Defendants: majority of sales in foreign commerce
- Court: not a question of subject matter jurisdiction
- Court: question of fact as to whether conduct had direct effect on U.S. commerce



*In re TFT-LCD (Flat Panel) Antitrust Litigation*  
(N.D.Cal. Oct. 5, 2011)

# Eggs are Eggs

- Claim: egg manufacturers fixed prices of eggs and egg products
- Plaintiffs: alleged conspiracy in undifferentiated market for **shell eggs** and **egg products**
- Defendants: sought dismissal of **egg products** claim
- Motion denied: plaintiffs did not plead separate egg products claim



*In re Processed Egg Prods. Antitrust Litigation*

(E.D. Pa. Oct. 17, 2011)

# ATM Operators Sue Visa, MC

- Alleges Visa & MC enforced agreement among banks
  - Fix prices for ATM services
  - Suppress network competition
  - Constrain judgment of ATM operators
- Defendants have moved to dismiss for lack of standing



*Nat'l ATM Council, Inc. v. Visa Inc.*  
(D.D.C. filed Oct. 12, 2011)

# Indirect Purchaser Claims Dismissed

- Alleged price fixing in MgO manufacturing market
- Plaintiffs denied standing: failed to identify specific products they purchased; no causal connection
- Dismissed with leave to amend



*In re Magnesium Oxide Antitrust Litigation*

(D.N.J. Oct. 20, 2011)

# Strike against *Concepcion* & Arbitration Clauses Rejected

- Class action waivers enforceable: *AT&T Mobility v. Concepcion* (U.S. April 2011)
- Plaintiffs filed > 900 arbitrations to enjoin AT&T/T-Mobile merger
- AT&T sought to enjoin arbitration
- Held: enjoining merger outside scope of arbitration agreement



*AT&T v. Gonnello*  
(S.D.N.Y. Oct. 7, 2011)

## **Agency - Civil**

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Douglas Ross  
(Presenter)

# **CIVIL AGENCY UPDATE**



# DOJ v. AT&T, T-Mobile

- Sprint, Cellular South and Corr Wireless moved to intervene in U.S. case
  - Denied (Oct. 24, 2011)
- Trial set for February 13

Justice Department Files  
Antitrust Lawsuit to Block  
AT&T's Acquisition of T-Mobile

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# H&R: Blocked

- H&R Block's acquisition of 2SS Holdings (TaxACT software) enjoined
  - October 31 order; redacted opinion to follow
- Claim: "Digital do-it-yourself" tax prep market
- 3-2 merger
  - Intuit 62%
  - H&R 16%
  - TaxACT 13%



# H&R: Blocked

- Definition of market
  - Unassisted
  - Do-it-yourself products
  - Professional tax preparer assistance
- H&R: argued a distinction between “premium” and “value” segments of DIY

# H&R: Blocked

## *Importance of documents*

- TaxACT has been a “tax industry maverick” and a “catalyst for change in the tax preparation industry . . . [that] has consistently forced the tax preparation industry to become more competitive”
- DOJ: “when the deal was announced, HRB’s Vice President of Marketing boasted in an email that [REDACTED].”

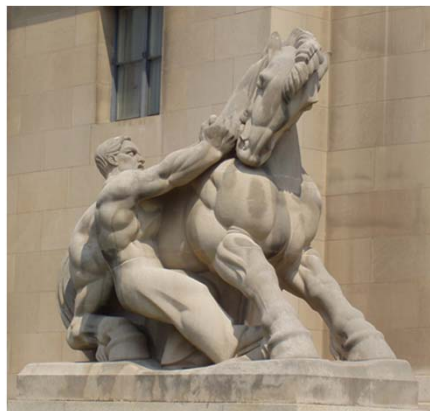
# Sliced Bread: Still the Best Thing

- DOJ sued to enjoin Grupo Bimbo's acquisition of Sara Lee Bagged fresh bread
- Claim: anticompetitive in certain urban areas in CA, KS, NB, PA
- Consent decree: divest brands



# FTC: Focus on Health

- Health care reform: ACO Policy Statement
- Competition advocacy
- Pay-for-delay settlements



# FTC: Focus on Health

## *Health care reform: ACO Policy Statement*

- FTC, DOJ issued final Policy Statement
- Context
  - Health care reform bill
  - Medicare's Shared Savings Program
  - ACOs must qualify with Medicare agency
  - ACOs will operate in commercial markets too



# FTC: Focus on Health

- Rule of reason treatment for qualified ACOs
  - Presumption of clinical integration
- Safety zone for certain ACOs
  - <30% share within a primary service area
- Voluntary review program for other ACOs
- Antitrust issues of interest:
  - Why presume integration?
  - Is a PSA a relevant market?



