STATE BAR OF MICHIGAN
ANTITRUST, FRANCHISING, AND TRADE REGULATION SECTION
E-NEWSLETTER
DECEMBER, 2008

Section Info:

In This Issue:

MESSAGE FROM THE CHAIR

Welcome to the State Bar of Michigan, Antitrust Franchising, and Trade Regulation Section's new and improved e-Newsletter, which will be available in electronic format and distributed in hard copy to Section members. It will provide the Section with Michigan-specific and national antitrust developments, as well as articles addressing current issues.

Section members have a great deal to look forward to in 2009. A new administration will bring significant changes to the antitrust and trade regulation landscape. Indeed, Barack Obama was the only candidate to respond to the American Antitrust Institute's request for comments. His brief statement indicates stronger enforcement and a policy shift is ahead. The link to his comments heads up the National News section below.

Also in 2009, the Section will be providing members opportunities to participate in social and educational events. Watch for the e-blast announcements and become an active part of our legal community. We welcome suggestions for events, speakers or get-togethers so please feel free to contact me or any officers about your ideas.

We hope that you find the new, expanded content of the Newsletter useful. Please note that the electronic copy of this document is hyperlinked, so that readers can click through to view the primary sources on which we rely. We look forward to your comments and feedback and hope to see you in the coming year.

Happy Holidays and a Prosperous New Year,

Rick Juckniess, Chair

SECTION NEWS

Dinner and Wine Tasting at Bella Ciao

The Antitrust, Franchising, and Trade Regulation Section hosted a dinner and wine tasting at Bella Ciao in Ann Arbor on Thursday, November 20, 2008. The dinner was a success, and nobody left hungry. Be sure to watch your email to find out about future Section events.

MICHIGAN NEWS

FTC Approves Divesture in Agrium Inc. & UAP Holding Corp. Acquisition

The Commission approved a Agrium Inc.'s petition to divest certain holdings related to its acquisition of UAP Holding Corp. The petition and divesture came pursuant to a consent order entered into by the parties and the Commission addressing competitive problems posed by the merger. The Commission specifically took issue with the bulk-fertilizer market in several local markets in Michigan and Maryland. Agrium was required to sell five UAP farm stores in Michigan in addition to two stores in Maryland and Virginia.
Press Release; FTC Docket.

Problems Mount at Reddy Ice

Private suits brought against Reddy Ice and related companies continue to mount, with over 100 nationwide, many of which have been filed in the E.D. Mich. The suits have been steadily filed since March, when the DOJ executed a subpoena as part of an antitrust probe

Deal Log:

CCC Information Services Inc. & Mitchell International Inc.

The FTC filed suit to enjoin the $1.4B merger of CCC and Mitchell, alleging that the merger would impair competition in markets for collision repair estimation electronics (estimatics) market and total loss valuation systems.
FTC Press Release; FTC Docket.

InBev SA & Anheuser-Busch

The DOJ has approved the InBev purchase of Anheuser-Busch for $52B, subject to the divesture of the InBev Subsidiary, Labatt USA.
DOJ press release.

Abitibi-Consolidated Inc. & Bowater Inc.

The DOJ entered a consent order in the merger of newsprint producers Abitibi-Consolidated and Bowater on the 6th, permitting the firms to merge, but requiring divesture of a newsprint mill in Arizona. The merger was promptly consummated.
DOJ Docket.

CCS Corp. & Newpark Resources, Inc.

The FTC filed for injunction to stop the proposed merger between CCS Corp. and Newpark Resources, Inc., two of three providers of offshore waste disposal services in the Gulf Coast region. The Commission alleges that the merger would create a monopoly in the industry.
Complaint; related proceedings.

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into the company's practices.
Justia.com (filings).

