STATE BAR OF MICHIGAN
ANTITRUST, FRANCHISING, AND TRADE REGULATION SECTION
E-NEWSLETTER
JULY, 2011

SECTION INFO:

MESSAGE FROM THE CHAIR

As we were unwinding from our Spring Social at Ann Arbor's Kelsey Museum, I began to consider how hot this summer has become with Michigan antitrust news.

As a preliminary matter, I want to thank all of our members that made our Spring Social an absolute success. It was nice to see all the new faces, as well.

Concerning the State Bar of Michigan's Annual Meeting, we are excited to announce that our Section is hosting a luncheon and panel of nationally recognized antitrust litigators to debate the U.S. DOJ Antitrust Division's Leniency Program. The panelists include Kevin Culum, U.S. DOJ Antitrust Division (Cleveland, OH), Jay Himes, Labaton Sucharow LLP (New York, NY), and Gordon Lang, Nixon Peabody LLP (Washington, D.C.). The debate is scheduled to commence at noon on September 16, 2011. We encourage you to attend. With the recent upswing of state and federal antitrust investigations within the region, you are sure to learn a tip to better serve your clients.

We are scheduled to have our Council meetings July 22 and September 16. Additionally, we will likely have Council meetings during November and December. We will be ramping up our grass-roots campaign to promote antitrust law awareness at Wayne State University School of Law and Michigan State University School of Law.

Cheers,
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SECTION NEWS

Now Accepting Submissions

If you have an antitrust, franchising, or trade regulation article that you would like to submit to be considered for publication in an upcoming e-Newsletter, please submit your work to the Section's Publications Editor, Justin Hakala.

Missed the Last E-Newsletter?

If you missed the last e-Newsletter, be sure to check out the archives at the State Bar of Michigan's website, accessible here.

MICHIGAN NEWS

In re Detroit Association of Realtors, 2010-cv-14046 (E.D. Mich.)
July 12, 2011
On June 28, 2011, the Eastern District of Michigan denied Defendant Associations of

In This Issue:

Realtors' motion to dismiss. On July 12, 2011, Dearborn Board of Realtors, Detroit Association of Realtors, Eastern Thumb Association of Realtors, Livingston Association of Realtors, Metropolitan Consolidated Association of Realtors, North Oakland County Board of Realtors, and Western Wayne Oakland County Association of Realtors answered the class action complaint with affirmative defenses.

A group of consumer, as purchasers of real estate brokerage services for real estate listed for sale by member brokers and agents of defendants, lodged a complaint against the Detroit Association of Realtors, Realcomp II, Ltd., et al., alleging that defendants entered into an illegal agreement that resulted in the restriction of Realcomp's Multi Listing Service ("MLS") resulting in higher prices.

The complaint follows the United States Federal Trade Commission's antitrust investigations of Realcomp II, Ltd. (Docket No. 9320) and Sixth Circuit appeal (Case No. 09-4596). An administrative judge previously found that Realcomp II held substantial market power in the relevant market multiple listing services, including throughout the four Michigan counties of Wayne, Oakland, Livingston, and Macomb.

The consumers are represented by Barris Sott Denn & Driker, PLLC, Goldman Scarlato & Karon (Cleveland, OH), Freed Kanner London & Millen LLC (Chicago, IL), and Reinhardt Wendorf & Blanchfield (St. Paul, MN).

Polyurethane Foam Antitrust Investigations, MDL No. 2196 (Consolidated – N.D. Ohio)
July 1, 2011
On July 1, 2011, the Northern District of Ohio denied the defendants' motion to dismiss the civil litigation. Many of the defendants have offices here in the Detroit metro area.

We previously reported that the European Commission's antitrust division carried out unannounced inspections at the premises of companies active in the polyurethane foam sector in several Member States. The dawn raids relate to an alleged price-fixing cartel. Within North America, including most of the Midwestern states and Ontario, the FBI and Canadian Competition Bureau executed search warrants on the offices of leading polyurethane foam manufacturers and various sales representatives.

Vitafoam Inc., with headquarters in North Carolina and Ontario, and Recticel S.A., with headquaters in Belgium and Michigan, both polyurethane foam manufacturers, are reported as being accepted into the various Corporate Leniency Programs.

U.S. Plaintiffs are represented by Boies Schiller & Flexner LLP (Washington, D.C.), Quinn Emanuel Urquhart & Sullivan LLP (New York, NY), and Miller Law LLC (Chicago). Defendants are represented by a dozen plus firms, including Dykema Gossett, PLLC and Barnes & Thornburg LLP.

Refrigerant Compressors Antitrust Litigation, MDL. No. 2042 (E.D. Mich.)
June 13, 2011
On June 13, 2011, Honorable Sean F. Cox denied, in part, and granted, in part, the defendants' motion to dismiss. Various defendants also took issue with plaintiffs' class

DEAL LOG:

Grifols & Talecris

June 1, 2011

The FTC will allow Grifols, S.A. to proceed with its acquisition of Talecris Biotherapeutics Holdings Corp., both manufacturers of plasma-derived drugs, provided that Grifols divests two of its plasma collection centers and the Talecris fractionation facility in Melville, New York. The assets will be sold to Kedrion S.p.A., a manufacturer of plasma-derived products that will be a new entrant in the U.S. market. The FTC said that the acquisition as originally proposed would have resulted in loss of competition in three markets for plasma-derived products and increased likelihood of coordination. FTC Press Release.

Berkshire Hills Bancorp & Legacy Bancorp

May 18, 2011

To address antitrust concerns raised by the DOJ and in order to forward with the proposed merger, Berkshire Hills Bancorp Inc. and Legacy Bancorp Inc. will divest four Legacy branches located in Berkshire County, MA, including related commercial loans made by those branches. The branches have approximately $158 million in total deposits. DOJ Press Release.

Unilever & Alberto-Culver Co.

May 6, 2011

Unilever and Alberto-Culver Co.

period arguing that they did not sufficiently allege a conspiracy, let alone a conspiracy before June 2004 or after December 2006 or December 2007 (two of the defendants plead guilty to criminal price fixing charges for the 2007 time-period). The plaintiffs' class period was set at January 1, 2004 up to and including December 31, 2008.