# FTC: Focus on Health

## *Competition advocacy*

- FTC has a long history of advocating competition in health care
- In October, FTC advocated against:
  - Tennessee bill that would require physician supervision of pain management services
  - NY bill that would immunize collective negotiation of rates by physicians



# FTC: Focus on Health

## *“Pay-for-delay” settlements*

- FTC study: 28 pay-for-delay deals in FY 2011, 25 brand name drugs, sales > \$9 B
- FTC has litigated against these, without success so far
  - California case (10/31) same result (Bayer paid Barr to delay generic version of Cipro)
- Chairman Leibowitz called on the budget Supercommittee to address the issue

# FTC: Market Research Merger

- Merger of two market research firms
  - Both sell promotional audits and medical audits
- The two companies had 98% of one market, 100% of the other
- Required to divest in order for acquisition to proceed

*In the Matter of* Healthcare Technology Holdings, Inc. FTC  
File No. 111 0097 (Oct. 28, 2011)

# FTC: Pharma Merger

- Teva Pharmaceutical acquisition of Cephalon
- Three markets alleged
  - Lozenges used to treat cancer pain: 3-2, 80%
  - Drugs used as a muscle relaxant: no generic competition; Teva, Cephalon likely entrants
  - Tablets used to improve wakefulness: Cephalon has brand drug, no generic, Teva likely entrant

*In the Matter of* Teva Pharmaceutical Industries Ltd., and Cephalon, Inc.

FTC File No. 111 0166 (Oct. 7, 2011)



# FTC: Pharma Merger

- Relief
  - Must sell rights to generic cancer pain drug and generic muscle relaxant
  - Must agree to supply a competing firm to sell a generic version of Cephalon's wakefulness drug in 2012

*In the Matter of* Teva Pharmaceutical Industries Ltd., and Cephalon, Inc.  
FTC File No. 111 0166 (Oct. 7, 2011)

# Changes at the Top

- Commissioner and former chair, Bill Kovacic honored
  - Miles W. Kirkpatrick Award for Lifetime FTC Achievement



# Changes at the Top

- Hearing announced for Maureen Ohlhausen, nominee for open spot, on November 15
  - Former director, Office of Policy Planning
  - Privacy, data protection focus



**Agency - Criminal**

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Mark Bartlett  
(Presenter)

# **Criminal Agency Update**

# Foreclosure Auctions

- Eight more real estate investors agreed to plead guilty to conspiracy to commit mail fraud and violate Sherman Act
  - Bid rigging
- Brings total guilty pleas to 18





# Refrigerant Compressors

- International conspiracy to fix prices of light commercial compressors
- Danfoss Flensburg agreed to plead guilty to price fixing and pay \$3 million fine
- Third company to plead:
  - Panasonic (\$49.1 million fine)
  - Embraco (\$91.8 million)
- Three executives also have been charged

# Japanese Auto Parts

- Multinational investigation into price fixing of Japanese Auto Parts
- Coordinated investigation by DOJ and antitrust agencies of EU, Japan, and Canada
- Last year, FBI raided U.S. offices of Denzo, Yazaki, and TRAM

# Japanese Auto Parts

- Furukawa Electric Co. and three executives agreed to plead guilty to fixing prices for wire harnesses
- Company agreed to \$200 million fine and sentences of 12-18 months for executives



# Japanese Auto Parts

- Since Oct. 5, ten civil suits have been filed
  - Furukawa, Sumitomo Elec. Indus., Delphi Automotive, Lear Corp., Leoni AG, Denzo, TRAM, Fujikura America, and S-Y Systems Technologies
- U.S. wire harness industry: \$29 billion (est.)



# AU Optronics Case (LCD)

- Court *sua sponte* moved trial date from Nov. 14 to Jan. 9
- Parties estimate: 3-4 month trial
- Case could decide significant issues relating to Sherman Act's applicability to international cartels in the criminal context, particularly jurisdiction and intent

# Plan to Cut Four Field Offices

- DOJ will close antitrust field offices in Atlanta, Cleveland, Dallas, Philadelphia
- 94 affected employees will go to New York, Chicago, or San Francisco



**International  
Update**

Allison A. Davis  
(Presenter)



# INTERNATIONAL UPDATE

# EC: LCD Price Fixing

- Six defendants: LG, Samsung, AUO, Chimei, CPT and Hannstar
- Fines issued December 2010
- Final Public Decision
- Concerns panels not smaller than 12"