J. Rettenmaier USA LP's Former Exclusive Distributor Brings Antitrust Claims

Sweetener Supply Corp. (SSC) brought a counterclaim alleging attempted monopolization of the food quality cellulose fiber market. SSC was formerly the exclusive distributor for Rettenmaier cellulose fiber products, and the counterclaims arise out of an action originally filed by J. Rettenmaier against SSC.
Westlaw docket; Justia.com (filing).

NATIONAL NEWS

What's In Store for Antitrust Under Barack Obama?

Antitrust commentators have already begun to speculate on the coming changes for antitrust under Barack Obama. Obama's own statement, made to the American Antitrust Institute, criticizes the Bush administration's lax enforcement record, and signals a reinvigoration of antitrust enforcement under his leadership. Daniel Sokol also weighs in at Antitrust & Competition Policy Blog with some initial observations, and a series of articles have been written speculating on the Department of Justice's new Assistant Attorney General in charge of the Antitrust Division as well as the future Chairman of the Federal Trade Commission. David Bois also argues in a NY Times article that practical concerns will make increased merger scrutiny difficult in the next two years.
Statement to the AAI; Antitrust & Comp. Policy Blog; theDeal.com DOJ Article; theDeal.com FTC Article; David Bois in the NY Times.

FTC Seeks Supreme Court Review in *Rambus v. FTC*

The FTC is petitioning the High Court for review in Rambus Inc. v. FTC. The Commission alleged that Rambus deceived a standard setting organization ("SSO"), and the trial court held that the deception enabled Rambus to attain monopoly power, or in the alternative, to avoid licensing fee limits imposed by the SSO. The D.C. Court reversed, finding that the second ground would not support a section 2 claim independently and thus the alternative holding could not be sustained. The court went on to question the sufficiency of the factual basis for the antitrust claim generally, and suggested that the claim might be better brought as an FTC Act section 5 action.
D.C. Circuit Opinion; Petition for Certiorari; FTC Press Release.

Whole Foods Files Suit Against FTC for Violating its Due Process Rights

The latest turn in the Whole Foods and Wild Oats merger saga leads back to the very same District Court Judge who declined to enjoin the merger in the first place. This time, Whole Foods brought the action alleging due process and Administrative Procedure Act violations. The complaint likens the FTC's conduct to that of the Queen of Hearts, from *Alice in Wonderland*, whose infamous demand is quoted at the outset of the complaint: "First the sentence, and then the evidence!"
Complaint via Legal Times.

D.C. Circuit Denies Whole Foods Rehearing Petition

Despite the splintered opinion, a powerfully worded reply brief supporting petition for rehearing, and widespread scrutiny of the opinion, the D.C. Circuit declined to rehear the case *en banc*. Whole Foods sought rehearing, and sought permission to file reply brief in sup-

& National Beef Packing Co.

The DOJ filed suit in the N.D. Ill. on the 20th to enjoin a merger between the third and fourth largest beef packers in the U.S., alleging the merger would lead to higher beef prices.
Complaint; press release.

Bank of America, Corp. & Merrill Lynch & Co.

The Federal Reserve, in conjunction with the DOJ, cleared Bank of America's Purchase of Merrill Lynch for approximately $50B. Shareholder approvals for the merger came in early December.
Federal Reserve Order.

Manitowoc Company Inc. & Enodis PLC

The DOJ reached a settlement requiring divesture of Enodis PLC's U.S. ice machine business in order to proceed with the merger between the two companies. The DOJ explained the transaction would have substantially lessened competition in the commercial ice cube machine business in the U.S.
DOJ Docket; press release.

Northwest Airlines & Delta Air Lines

The DOJ closed its investigation of the Delta/NWA merger after a six month investigation. The Department found that the merger was likely to lead to cost savings and other synergies that would likely benefit consumers, while the merged company would still compete with other carriers on the vast majority of its routes.
DOJ press release; NWA/Delta release; Antitrust & Comp. Policy Blog.