The court concluded "that *Twombly* does not support such a 'dismemberment' or 'carve out' approach to assessing the sufficiency of a complaint. *Twombly* does 'not require heightened fact pleadings of specifics, but only enough facts to state a claim to relief that is plausible on its face.' Here, the [complaint] contains direct and inferential allegations respecting all material elements to sustain a recovery under the Sherman Act." The court also rejected Defendants' motion to dismiss the claims prior to June 2004 or after December 2006.

The court ruled, however, that plaintiffs failed to plead fraudulent concealment with particularity with any claim accruing before February 25, 2005, and dismissed those claims as time-barred. The court found that the plaintiffs failed to plead what due diligence, if any, it engaged to learn that they were alleged victims of a price-fixing conspiracy.

The opinion highlights the difficulty that plaintiffs have encountered developing the merits of a case in order to satisfy the requirements of *Twombly,* and further the very high bar set by the Sixth's Circuit's opinion in *Dayco Corp. v. Goodyear Tire & Rubber Co*., 523 F.2d 389 (6th Cir. 1975). *Dayco* requires due diligence in plaintiffs' pleading, which is frequently a difficult task for small businesses owners, indirect-purchasers, and end users who have suffered an antitrust injury.

Auto Components Antitrust Investigations Continue to Expand in Scope

June 7, 2011

On June 7, 2011, the European Commission carried out unannounced inspections at the companies that supply car seatbelts, airbags and steering wheels, known in industry as automotive occupant safety systems.

On February 9, 2011, it was reported that the FBI executed a search warrant on TK Holdings Inc., the subsidiary of Takata Corp., seeking the production of any communications concerning seat belts between it, Takata, Tokai Rika Co's TRAM and TRMI. These companies appear to manufacture seatbelts and airbags.

Last summer we reported that the United Kingdom's Office of Fair Trading arrested a British-based employee of Yazaki after receiving a tip-off from Sumitomo Electric Wiring Systems about antitrust activities within the electrical wiring industry.

During 2010 and 2011, the FBI and Japanese Fair Trade Commission carried out unannounced inspections at the offices of Denso Corp., Yazaki North America, Sumitomo Electric Industries Ltd., Tokai Rika Group North America, Tram Inc. and Lear Corp.

***In re* Blue Cross Blue Shield of Michigan**, (E.D. Mich.)

entered an agreement with the DOJ to divest two hair care brands, Alberto-Culver's Alberto VO5 brand and Unilever's Rave brand, as a condition to Unilever's $3.7 billion acquisition of Alberto-Culver. The divestiture will preserve competition in the value shampoo, value conditioner and hairspray retail market. As originally proposed, the transaction would have left only two competitors in the value shampoo and conditioner markets, with Unilever controlling approximately 90% of those markets. Unilever would also have acquired a 46 percent share of the hairspray market, resulting in a highly concentrated market. DOJ Press Release.

FPP Family Investments & Coleman Natural Foods

May 2, 2011

After obtaining extensive information from relevant agricultural market participants, the DOJ has decided to allow the proposed acquisition of Coleman Natural Foods by FPP Family Investments, the parent company of Perdue Farms Inc., but will continue to monitor the situation.

The department was concerned about adverse effects on competition between chicken processors for obtaining the services of chicken growers but decided that the merger was not likely to have any anticompetitive effects by enhancing the buying side of the market as Perdue and Coleman processing plants do not overlap in the same region. Due to specific market conditions, the DOJ said that the merger would not to

June 7, 2011

We previously reported that the US Department of Justice and the State of Michigan filed a civil antitrust lawsuit against Blue Cross Blue Shield of Michigan (BCBSM) alleging that provisions of its agreement with hospitals result in artificially high prices for various medical procedures and services as well as prevents other insurers from entering the marketplace.

In particular, the DOJ and Office of the Mich. AG have taken issue with the most favored nation (MFN) clauses incorporated into the contracts between BCBSM and certain Michigan healthcare facilities. As the plaintiffs argue, these MFN clauses result in hospitals charging BCBSM's competitors more than they charge BCBSM for the same services. On June 7, 2011, the E.D. Mich. denied BCBSM's motion to dismiss.

Several civil antitrust class actions have also been filed against BCBSM. One of the more recent filings includes the matter of Abatement Workers National Health and Welfare Fund, Michigan Regional Council of Carpenters Employee Benefits Fund and Monroe Plumbers and Pipefitters Local 671 Welfare Fund, 2:2010cv14887 (Dec. 8, 2010).

Packaged Ice Antitrust Litigation, MDL No. 1952 (E.D. Mich.)

May 10, 2011

In an unexpected move, on May 10, 2011, Honorable Paul D. Borman ordered the U.S. DOJ to produce the tape recordings and transcripts, which are believed to contain admissions of various confidential witnesses, former employees of the defendants, and known whistleblowers of the market allocation scheme between Arctic Glacier, Home City Ice, Reddy Ice, and possibly other regional ice companies. The court emphasized that the investigation was closed and that "the federal discovery rules, including Rule 45 and Rule 26(b), along with all applicable privilege rules, provide sufficient 'tools' with which this Court can adequately protect both litigant's right to receive evidence and the government's interest in protecting both its processes and its resources.'" The court also provided a thorough analysis of 28 C.F.R. § 16.26.

In re Prandin Antitrust Litigation, 2010-cv-12141 (E.D. Mich.)

The plaintiff direct-purchaser of pharmaceutical drugs alleges that Nova Nordisk, Inc. unlawfully monopolized the repaglinide market and prevented the introduction of lower-cost generic repaglinide.

Repaglinide is typically used in one of three ways: (1) as a stand-alone treatment; (2) in combination with drugs called thiazolidinediones; and (3) in combination with a drug called metformin. The repaglinide compound itself is now off patent, but Novo has a patent on the combination with metformin, a so-called "method of use" patent. There is no patent protection for the other two primary uses. The patent holder may list any method of use patents with the Food and Drug Administration (FDA) using a "use code narrative" that describes the method of use. Prior to 2009, the use code narrative in place for Prandin stated as follows: "U-546: use of repaglinide in combination with metformin to lower blood glucose."

Earlier this year, Defendants Novo Nordisk A/S and Novo Nordisk Inc. filed their motion

make coordination among processors more likely. DOJ Press Release.