- 2001-2006
- Price agreement and other information



EUROPEAN  
COMMISSION



# EC: LCD Price Fixing



- Fines total €649 million (\$860 million)
- Compare to DOJ fines of \$890 million
- 100% leniency for Samsung; less for others
- No ITP

# South Korea

- Fair Trade Commission fined 10 Korean and Taiwanese TFT-LCD makers \$176 million
  - Largest ever
- 80% of the market
- Harmed domestic consumers' interest
- Five year investigation
- No written decision



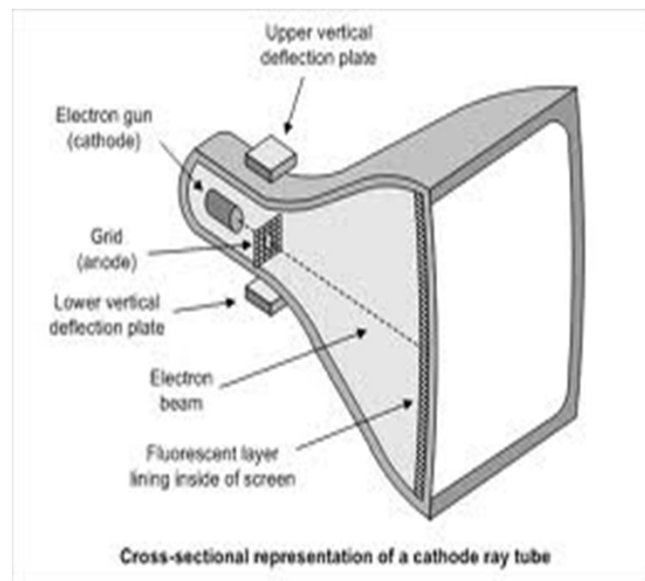
# CRT Fines

- Four producers of CRTs
- €128.7 million
- 100% leniency for Samsung
- 1999-2004
- Invites civil actions



EUROPEAN  
COMMISSION

## *Cathode Ray Tubes*



# Banana Slip?

- EC imposed €8.9 million fine on Pacific Fruit for operating price fixing cartel in Southern Europe 2004-2005
  - Chiquita Brand was given immunity
- Second time for Chiquita: €60.3 million fine imposed on Dole and Weichert for banana price fixing 2000-2002



# Italian Raw Tobacco Cartel

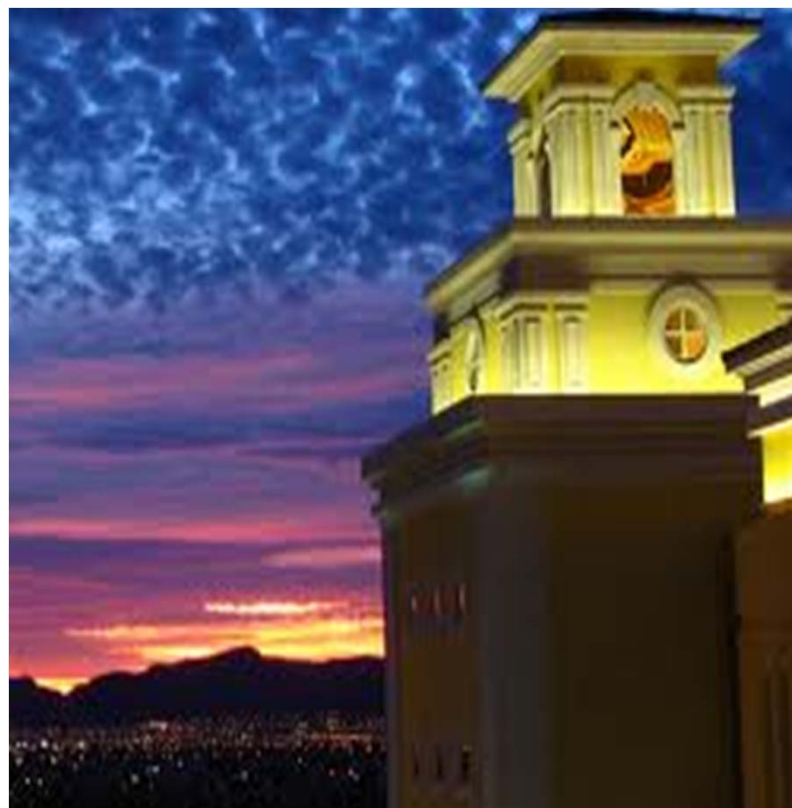
- European Commission partially annulled its decision and reduced the fine for Romana Tabacchi
  - Error in assessment of facts as to the duration
  - Weighed market share for full year in 2001 but quit the cartel in 1999
  - Resulted in disproportionate fine to actual participation
  - Fine reduced from €2.05 million to €1 million