Verizon Communications Corp.

port authored by Ted Olson. Olson's brief raises questions about the D.C. Circuit's merger analysis, market definition, and standard of review, arguing that "[t]he Panel's decision has turned antitrust law on its head." The initial decision, released over the summer, remands the FTC's suit for injunction against the Whole Foods & Wild Oats merger back to the trial court. As a result, an administrative law judge will determine the merits of the Commission's claims and decide whether further action must be taken to remedy the already-consummated merger.
Denial Order via Antitrust Review; Whole Foods Brief; Wall Street Journal Law Blog.

SCOTUS Grants AAI's Motion to Argue as Amicus Curiae

The U.S. Supreme Court, in an uncharacteristic move, granted the American Antitrust Institute's motion to participate in oral argument as amicus curiae in *Pacific Bell v. linkLine Communications*. The AAI argued in its motion that it should be permitted to argue so that the validity of the 'price squeeze' claim, relied upon by the 9th Circuit below, is vigorously argued. The AAI contended that the respondents have largely conceded their price squeeze claim, which is troublesome given that petitioner – as well as the solicitor general on behalf of the US as amicus curiae – argues price squeeze claims should be—or already have been—eliminated as a matter of law. Oral argument took place on Monday, December 8th.
AAI Motion via SCOTUSBlog; SCOTUSWiki; Antitrust Review; Oral Argument Transcript.

Apple Wins Dismissal on Antitrust Counterclaims

The Northern District of California dismissed monopolization, tying, and exclusive dealing counterclaims brought by Psystar Corp. in a trademark and copyright suit originally brought by Apple earlier this year. The court declined to construe the relevant product market as limited to Mac OS systems, or in the alternative to Mac OS-compatible systems. Based on the finding, the court dismissed the antitrust claims as the plaintiffs would not have been able to show market power in the broader market.
Opinion via Legal Pad.

Tom Barnett to Resign as Assistant Attorney General

The United States Department of Justice AAG, in charge or the Antitrust Division, announced his resignation, effective on Nov. 19. Barnett was formerly a Deputy AAG until June, 2005 when he became the acting AAG. He was confirmed in the position by the Senate in early 2006. The DOJ reports $1.8B in criminal sanctions levied, and 34 merger cases challenged during Barnett's tenure. Debra Garza replaced Barnett and is the acting AAG in charge of the Antitrust Division.
DOJ Press Release; Garza Appointment via Antitrust Review.

Google Is Done Dancing With Yahoo

Citing risks of "not only a protracted legal battle but also damage to relationships with valued partners," Google's Chief Legal Officer, David Drummond, announced the end of the Google–Yahoo advertising partnership on November 5th. The end of the partnership – formed in May as a strategic defense to an unsolicited takeover bid from Microsoft – came following an announcement from Tom Barnett signaling that the Department of Justice would seek an injunction blocking the partnership. The aggressive DOJ stance may foreshadow increased agency scrutiny on Google, suggests the New York Times Dealbook. Meanwhile rumors of a revitalized Microsoft takeover of Yahoo swirl amid the Google fallout.

& Alltel Corp.

The DOJ requires divestures in 100 markets across 22 states in the Verizon's $28B purchase of Alltel. The merger will combine the second and fifth largest US wireless carriers, and is subject to additional review by the FCC.
DOJ press release.

Have We Missed Something?

Do you know of a recently antitrust, franchising, or trade regulation case that you don't see in the newsletter? Please email the editor with recently resolved or newly pending cases that we have missed.

DOJ press release; WSJ Law Blog; Official Google Blog; NYT Dealbook.

Discover Reaches Settlement with Visa and MasterCard

Discover reportedly has reached an agreement with Visa and MasterCard in a dispute involving Visa and MasterCard's alleged practice of forcing banks to choose between Visa/MasterCard and Discover. The news came only days ahead of jury selection for the trial; the suit was initiated in 2004. Discover reported in a press release that the settlement would award the company up to $2.75 million in quarterly installments beginning this quarter and ending in the fourth quarter of 2009.
Reuters; Discover press release.