Southwest Airlines & AirTran Airways

April 26, 2011

The DOJ will allow Southwest Airlines to acquire AirTran Airways, saying at the close of this investigation that the merger does not raise serious competition concerns. The merger will allow for new routes and services that are not currently offered to customers. The benefits of the merger, said the DOJ, outweigh any possible concerns and similar mergers have previously proven to lower fares on certain routes. DOJ Press Release.

CPTN Holdings LLC & Novell

April 20, 2011

The acquisition agreement between CPTN Holdings LLC and Novell that will allow CPTN to acquire certain patents and patent applications of Novell's, has been modified in response to concerns raised by the DOJ that the agreement as proposed would make it difficult for open source software, such as Linux, to continue competing in the development and distribution of server, desktop and mobile operating systems, middleware and virtualization products.

Microsoft Inc., Oracle Corp., Apple Inc. and EMC Corp. own equal shares in CPTN Holdings and created it for the acquisition of Novell's patents. Part of the deal also involved the merger of Novell with Attachmate Corporation to dismiss the direct purchaser plaintiffs' consolidated class action complaint for failure to plead exclusionary conduct and for lack of standing.

Plaintiffs are represented by Patrick Cafferty, Cafferty Faucher LLP (Ann Arbor), Berger & Montague, P.C., Cohen Milstein Sellers & Toll PLLC, Faruqi & Faruqi LLP, Taus Cebulash & Landau LLP, and Hagens Berman Sobol Shapiro LLP. Defendant is represented by David Ettinger and Herschel Fink, Honigman Miller Schwartz and Cohn LLP.

NATIONAL NEWS

DOJ/FTC Announce New Premerger Notification Form

July 7, 2011

In an effort to streamline and make the process of obtaining antitrust clearance under the Hart-Scott-Rodino Act less burdensome, the FTC and DOJ have changed the notification form. The new form requires some additional information but no longer requires that copies of documents be filed with the SEC, the reporting of "economic code 'base year' data," or a "detailed breakdown of all the voting securities to be acquired." For more information, the revised rules are available here. DOJ Press Release. FTC Press Release.

The revised Rules can be found at.

Assistant Attorney General Christine Varney To Leave The DOJ

July 6, 2011

Assistant Attorney General Varney announced her resignation effective as of August 5, 2011. She joined the Antitrust Division in 2009 and during her tenure she strengthened partnerships between the division and other agencies to ensure compliance with competition laws. DOJ Press Release.

FTC Issues New Guidance Doc On Filing Requests For Advisory Opinions

June 22, 2011

The FTC Bureau of Competition has issued a new guidance document that includes practice tips for filing requests for advisory opinions. FTC Press Release.

FTC Names New Deputy Director For Antitrust In The Bureau of Economics

June 22, 2011

Dr. Alison Oldale will replace Howard Shelanski as Deputy Director for Antitrust in the Bureau of Economics at the FTC. Dr. According to the FTC press release, Dr. Oldale is the Chief Economist for the UK's Competition Commission. The transition will take place in mid-July. FTC Press Release.

ENFORCEMENT ACTIONS

North Carolina Dental Board Engaged in Illegal Anticompetitive Conduct

July 19, 2011

and the eventual distribution of the acquired patents amongst CPTN's owners.

Among the numerous modifications provided was an agreement that (1) all of the Novell patents acquired by CPTN will be subject to an open-source license, Version 2 of the GNU General Public License, and Linux will be subject to the Open Invention Network license; (2) EMC will not acquire 33 Novell patents on virtualization software; and (3) Microsoft must sell back to Attachmate any patents it will acquire in the transaction, but can receive a license for the use of any patent sold back, any patent maintained by Novell, and for the use of any license acquired by the other three owners.

The investigation of this deal was done in cooperation between DOJ and the German Federal Cartel Office. The DOJ said it will continue monitoring the transaction. DOJ Press Release.

Stericycle & Healthcare Waste Solutions

April 8, 2011

The DOJ and the New York Attorney General filed suit on April 8, 2011 seeking to prevent the proposed acquisition of Healthcare Waste Solutions (HWS) by Stericycle. The DOJ said the proposed acquisition would leave only two competitors with local transfer stations in the infectious waste treatment market located in the NYC metropolitan area. Stericycle and HWS would conse-

Chief Administrative Law Judge D. Michael Chappell issued an order that the North Carolina Board of Dental Examiners, a regulatory state agency, "cease and desist" from engaging in anticompetitive conduct against non-dentist providers of teeth-whitening goods and services. The Board, comprised of six licensed dentists and two additional members, sent 42 letters advising non-dentist providers of teeth whitening services that it was illegal for them to be providing these services and requiring that they stop. Judge Chappell found that the Board did not have the authority to issue such orders and that it violated the law as it harmed competition. The order also requires that the Board send follow-up letters to the entities it misled. FTC Press Release.

Northern California Bid-Rigging Conspiracy

June 30, 2011

Guilty pleas continue in the Northern California real estate bid-rigging conspiracy. Eight California real estate investors pled guilty for their participation in two different conspiracies in different counties involving mail fraud and agreements not to bid against each other at public real estate foreclosures.

As previously reported, the conspiracy aimed to suppress competition to acquire real estate at low, non-competitive prices. Once the property was bought by a designated bidder for the group of conspirators, it was then auctioned off amongst the conspirators. The difference between the price at which the property was acquired during the public auction and the price paid by the winning conspirator was dividing among the remaining conspirators as profit. DOJ Press Release.

DOJ Reaches Settlement Agreement With George's Inc.

June 23, 2011

On May 10, 2011, the DOJ challenged the acquisition of Tyson Food's chicken processing plant located in Harrisonburg, VA by George's Inc. The department cited concerns that the proposed acquisition will eliminate competition between the two remaining companies in obtaining the services of Shenandoah Valley chicken growers. The DOJ requested declaratory and equitable relief, including the divestiture of the Harrisonburg.

George's and Tyson entered and closed an asset purchase agreement on May 7th, despite the DOJ's investigation into the proposed deal and without responding to the DOJ's request for information. The companies were not required to report the acquisition under the Hart-Scott-Rodino Act.