# China Merger Control Decision

- Merger of Uster Technologies AG (Alpho-Alpha Private Equity Fund) and LOEPFE (Savio) technology for automatic winders/textiles
  - Uster (Swiss) and LOEPFE (Italian) only two manufacturers in the world making this technology;
  - Merger approved with modifications
- Significant in its detail and mode of analysis
  - Analyzed supply/demand of relevant market
  - Investigation (including third party info) focused on competitive status, purchasing model and market access (barriers due to patents)

# Rude Awakening for EU Banks

- Oct. 19 EC dawn raid on banks: concern banks manipulated interest rates
- Euro Interbank Offered Rate (EURIBOR) – interest rate benchmark





# Rude Awakening for EU Banks

- Large French, German banks including Deutsche Bank in London
- Investigation: offshoot of Libor investigation in U.S., EU and Japan
- Euribor set by more than 40 banks; Libor only 15 banks; also Tibor
- Civil suits in the U.S.



Commissioner Joaquin Almunia



# Rude Awakening for EU Banks

- EC: “No comment”
- Banks’ comment:  
“more of a visit” to  
educate  
themselves on  
Euribor



# New Trio Act

FTC, DOJ and EC issued updated “Best Practices” to coordinate merger reviews

- Interagency communication and coordination on timing
- Consultation on discovery and information sharing
- Coordination on remedies



# Goal for Pub Owner in “Karen Murphy” Soccer Case

EU highest court ruled  
exclusive territorial  
licensing for soccer  
broadcasts violated  
competition law



# Goal for Pub Owner in “Karen Murphy” Soccer Case

- Pub owner refused to pay Sky TV’s (and ESPN) prices for a decoder for Premier League soccer games
- Purchased cheaper decoder from Greek based broadcaster and was fined £8,000 by British court

Issue: extent media content licenses may confer absolute territorial exclusivity under EU law

# Goal for Pub Owner in “Karen Murphy” Soccer Case

European Court of Justice:

- Can't claim copyright in the matches themselves but only those portions Premier League created
- Arrangement violated competition rules and incompatible with free movement provisions of the EU
  - “National legislation which prohibits the import, sale or use of foreign decoder cards is contrary to the freedom to provide services and cannot be justified either in light of the objective of protecting intellectual property rights or by the objective of encouraging the public to attend football stadiums.”
- No exemption because absolute territorial protection unnecessary to protect rights holders' investment

# Goal for Pub Owner in “Karen Murphy” Soccer Case

## Implications

- No license agreement may divide internal market for provision of media content on state by state basis
- Questions validity of the current license agreements
- Businesses that hold or license media copyright on strict exclusive basis across EU member states may need to revise agreements

# Bear Market Decision?

- EC: 130 pages of “concerns” re: German Exchange, Deutsche Börse AG’s \$9 billion deal to buy NYSE Euronext
- Sets the stage for concessions and deal making with the EC
- Combination near monopoly on exchanged-based futures trading in Europe

# Latin America

- Brazil
  - New antitrust law passed Oct. 5, including new premerger control law
- Argentina:
  - Fox News, cable companies and newspaper distributor enforcement
- Ecuador:
  - Merger control/cartels regulation





# South Africa Competition Tribunal

- Disapproved proposed merger of US based Pioneer Hi-Bred and Pannar Seed of South Africa (corn seed producers)
  - 3-2 merger
- Wal-Mart purchase of Massmart
  - Tribunal initially approved
  - Stakeholders intervened
  - After concessions, merger allowed



# Canada

- Competition Bureau announced publication of the final draft of Merger Enforcement Guidelines
  - FTC/DOJ revisions in 2010
- Both purport to memorialize current practice and downplay market definition



Competition Bureau  
Canada

Bureau de la concurrence  
Canada

# Upcoming...

## ABA Fall Forum (Nov. 17)

- Antitrust Division, FTC, CFPB
- Economists on Revised Merger Guidelines
- Innovation and Antitrust in On-line Markets
- Behavioral Relief in Mergers and Other Actions
- Accountable Care Organizations
- Criminal Enforcement

<http://www2.americanbar.org/calendar/at11111-2011-antitrust-fall-forum/Pages/default.aspx>

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