NY Times Editorial Bashes DOJ §2 Statement

A NY Times editorial sharply criticized the recent DOJ §2 guidelines, released in September, noting, "even the Federal Trade Commission declined to support the Justice Department's new guidelines." The Times reports that "[t]he new doctrine bends over backward to protect big firms from accusations of anticompetitive behavior."
NY Times article; DOJ §2 report; FTC Responses.

ENFORCEMENT ACTIONS

Dunlop Oil & Marine, Ltd. Agrees to Plead Guilty to Conspiracy

On December 1st, the DOJ announced that the marine rubber hose manufacturer Dunlop had agreed to plead guilty to a price fixing conspiracy that affected both consumers and the United States Department of Defense. The plea resulted in a $4.54M criminal sanction and an agreement to cooperate in the ongoing DOJ investivation.
Press Release.

LG, Sharp, and Chunghwa Picture Tubes Plead Guilty to Price Fixing

LCD TV makers LG, Sharp, and Chungwa pled guilty and agreed to pay a nearly $600M in total criminal fines for their roles in a scheme to fix the prices of LCD TVs. A statement from AAG Tom Barnett praised the companies for timely accepting responsibility and agreeing to cooperate with the DOJ, but alluded to the ongoing nature of the investigation.
WSJ Law Blog; DOJ Press Release; Tom Barnett's Statement.

DOJ Declines to Challenge Consortiums Radio Frequency Patent-Licensing Agreement

In a business review letter issued the November 21, the Department of Justice explained that it would not challenge a consortium of companies proposed patent-licensing agreement dealing with ultra high frequency radio frequency identification (UHF RFID) technology standards, finding that the agreement would yield procompetitive benefits and limit members of the consortium's ability to impede the technology's progress by using their intellectual property rights.
DOJ Business review letter; Press Release.

DOJ Approves the Final Settlement in U.S. v. NAR

Following the comment period the Department of Justice announced that, with minor changes, it intends to move the court to enter the final settlement in the action brought by the Department against the National Association of Realtors. The settlement targets NAR policies that discriminating against 'Virtual Office Websites,' which are designed to pro-

vide customers with online access to brokerage services including multiple listing service (MLS) access.
Proposed final settlement; DOJ docket.

FTC Announces Consent Order in Dick's Sporting Goods Market Allocation Case

The Commission announced a consent agreement and order settling allegations that a Dick's Sporting Goods subsidiary, Golf Galaxy, had agreed with a potential competitor, Golf Canada, to allocate U.S. and Canadian markets. The charges came as the result of a 2004 non-compete agreement that the FTC claimed went "beyond what can be justified by pro-competitive arrangements."
Press Release; FTC docket.

Plea Reached With One Member of Bid Rigging & Customer Allocation Scheme

The DOJ announced in late October that a plea deal had been reached with Humberto Lopez, an El Paso executive involved in a bid rigging and customer allocation conspiracy that allegedly dates back to the early 1990s. The door and hardware companies El Paso Steel Doors and Frames Inc. and Architectural Products Co. Inc., were indicted in September for their roles in the scheme, along with Lopez, an El Paso VP, and Lindsay B. Holt, Sr., an executive at Architectural Products.
DOJ press release; Indictment.

DOJ Ends Probe of Nvidia & Advanced Micro Devices

The Wall Street Journal reported this month that the DOJ probe into Nvidia and Advanced Micro Devices had been closed after a two year investigation of the companies. The companies recently settled a private action brought on behalf of purchasers alleging the companies coordinated product release times and prices.
WSJ Blog Article; WSJ Article.