On June 23, 2011, the department announced that it had reached a settlement agreement with George's Inc. requiring it to make capital improvements to the Harrisonburg plant to significantly increase its production capacity. The expanded facility will act as an incentive for George's Inc. to increase its local poultry production and thereby mitigate the anticompetitive consequences that would have led to lower prices for local chicken growers. Latest DOJ Press Release.

Federal E-Rate Program Bid-Rigging Conspiracy

June 21, 2011

quently control 90% of the market leading to higher prices and lower quality of service. Under the simultaneously filed proposed settlement, the companies must divest HWS's transfer station located in the Bronx. DOJ Press Release.

Google & ITA Software

April 8, 2011

As a condition to allowing Google's acquisition of ITA Software, Inc. to proceed, the DOJ will require Google to continue licensing ITA's QPX software which is used by airfare websites to search "for air travel fares, schedules and availability." Google will also be required to continue to develop and offer ITA's next general InstaSearch product.

Additionally, Google will have to install firewalls in order to protect the commercially sensitive data gathered from ITA's customers and to maintain a mechanism that allows for the reporting of complaints should Google act in an unfair manner. The proposed settlement also explicitly prohibits Google from entering into agreements "with airlines that would inappropriately restrict the airlines' right to share seat and booking class information with Google's competitors." DOJ Press Release.

On June 2, 2011, yet another owner of two Illinois technology companies pled guilty for her involvement in the conspiracy to defraud the federal E-Rate Program. Gloria Harper was charged on November 2010 for paying bribes to various school officials responsible for contracting for Internet access services in Arkansas, Illinois and Louisiana. Harper was a co-owner of Global Networking Technologies Inc. (GNT) and owner of Computer Training Associates (CTA) and participated in the conspiracy from December 2001 to September 2005.

A few weeks later, on June 21, 2011, GNT's other former co-owner, Tyrone Pipkin, who we reported pled guilty this past March, was sentenced to a year and a day in prison, in addition to being charged $6,000 in criminal fines.

Earlier, on June 9, 2011, Barrett C. White, a co-conspirator of Pipkin and Harper, was also sentenced to serve a year and a day in prison and to pay $4,000 in criminal fines. To date 7 companies and 24 individuals have pled guilty for their involvement in the conspiracy to defraud the federal E-Rate program, resulting in more than $40 million in criminal fees. Latest DOJ Press Release.

Iowa Ready-Mix Concrete Price Fixing Conspiracy

June 20, 2011

The investigation into the ready-mix concrete industry in Iowa has led to another guilty plea. On May 20, 2011, GCC Alliance Concrete Inc., an Iowa company, pled guilty for its involvement in three conspiracies to fix ready-mix concrete prices with three different companies from January 2006 to August 2009. GCC will pay a criminal fine. As reported, GCC's former sales manager, Steven VandeBrake, was already convicted this past February for his involvement in the conspiracy. VandeBrake was sentenced to 48 months in prison and required to pay $829,715.85 in criminal fines.

On June 20, 2011, Tri-State Ready Mix Inc., another Iowa ready-mix concrete company, pled guilty for its involvement in the price-fixing conspiracy with GCC Alliance Concrete. Latest DOJ Press Release.

FTC Requires Irving Oil To Give Up Maine Assets Acquired From ExxonMobil

May 26, 2011

Irving Oil Terminals Inc. and Irving Oil Limited have agreed to sell the Maine pipeline and terminal assets that they acquired from ExxonMobil to settle charges by the FTC that the acquisition was anticompetitive. In addition to ExxonMobil and Irving, there is only one additional firm able to provide gasoline terminaling services to the Bangor/Penobscot Bay area, and only two additional firms servicing the South Portland area. The FTC's proposed order maintains vital competition in the gasoline and distillates terminaling markets in South Portland and the Bangor/Penobscot Bay area, preventing higher gasoline and diesel prices. FTC Press Release.

DOJ Seeks To Prevent the Acquisition of TaxACT by H&R Block

May 23, 2011

The DOJ filed an enforcement action to enjoin the acquisition of 2SS Holdings Inc., the maker of TaxACT, by H&R Block. TaxACT is seen as a "maverick" in the do-it-yourself tax

software market, where it competes head to head with H&R Block and Intuit. Together these three companies control about 90% of a market that services 35-40 million taxpayers looking for help in filing their taxes, with H&R Block and TaxACT being the second and third largest, respectively. In a prepared statement, AAG Varney said that the DOJ's action's will "ensure that the millions of consumers who each year use do-it-yourself tax programs will continue to have the benefit of competition."

The DOJ relied on a multitude of statements by H&R Block that identified the elimination of competition as one of the benefits of the proposed acquisition in characterizing the transaction as clearly anticompetitive. According to the statement, TaxACT has over the past couple of years taken the lead in the market to lower retail store prices and to offer customers free preparation and filing of tax returns via its website. In addition, the DOJ was concerned that allowing the acquisition would subsequently make coordination in the market more likely. DOJ Press Release. AAG Christine Varney's Statement.

VeriFone And Hypercom Agree To Find Suitable Buyer For Hypercom's U.S. Business

May 20, 2011

On May 12, 2011, the DOJ filed suit seeking to block the acquisition of Hypercom Corp. by VeriFone Systems Inc., citing concerns that the deal does not adequately address the risk of diminished competition in the sale of point-of-sale (POS) terminals, which are used by retailers to accept electronic payments. Hypercom and VeriFone together control more than 60 percent of the U.S. market for POS terminals, facing only one other substantial competitor, Ingenico S.A.

In an effort to address DOJ's concerns, Hypercom announced it would sell its U.S. business to Ingenico S.A., which is also the largest provider of POS terminals in the world. However, seeing as transferring the U.S. business to Ingenico did not resolve the antitrust concerns raised by the DOJ, the DOJ filed suit to enjoin the divestiture. On May 20, 2011, VeriFone, Hypercom and Ingenico announced that they were abandoning their divestiture plans. The DOJ and the companies are in talks to find a suitable buyer. Latest DOJ Press Release.

NASDAQ and IntercontinentalExchange Abandon Bid To Acquire NYSE

May 16, 2011

Assistant Attorney General Christine Varney commented on the abandonment of a joint bid by NASDAQ and IntercontinentalExchange to acquire The New York Stock Exchange, saying that they "are fierce competitors that are the only full service stock exchange operators in the United States." Consequently, a merger between these two rivals would "effectively create a monopoly," Varney continued, leading to higher prices for stock listings, an increase in the price of trading services during the open and close process offered by NASDAQ, higher price for services reporting the data of off-exchange and alternative trading systems, and higher prices for the provision of proprietary real-time equity data products.

Earlier in the day, the two companies announced that they had abandoned the proposed acquisition after the department advised that it would seek to block the pro-

Have We Missed Something?

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

posed deal by filing an antitrust suit. DOJ Press Release. AAG Christine Varney's Statement.

Municipal Bonds Bid-Rigging Conspiracy

May 2, 2011

UBS AG has joined Bank of America and has now entered into an agreement with the DOJ to pay $160 million in restitution, penalties and disgorgement to federal and state agencies. As a result of its cooperation, UBS will avoid prosecution by the DOJ, provided it continues to cooperate. UBS acknowledged that from 2001 to 2006, some of its former employees in the municipal reinvestment and derivatives desk and related desks unlawfully conspired to rig the bidding process on municipal investment contracts.

Criminal charges have been issued against 18 former executives of various institutions providing financial services, including 4 former UBS employees. To date, nine of those charged have pled guilty. DOJ Press Release.

Global Airline Price-Fixing Conspiracy

April 26, 2011

Indictments still continue in the global conspiracy to fix prices for air transportation services. In late April, two former Société Air France (Air France) executives were indicted for conspiring to fix certain surcharges on cargo shipments to and from the United States and other regions, and for agreeing not to pay commissions earned by customers on those surcharges. Marc Boudier and Jean Charles Foucault were involved in the conspiracy from August 2004 to February 2006.

Taiwan-based EVA Airways Corporation also pled guilty a month later, on May 27, 2011. According to the indictment in the U.S. District Court for the District of Columbia, EVA was involved in the conspiracy to fix cargo rates and fees from January 2003 till February 2006. EVA has agreed to cooperate with the DOJ's investigation and pay $13.2 million in fines.

These latest indictments in Chicago, bring the total to 22 airlines and 21 executives that have been charged by the DOJ's for their participation in this conspiracy. More than $1.8 billion have been obtained in criminal fines. In addition, four executives have been sentenced to prison time. DOJ Press Release.

FTC Challenges Acquisition of Palmyra Park Hospital by Phoebe Putney Health Systems

April 20, 2011

The FTC has decided to challenge the acquisition of Palmyra Park Hospital, Inc. by Phoebe Putney Health System, Inc saying it would result in increased prices for acute-care hospital services in Albany, Georgia. The FTC and the Attorney General of Georgia are seeking to block the proposed transaction until FTC administrative proceedings conclude. The FTC further "alleges that Phoebe has structured the deal in… an attempt to shield the anticompetitive acquisition from federal antitrust scrutiny under the "state action" doctrine." FTC Press Release.

NO RELIANCE PROVISIONS: HOW MANY FRAUD CLAIMS SHOULD THEY BAR?

By: Howard Yale Lederman

During the last several years, more and more contracts, including franchise agreements, have included a no-reliance or non-reliance provision as a separate boilerplate provision or part of an integration or similar boilerplate provision. In pleading, proving and defending against fraud claims, reliance is often the key element of contention. To recover for common law fraud and franchise investment law or similar statutory fraud, the plaintiff must prove reasonable or justifiable reliance on the claimed fraudulent representations.[1]

The purposes of a no-reliance provision are similar to the purposes of an integration provision: protection of one contract party against the other party's fraud in the inducement actions, protection against fabrication of contract provisions, and protection against faulty memories leaving the parties uncertain of what provisions they had agreed to. In approving no-reliance provisions as binding on contracting parties, Judge Easterbrook focused on their promotion of adherence to the written word and their prevention of the negative effects of fabrication and a faulty memory on contracting:

> A non-reliance clause ensures both the transaction and any subsequent litigation proceed on the basis of the parties' writings, which are less subject to the vagaries of memory and the risks of fabrication . . . .
>
> Memory plays tricks. Acting in the best of faith, people may 'remember' things that never occurred[,] but now serve their interests. Or they may remember events with a change of emphasis or nuance that makes a substantial difference to meaning. Express or implied qualifications may be lost in the folds of time. A statement such as 'I won't sell at current prices' may be recalled years later as 'I won't sell.' Prudent people protect themselves against the limitations of memory (and the temptation to shade the truth)[,] by limiting their dealings to those memorialized in writing, and promoting the primacy of the written word is a principal function of the federal securities laws.[2]

Regarding his last sentence, Judge Easterbrook might have said the same thing about federal and state contract law.

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[1] *E.g., Hord v. Environmental Research Institute of Michigan,* 463 Mich. 399, 404, 617 N.W.2d 543 (2000) (to recover for intentional misrepresentation, reliance is a required element); *Novak v. Nationwide Mutual Insurance Co.,* 235 Mich. App. 675, 690, 599 N.W.2d 546 (Mich. App. 1999), *app. dis.* 611 N.W.2d 799 (2000) (reliance must be reasonable); *Hamade v. Sunoco, Inc. (R & M),* 271 Mich. App. 145, 171, 721 N.W.2d 233 (Mich. App. 2006), *appeal den.* 477 Mich. 910, 722 N.W.2d 808 (2006) (to recover for fraudulent concealment, reliance is a required element); *Lumber Village, Inc. v. Siegler,* 135 Mich. App. 685, 700, 355 N.W.2d 654 (Mich. App. 1984) (reliance must be reasonable); *Cook v. Little Caesar Enterprises, Inc.,* 210 F.3d 653, 658 (6th Cir. 2000) (to prove MFIL fraud, the plaintiff must prove reasonable reliance).

[2] *Rissman v. Rissman,* 213 F.3d 381, 384 (7th Cir. 2000).