RENEWED EFFORTS TO CURB MANDATORY ARBITRATION

BY: HOWARD YALE LEDERMAN[†]

On November 4, 2008, the Democrats won the 2008 presidential and congressional elections big. On January 20, 2009, Barack Obama will become our next President. Even before that, the 111th Congress, with its commanding Democratic House and Senate majorities, will take office. As of this writing, the Democrats will have at least a 58-42 Senate majority and a 256-175 House majority. Two Senate and four House seat elections remain undecided. As a result, the Democrats gained at least six Senate and 21 House seats. Thus, renewal of 110th Congress bills attacking, restricting, and outlawing contractual mandatory arbitration provisions is a near certainty.

In 1925, Congress enacted the Federal Arbitration Act ("FAA") permitting contracting parties to include in their contracts arbitration provisions.[1] Beginning in 1984, several U.S. Supreme Court decisions have approved mandatory, as opposed to voluntary, arbitration provisions.[2] For example, in employment contract situations, the Court brushed aside the unequal bargaining power defense to application of mandatory arbitration provisions: "Mere inequality of bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[3] The Court has "rejected generalized attacks on arbitration" resting "on suspicion of arbitrations as a method of weakening" federal law protections.[4] More and more consumer, employment, franchise, health care, and other commercial contracts include mandatory arbitration provisions. Many commentators have criticized mandatory arbitration provisions as inappropriate for individuals, small businesses, and other small organizations. Their criticisms have fallen on deaf ears. Until the last two years neither Congress, the Executive Branch, nor the Federal Courts had done anything to stop or even restrict the mushrooming of these provisions. But with the Democrats' 2006 election victory, that has changed.

On July 12, 2007, Senators Feingold and Durbin, with Senators Boxer, Byrd, Kennedy, Kerry, Leahy, and Whitehouse (all Democrats) as cosponsors, introduced Senate Bill 1782, the Arbitration Fairness Act of 2007.[5] In the bill's preamble, the authors declared the bills purposes as 1) Overriding several recent US Supreme Court decisions approving and expanding mandato-

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[1] 9 U.S.C. §§ 1-16 (2006).

[2] *E.g.*, Moses H. Cone Memorial hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L. Ed. 2d 765 (1983); Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L. Ed. 2d 1 (1984); Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L. Ed. 2d 444 (1985); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32, 111 S.Ct. 1647, 114 L. Ed. 2d 26 (1991); Allied-Bruce Terminix Companies, Inc., 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995); *see also* Seawright v. American General Financial Services, Inc., 507 F.3d 967, 972-974 (6th Cir. 2007); Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003) (en banc); Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1151 (7th Cir. 1997); Daisy Manufacturing Co. v. NCR Corp., 29 F.3d 389, 393-395 (8th Cir. 1994).

[3] *Gilmer,* 500 U.S. at 32.

[4] Green Tree Financial Corp.-Alabama v. Randolph*,* 531 U.S. 79, 89-90, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

[5] S. 1782, 110th Cong. (2007).

ry arbitration provisions and 2) Restricting such provisions to large businesses and other large organizations with substantial bargaining power. The preamble reads:

> Section 1. Short Title.
>
> This Act may be cited as the 'Arbitration Fairness Act of 2007.'
>
> Section 2. Findings
>
> The Congress finds the following:
>
> (1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
>
> (2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of generally disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.
>
> (3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.
>
> (4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.
>
> (5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.
>
> (6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.
>
> (7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to

> arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.[6]

In his statement, Senator Feingold discussed these findings and mentioned that Georgia Democratic Representative Hank Johnson would introduce this bill in the House. On July 12, 2007, with 103 cosponsors (almost all Democrats), he did so.[7]

These bills would amend the FAA to bar mandatory arbitration provisions, if such provisions compel arbitration of consumer, employment, or franchise disputes, disputes arising under civil rights statutes, or disputes arising under other laws designed to regulate contracts between persons of unequal bargaining power. The bills would permit voluntary arbitration provisions.