Judge Griesbach emphasized no reliance clauses' fraud claim prevention purpose: "Non-reliance clauses are not unusual in commercial or investment contracts and reflect a desire on the part of one party to avoid charges of misrepresentation or fraud based on allegations of oral representations that are difficult to refute. They also put the other party on notice that the other party refuses to be bound by oral representations not included in the contract documents."[3]

In several recent cases, courts have confronted the issue of whether no-reliance provisions, alone or in combination with integration provisions, bar one contracting party's, usually a buyers, reasonable reliance on another contracting party's, usually a seller's, precontract oral or written statements. Two approaches have arisen. Under the first per se rule approach, no-reliance provisions bar a party's reliance on such statements. Under the second factors approach, whether no-reliance provisions do so depends on the outcome of an analysis of factors.

To a certain extent, the *Rissman* opinion illustrates both approaches. In 1986, Randall Rissman owned 2/3 of the shares of a toy company, Tiger, while his brother, Arnold, owned 1/3. After a falling out, "Arnold sold his shares to Randall for $17 million. Thirteen months later, Tiger sold its assets (including its name and trademarks) for $335 million to Hasbro, another toy maker, and was renamed Lion Holdings."[4] Arnold sued Randall for federal and state securities law violations. Arnold claimed that he would not have sold his shares for $17 million, and he might not have sold at all if Randall had not "deceived him into thinking that Randall would never take Tiger public or sell it to a third party. Arnold says that these statements convinced him that that his stock would remain illiquid and not pay dividends, so he sold for whatever Randall was willing to pay."[5] Arnold sued for "the extra $95 million he would have received had he retained his stock until the sale to Hasbro."[6]

The stock sale contract between Arnold and Randall had no-reliance provisions. One read:

> The parties further declare that they have not relied upon any representation of any party hereby released [Randall or his attorneys, agents, or other representatives]….
>
> (a) no promise or inducement for this Agreement has been made to him [Arnold] except as set forth herein; (b) this Agreement is executed by [Arnold] freely and voluntarily, and without reliance upon any statement or representation by Purchaser, the Company, any of the Affiliates or O.R. Rissman or any of their attorneys or agents except as set forth herein; . . . (e) he has been advised to consult with counsel before entering into this Agreement and has had the opportunity to do so.[7]

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[3] *Westerfield v. The Quizno's Franchise Co.,* Case No. 06-C-1210, 2008 U.S. Dist. Lexis 74398, at *11 (E.D. Wis. April 16, 2008) .

[4] *Rissman, 213 F.3d a*t 382.

[5] *Id*.

[6] *Id*.

[7] *Id*. at 383.

When Randall moved for summary judgment for no genuine issues of material fact, the district court granted the motion based on the no-reliance clauses. Thus, the Court assumed that all of Arnold's fraudulent inducement allegations were true. For example, the Court assumed that Randall had told Arnold that he aimed to keep Tiger a family firm, that Randall had not received any third party offers to buy Tiger, and that Randall was not negotiating with anyone to sell Tiger. But when Arnold asked Randall to confirm these assurances in writing, Randall refused. Nor did the parties include them in their contract. Arnold claimed that "[t]he parties also agreed that if Tiger were sold[,] before Arnold had received all installments of the purchase price, then payment of the principal and interest would be accelerated."[8]

Affirming summary judgment for Randall, the Court cited both the no-reliance provisions and the above course of events as reasons why Arnold's reliance on the precontract statements and agreements was unreasonable. Then, the Court cited two other circuits' decisions holding that in written stock purchase agreements, no-reliance provisions barred any reasonable reliance on precontract agreements or representations. Present U.S. Supreme Court justices wrote both decisions: Justice Breyer wrote *Jackvony v. RIHT Financial Corp.*,[9] while Justice Ginsberg wrote *One-O-One Enterprises, Inc. v. Caruso*.[10] Next, the Court cited several Seventh Circuit decisions implying agreement with Judge Breyer's and Judge Ginsberg's decisions.[11]

After reviewing *Jackvony* and *One-O-One,* the Court held that "a written anti-reliance clause precludes any claim of deceit by prior representations."[12] The Court explained that its holding is the functional equivalent of "a doctrine long accepted in this circuit: that a person[,] who has received written disclosure of the truth may not claim to rely on contrary oral falsehoods."[13] Finally, the Court found that truthful disclosures and no-reliance provisions have the same functions: preventing fabrication and faulty memories from complicating contractual relations.

With its broad holding, the *Rissman* majority adopted a per se rule approach: A no-reliance provision means that any party's reliance on the agreements, representations, statements, and understandings referred to in the provision is per se unreasonable as a matter of law.

But one judge dissented from the majority's broad holding and per se approach. While concurring in the outcome, Judge Rovner rejected the majority's broad holding and per se rule approach. Instead, he urged adoption of *Jackvony's* factors analysis.

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[8] *Id*.

[9] 873 F.2d 411 (1st Cir. 1989).

[10] 848 F.2d 1283 (D.C. Cir. 1988).

[11] Among the cases cited were *SEC v. Jakubowski,* 150 F.3d 675, 681 (7th Cir. 1998), *Pommer v. Medtest Corp.,* 961 F.2d 620, 625 (7th Cir. 1992), *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.,* 910 F.2d 1540, 1545-1546 (7th Cir. 1990).

[12] *Rissman,* 213 F.3d at 384.

[13] *Id.* (citations omitted).

Like *Rissman, Jackvony* involved a securities sale contract:

> In September 1982[,] the Rhode Island Hospital Trust Bank bought the Columbus National Bank[,] by purchasing its shares. It agreed to give the Columbus shareholders their choice of $25 cash or $25 worth of Hospital Trust stock for each Columbus share (five Hospital Trust shares for six Columbus shares)."[14] In November 1983, the Bank of Boston agreed to buy Hospital Trust for $73 per share. Louis Jackvony was a major Columbus shareholder. He sued Hospital Trust and related entities for fraud in the inducement. He claimed that in 1982, Hospital Trust had defrauded him, "by (1) making certain misleading statements about Hospital Trust, and (2) omitting to disclose certain material facts about Hospital Trust.[15]

Jackvony asserted that these misleading statements and crucial omissions led him to exchange his Columbus shares for "fewer Hospital Trust shares (and far more cash) than he would otherwise have done."[16] He added that in 1983, Hospital Trust had defrauded him, by concealing key information "about the upcoming Bank of Boston acquisition."[17] He claimed that this fraudulent concealment had caused him to sell his relatively few Hospital Trust shares that "he had pledged at a price lower than what Bank of Boston paid for Hospital Trust shares[,] when the merger was completed."[18] Jackvony contended that this fraud had violated the federal securities laws,[19] state securities laws, and federal and state common law. When the defendant moved for a directed verdict, the district court granted the motion.