Senators and Representatives have introduced several bills to bar mandatory arbitration provisions in specific areas. A leading example is nursing home-nursing home resident contracts. On April 9, 2008, Republican Senator Mel Martinez of Florida introduced the Fairness in Nursing Home Arbitration Act in the Senate with Senators Durbin, Feingold, Kohl, and Leahy, all Democrats, as cosponsors.[8] On May 22, 2008, Representative Linda Sanchez of California, with 23 cosponsors (almost all Democrats), introduced the same bill in the House.[9] These bills would bar mandatory arbitration provisions in contracts between nursing homes and their residents. But the bills would permit voluntary arbitration provisions.

On July 18, 2008, the Senate Committees on Aging & Antitrust, Competition Policy, and Consumer Rights held joint hearings. On September 11, 2008, the Senate Judiciary Committee approved the Senate bill by voice vote. On July 30, 2008, the House Judiciary Committee approved the House version 17-10.

The Automobile Arbitration Fairness Act[10] would bar mandatory arbitration provisions in contracts between vehicle dealerships and their customers. On February 7, 2008, Rep. Sanchez of California introduced the bill with 12 cosponsors, all Democrats. On July 15, 2008, the House Subcommittee on Commercial and Administrative Law approved the bill and forwarded it to the House Judiciary Committee.

On May 22, 2008, Congress passed the agricultural subsidy bill, including a provision permitting farmers to reject mandatory arbitration provisions in livestock and poultry contracts, over President Bush's veto.[11] But unlike the other bills in the 110th Congress, the FAA amendment was part of a much larger bill.

On October 22, 2007, Democratic Representative Bradley Miller, with 27 cosponsors (all Democrats), introduced the Mortgage Reform and Anti-Predatory Lending Act of 2007 barring

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[6] S. 1782.
[7] H.R. 3010, 110th Cong. (2007).
[8] S. 2838, 110th Cong. (2008).
[9] H.R. 6126, 110th Cong. (2008).
[10] H.R. 5312, 110th Cong. (2008).
[11] H.R. 2419, 110th Cong. § 11005 (2007).

mandatory arbitration provisions in residential home mortgage loan agreements.[12] On November 15, 2007, the House passed the bill 291 to 147, with 14 representatives not voting. Almost all House Democrats and about 33% of the House Republicans voted for the bill. The Senate has not acted on this bill.

On March 14, 2007, Democratic Representative Charlie Gonzalez, with two Democratic cosponsors, introduced the American Homebuyers Protection Act, H.R. 1519, banning mandatory arbitration provisions in home sale contracts. On May 15, 2007, the House referred the bill to its Commerce, Trade, and Consumer Protection Subcommittee. Neither the subcommittee nor the House Energy and Commerce Committee has acted on the bill.

On May 9, 2007 Democratic Representative Louis Gutierrez, with four Democratic cosponsors, introduced the Consumer Fairness Act of 2007, H.R. 1443 declaring mandatory consumer agreement arbitration provisions as unfair and deceptive trade practices and banning them as unenforceable. On March 9, 2007, the House referred the bill to the House Committee on Financial Services. The committee has not acted on the bill.

On January 9, 2007, Republican Senator Charles Grassley, with five Democratic and one Republican cosponsors, introduced the Fair Contracts for Growers Act, S.221, banning mandatory arbitration provisions in contracts between meatpackers and meat producers. On October 15, 2007, a Senate committee held hearings on the bill. The Senate has not acted further on the bill.

On August 3, 2007, Democratic Representative Artur Davis, with 13 Democratic cosponsors, introduced the Reservist Access to Justice Act of 2007, H.R. 3393 banning mandatory arbitration provisions in employment and related disputes between military reservists and their employers. On August 16, 2008, a House subcommittee held a hearing on the bill. The House has not acted further on the bill.

As President Obama and the new Congress begin work next year, look for the sponsoring senators and representatives to reintroduce these bills, and for these bills to progress to floor votes during the third and fourth quarters of next year.

[12] H.R. 3915, 100th Cong. (2008).

SKEPTICAL AFTER THE MARKET CRASH OR CAMPAIGN SEASON? COURTS TOO, ABOUT *PER SE* LABELS

BY: FREDERICK R. JUCKNIESS[†]

In these days of volatile stock markets and increased skepticism regarding financial markets, some are questioning why those responsible were not sufficiently skeptical earlier. Likewise, after a long campaign season, voters' critical thinking about labels, platitudes and candidate statements has been cranked to its peak. For each group, the recent decision in *Meijer, Inc. v. Barr Pharmaceuticals*,[13] reflects the growing skepticism and critical thinking by the courts regarding labels and categorization of practices challenged as *per se* violations of the antitrust laws. The *Meijer* opinion illustrates a level of skepticism that may have behooved investors or voters that has been alive and growing in the antitrust realm when plaintiffs seek *per se* analysis of their claims.

In *Meijer*, the antitrust claims by several direct purchasers of the contraceptive Ovcon arose out of an agreement between two defendant pharmaceutical companies–Barr Pharmaceuticals and Warner Chilcott–that delayed the marketing and sale of a generic form of Ovcon. Warner Chilcott marketed and sold the brand name contraceptive Ovcon while Barr applied for and received approval for a generic form of Ovcon, and announced the impending launch of the generic product. Soon thereafter, Warner Chilcott and Barr entered into an agreement under which Barr became obligated to supply its generic Ovcon product exclusively to Warner Chilcott for five years in exchange for $20 million. The stated purpose of the agreement was to remedy alleged supply shortages suffered by Warner Chilcott, and not (as plaintiff contended) to prevent competition that could substantially impact sales of Ovcon.

Several antitrust suits followed. While the court approved a settlement between many of the parties resulting in dismissal of Warner Chilcott,[14] Barr refused to settle.

At summary judgment, the direct purchasers first sought their shortcut to victory by seeking application of *per se* analysis, so that "no elaborate study of the industry is needed to establish [its] illegality."[15] Accordingly, procompetitive benefits and proof become irrelevant since application of *per se* analysis means it is unnecessary "to study the reasonableness of an individual restraint in light of the real market forces at work" before condemning the practice as illegal.[16]

However, *per se* analysis is applied only to practices regarding which anticompetitive effects are deemed certain such as price fixing, and with the support of many scholars and practitioners in the field, it has been limited even further in recent years. As the D.C. Circuit ex-

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[13] 572 F.Supp.2d 38 (D.D.C. 2008).

[14] *See* Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd., 565 F.Supp.2d 49 (D.D.C. 2008).

[15] Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006).

[16] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S.Ct. 2705, 2712-13, 168 L.Ed.2d 623 (2007).

plained in an earlier opinion "[t]he Supreme Court's approach to evaluating a §1 claim has gone through a transition over the last twenty-five years, from a dichotomous categorical approach to a more nuanced and case-specific inquiry."[17] For example, the Supreme Court in its 2007 decision in *Leegin* overruled the longstanding rule that *per se* analysis applied to vertical minimum-resale-price agreements. Tying arrangements formerly subject to straight *per se* analysis have likewise been removed from summary condemnation, first through *Jefferson Parish Hospital District No. 2 v. Hyde*,[18] which defined the type of market power required, and then *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,[19] which nailed the coffin shut on any questions of the requirement that litigants demonstrate market power in a defined market, rejecting presumptions of market power based on patents. These and other recent cases demonstrate a continued departure from formalistic assumptions and an encouraging embrace of substantive economic analysis in evaluating when a business practice is in reality an unreasonable restraint on trade. Notwithstanding these developments in the field, the classics of price fixing and horizontal market allocation remain *per se* illegal.