Affirming, the Court held that no reasonable juror could find securities or common law fraud. In relevant part, the Court explained: "The fatal difficulty for Jackvony is that we cannot find in the record any significant evidence of a statement, by Hospital Trust officials, that they would operate Columbus independently for five years or more, *upon which Jackvony could reasonably have relied*."[20] While acknowledging Jackvony's trial testimony about Hospital Trust officials' statements to this effect, the Court found that the Columbus-Hospital Trust written agreement and written reorganization plan included an integration provision, and that the agreement and plan said "nothing about keeping Columbus independent. Hospital Trust also circulated a proxy statement and prospectus containing a no-reliance provision reading:

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[14] *Jackvony*, 873 F.2d at 412.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 15 U.S.C. § 78j(b) (1982); Rule 10b-5, 17 C.F.R. § 240.10b-5.
[20] *Id. at 46 (Court's emphasis).*

"No person has been authorized to give any information or make any representation not contained in the accompanying Prospectus/Proxy statement and, if given or made, any such information or representation should not be relied upon."[21]

Though including a provision that Hospital Trust intended to continue Columbus's business operations as a Hospital Trust subsidiary and under Hospital Trust supervision, the proxy statement did not define any time period. Thus, the time period could be one day, one month, one year, or 10 years. Moreover, the provision did not say that Hospital Trust would continue Columbus' operations, even if other business considerations necessitated discontinuing its operations. Because of the no-reliance and integration provisions, Jackvony could not have reasonably relied on any pre-contract statements. His claimed pre-contract statements conflicted with the prospectus and the agreement, and the no-reliance and integration provisions knocked them out.

Then, recognizing the policy conflict between the need for reliance on written contract provisions, for predictability and stability and the need to prevent fraud, the *Jackvony* Court concluded that a broad, per se rule like *Rissman's* was undesirable, as it failed to address fraud prevention. Instead, the Court listed eight factors for evaluating whether an investor's reliance on pre-contract statements is reasonable:

> (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.[22]

Lastly, the *Jackvony* Court analyzed the case, using the above factors. "Any Hospital Trust 'independent forever' type statements (as reported by Jackvony) [were] vague; Jackvony was a sophisticated investor; the written proxy statement tells Jackvony not to rely upon any such statements; Jackvony (and the other Columbus shareholders) seemed anxious to expedite the transaction (perhaps because of Columbus's shaky financial condition); and Jackvony helped draft the written acquisition documents."[23] These factors overrode the representations' specificity. Based on its factor analysis, the Court concluded that Jackvony's reliance on the pre-contract statements could not be reasonable, and that no reasonable juror could have found otherwise

Returning to Judge Rovner's concurring opinion in *Rissman,* he applied the eight factors to the facts there. He quoted the *One-O-One* analysis without mentioning that *One-O-One* was mainly an integration provision case: "`[W]e have here the case of 'a party with the capacity and opportunity to read a written contract, who [has] executed it, not under any emergency, and whose signature was

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[21] *Id.*
[22] *Id.* at 416. *Accord, Rissman,* 213 F.3d 381, 388 (Rovner, J., concurring) (quoting factors with approval).
[23] *Id. at 417*

not obtained by trick or artifice;' such a party, if the parol evidence rule is to retain vitality, 'cannot later claim fraud in the inducement.'"[24]

Next, Judge Rovner declared that in *Whelen v. Abell*,[25] the D.C. Circuit had expressly recognized that *One-O-One's* holding did not mean that an integration clause bars or restricts fraud-in-the-inducement claims generally, as either "reading would leave swindlers free to extinguish their victims' remedies by sticking in a bit of boilerplate."[26] Therefore, Judge Rovner read *Jackvony* and *One-O-One* as rejecting a per se rule and adopting the factors analysis in deciding whether a party's reliance on pre-contract agreements, statements or understandings is reasonable. In the factors analysis, a non-reliance provision is one factor, though "a fairly convincing one in many cases."[27] Judge Rovner concluded that even with a no-reliance provision, "it would be unreasonable to expect a person to pore through a 427-page document looking for 'nuggets of intelligible warnings,' [but] a person may not claim reasonable reliance[,] when a written disclaimer is apparent in an eight-page document."[28]

Published and unpublished decisions involving franchise agreements and no-reliance provisions are relatively few. One decision with great potential good and great potential harm is *Westerfield v. The Quizno's Franchise Co.*[29] There, the plaintiffs were Quiznos franchisees. They had sued the defendants for civil RICO, common law fraud, and antitrust law violations. When the defendants moved to dismiss the federal claims under Rule 12(b)(6), the Court had granted the motion. The Court cited the Uniform Franchise Offering Circulars' (UFOC) and franchise agreements' integration and no-reliance clauses as negating the franchisees' reasonable reliance on the statements of Quiznos area directors on "the amount of income the franchisees would likely generate."[30] The Court noted that these clauses were in "large-type."[31] The Court also cited a provision cautioning prospective franchisees that "Quiznos was furnishing no information as to 'actual or potential sales, earnings, or profits.'"[32] Another provision advised prospective franchisees "to seek professional assistance, to have professionals review the documents and to consult with other franchisees regarding the risks associated with the purchase of the franchise."[33] "[A] list of past and present Quiznos franchisees

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[24] *Rissman,* 213 F.3d at 388 (Rovner, J., concurring), quoting *One-O-One,* 848 F.2d 1283, 1287 (further citation omitted).

[25] 48 F.3d 1247, 1258 (D.C. Cir. 1995).

[26] *Id.* at 388 (quoting *Whelen,* 48 F.3d 1247, 1258.)

[27] *Id.* (quoting *Carr,* 95 F.3d 544, 547.)

[28] *Id.* at 388.

[29] No. 06-C-1210, 2008 U.S. Dist. Lexis 74398 (E.D. Wis. April 16, 2008).