The direct purchasers presented a logical argument that the agreement between Barr and Warner Chilcott could properly be characterized as a horizontal market allocation of information, thus *per se* illegal. Barr countered that, as a supplier, the contract was at best part vertical and part horizontal and that exclusive supply arrangements are consistently analyzed under the rule of reason.[20] Despite Barr's counter-argument, however, it was clear that Barr could have competed in the same market with a product that was functionally interchangeable with the brand name drug Ovcon. (The court also discussed role of functional interchangeability in product market definition which is also of interest).

In keeping with the increasing skepticism among courts of *per se* analysis, the D.C. Circuit refused to apply the *per se* rule even though a horizontal market allocation appeared to be a fair and rational characterization of the Barr agreement. The court explained its approach by noting that "forcing conduct into a particular 'category' and applying the *per se* rule" has been rejected and criticized by the Court in cases such as *Broadcast Music, Inc. v. CBS, Inc.*,[21] and *FTC v. Indiana Fed'n of Dentists*.[22] Though reasonable economists may differ regarding the proper characterization of challenged agreements among competitors, the *Meijer* court demonstrates how the scales have shifted to favor a full rule of reason inquiry over line drawing and simplified categorization.

In analyzing the contract, the *Meijer* court explains that "the law does not allow a party to simply isolate one particular provision or restraint within an overall agreement and argue, in isolation, that the restraint is subject to *per se* condemnation."[23] Even though Barr and Warner

[17] Polygram Holding, Inc. v. FTC, 416 F.3d 29, 33-34 (D.C. Cir. 2005).
[18] 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984).
[19] 547 U.S. 28, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006)
[20] *Meijer*, 572 F.Supp.2d at 48.
[21] 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (challenged agreement amounted to "literal" price fixing, but Court found *per se* analysis did not apply since analysis must be on the effects of the restraint).
[22] 476 U.S. 447, 458, 106 S.Ct. 2009, 2018, 90 L.Ed.2d 445 (1986) (agreement amounted to a group boycott, but Court holds that "we decline to resolve this case by forcing the [defendant's] policy into the 'boycott' pigeonhole and invoking the *per se* rule").
[23] *Meijer*, 572 F.Supp.2d at 49.

Chilcott were potential competitors who had agreed they would not compete by selling competing products, the court backed away from categorizing that as a horizontal market allocation, reasoning that "the Agreement's resulting economic effects largely depend on the definition of the relevant market."[24]

Predictably, however, the parties disputed the relevant market with plaintiffs, arguing Ovcon and its generic equivalents constituted the market, and defendants arguing that all contraceptives are part of the market. As a result, the disputes regarding the market meant that whether the contract produced anticompetitive effects was unclear, and thus improper for *per se* analysis. As the court put it: "The *per se* rule is reserved for restraints that are anticompetitive in all or nearly all instances, not those that are anticompetitive depending on particular market dynamics."[25] As a result, the court based its refusal to apply *per se* by going the extra step beyond the Barr Contract's characterization and instead analyzing whether there would be anticompetitive effects based on the known facts – precisely the analysis that *per se* analysis would have obviated. If courts are unwilling to presume anticompetitive effects if there is any doubt as to whether there will be *actual* anticompetitive effects, then *per se* analysis will be rare indeed.

Since relevant markets are so frequently a central dispute, and since the anticompetitive effects that are presumed as part of *per se* analysis depend upon their definition, courts will be hard pressed to justify *per se* analysis under a *Meijer*-type analysis. The approach has the merit of ensuring that competitive conduct is not condemned based on categorization or assumptions. However, antitrust plaintiffs will face greater challenges and tougher questions where they wish to avoid fulsome market definition and marshalling proof of anticompetitive effects. Antitrust jurisprudence continues to become more skeptical of assumptions as courts embrace and seek definitive proof of economic reality before potentially condemning a procompetitive practice. The approach certainly is reflective of the times in which we live where more healthy skepticism is a virtue.

[24] *Id.* at 50.
[25] *Id.*