[30] *Id.*at *3.

[31] *Id.*

[32] *Id.* at *4.

[33] *Id.* at *4-5.

with addresses and telephone numbers"[34] followed. Due to these provisions, the Court had dismissed the claims.

The plaintiffs moved for reconsideration. On the common law fraud claims, they pointed to the following evidence discovered on the day of the Court's decision: in another case, Quiznos had produced documents showing that "for at least three years, Quiznos had a written corporate policy instructing its field operatives that there was to be only one possible answer – 'None' – to the question in the Acknowledgement form they were required to sign upon becoming a Quiznos franchisee as to whether they had received any information outside the disclosures contained in the UFOC… several individual plaintiffs have submitted declarations stating that they were instructed by Quiznos Area Directors to write 'none' in the space provided by the Acknowledgement form before signing it, even though they had relied on information outside of the UFOC in deciding to enter into the Franchise Agreement . . . ."[35]

The plaintiffs contended that Quiznos' willful misconduct overrode the no-reliance provisions that the Court had used to dismiss the fraud claims and thus compelled reconsideration. In denying the motion for reconsideration on this issue, the Court found that the above evidence was not new. Though not having the documents, the plaintiffs had the information. Further, the Quiznos willful misconduct did not undermine the Court's original analysis. After reviewing the purpose of no-reliance clauses, the Court explained: "The fact that [the] plaintiffs actually wrote the word 'none' in the space provided for them to list the information not in UFOC on which they were relying does not strengthen their argument. It means that they had the opportunity to actually consider whether any other information was material to their decision."[36] As a result, the Court failed to recognize the Quiznos conduct as misconduct and failed to recognize the misconduct's serious actual and potential negative impacts on the franchising environment.

Therefore, the Court concluded that the "plaintiffs' evidence of Quiznos' policy to have its Area Directors instruct prospective franchisees to write the word 'none' on the Acknowledgement form in the space provided for them to list additional information on which they were relying constitutes newly discovered evidence within the meaning of Rule 59(e)" was not new evidence "to warrant reopening a case."[37]

But the Court did conclude that in reading *Rissman* and similar cases as holding that no-reliance and similar clauses barred fraud claims as a matter of law, it had erred. The Court recognized that it needed to consider more evidence than the contract provisions, such as at least the potential franchisee's "degree of sophistication."[38] "[W]hile the complaint suggests that [the] plaintiffs have a greater degree of sophistication than the average consumer, not even Quiznos argues that this case

[34] *Id.*
[35] *Id.* at *5-6.
[36] *Id.* at *11.
[37] *Id.* at *11-12.
[38] *Id.* at *25-26.

involves a contract between sophisticated commercial enterprises."[39] Thus, the Court reversed itself on the federal RICO claims and the state law fraud claims. Finally, the Court cited two Wisconsin-based[40] decisions holding exculpatory, no reliance, and similar clauses unenforceable, when the alleged injury arises from reckless or intentional misconduct.[41] The Quiznos misconduct was intentional. In so doing, the *Westerfield* Court presented a comprehensive justification for the factors, as opposed to the per se rule approach:

> As a matter of principle[,] it is necessary to weigh the advantages of certainty in contractual relations against the harm and injustice that result from fraud. In obedience to the demands of a larger public policy[,] the law long ago abandoned the position that a contract must be held sacred regardless of the fraud of one of the parties in procuring it. No one advocates a return to outworn conceptions. The same public policy that in general sanctions the avoidance of a promise obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices. In the realm of fact[,] it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations[,] which in fact have been made and in fact are false[,] but for which[,] he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience[,] where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another, but where they do, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law.[42]

The plaintiffs claimed that the above passage applied to them. They claimed that the defendants had fraudulently induced them to sign franchise agreements. They claimed that these agreements forced them to buy Quiznos' goods, services, and other materials essential to establish and maintain their franchises "at grossly inflated prices from which Quiznos directly or indirectly profits."[43]

> Then, when they can no longer withstand the losses caused by Quiznos' exploitation and go out of business, [the] plaintiffs allege that Quiznos obtains releases of any claims against it[,] by threatening the franchisees with a lawsuit to enforce provisions of the Franchise Agreement that purport to render them liable for payment of royalties over

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[39] *Id.* at *26.

[40] *RepublicBank Dallas, N.A. v. First Wisconsin Nat'l Bank of Milwaukee,* 636 F. Supp. 1470, 1473 (E.D. Wis. 1986); *Anderson v. Tri-State Home Improvement Co.,* 268 Wis. 455, 460, 67 N.W.2d 853 (1955).

[41] *Westerfield.* 2008 U.S. Distl Lexis 74398 at *27.

[42] *Id.* at *27-28, (quoting *Anderson,* 268 Wis. at 460).

[43] *Id.* at *29.

> the entire 15-year term of the Agreement. The closures are then used to 'facilitate the movement of a lengthy list of equally deceived franchisees awaiting store locations, into the same, now-vacant and bankrupt locations.'
>
> Though such a practice would seem counter to the interests of a franchisor whose income is dependent upon the success of its franchisees," the plaintiffs claimed that "Quiznos' actual motivation is not to establish stable and economically strong franchisees for the long term[,] but. . . to inflate Quiznos' profitability and make it more attractive to potential buyers and investors toward the ultimate goal of allowing the Schadens and other Quiznos insiders to sell their ownership interests for billions of dollars.[44]

Based on the above allegations and analysis, the Court granted the motion for reconsideration and repudiated its earlier adherence to the per se rule. Instead, the Court adopted at least a partial factors analysis. Most importantly, the Court brought countervailing public policy considerations into the no-reliance clause analysis.

Given no-reliance provisions' increasing appearance in franchise and other distribution agreements, attorneys representing franchisees, franchisors, and similar entities need to be aware of the alternative approaches in addressing them. Like integration provisions, no-reliance provisions should be serious negotiation subjects. As with integration provisions, broad, medium, or narrow no-reliance alternative provisions are feasible. In litigation, the per se rule and the factors analysis do conflict, and each promotes important, though different public policies. If this article increases attorneys' ability to address these provisions in transactional and litigation situations, it will have served its purpose.

[44] *Id.* at *29-30 (citations to factual record omitted).