



Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

Spring, 2003

Volume 3, Issue 1

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WSGR's Antitrust Wire

Record Penalties by DOJ for Failing to File HSR Notification, “Gun-Jumping” Violations

The antitrust laws protect and enhance consumer welfare by requiring firms to compete aggressively and restricting improper coordination among rivals. Among the antitrust laws, the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”) and Section One of the Sherman Act are particularly important in the context of mergers and acquisitions.

These laws can impose unique and difficult challenges for merging parties. The need to observe the antitrust laws can sometimes conflict with business needs, such as the need for secrecy in hostile takeovers, the need to exchange competitively sensitive information for valuation or due diligence purposes, the need to scrutinize a target’s decisions that affect the value of the company, and the need to begin integration activities in order to hit the ground running upon the close of a merger. Two recent actions by the Department of Justice (“DOJ”) address the risks where these business needs conflict with the antitrust laws.

I. \$5.478 Million Civil Penalty Sought for Failing to File HSR Notification (Smithfield Foods)

In a rare suit filed February 28, 2003, the DOJ charged Smithfield Foods with violating the premerger notification requirements of the HSR Act. The complaint charges Smithfield Foods with failure to file an HSR Notification when it acquired more than \$15 million in IBP Inc. voting securities. Rejecting Smithfield’s contention that its share

purchases qualified for the passive investment exemption, the DOJ is seeking a \$5.478 million civil penalty—*i.e.*, the maximum of \$11,000 for each of the 498 days Smithfield is alleged to have held the shares of IBP Inc. in violation of the HSR Act.¹

A. Creeping Acquisitions

Acquisitions valued in the aggregate in excess of \$15 million satisfy the “size of transaction” threshold, triggering an HSR filing requirement.² Smithfield Foods is alleged to have made successive acquisitions (sometimes called “creeping acquisitions”) of IBP securities, which, by June 26, 1998, amounted to more than \$15 million. After divesting shares that brought its holdings to less than \$15 million, Smithfield began again acquiring IBP voting securities in June 1999. By December 8, 1999, its holdings in aggregate were valued at more than \$15 million. The DOJ claims that Smithfield acquired and held IBP voting securities valued at more than

¹ See *U.S. v. Smithfield Foods* Complaint filed February 28, 2003. See also Department of Justice Press Release, available at http://www.usdoj.gov/atr/public/press_release/s/2003/200810.pdf.

² Since the timeframe covered by the DOJ complaint, Congress amended the HSR Act to change the thresholds. As of February 2001, a notification is required in one of two situations:

1. The acquisition is valued at greater than \$200 million or
2. The acquisition is valued at greater than \$200 million *and*
 - a. One party has total assets or sales of \$100 million
 - b. The other party has total assets or sales of \$10 million.

For persons who do not derive sales from manufacturing activities, the person’s total sales are ignored; only the person’s total assets are counted for HSR purposes.

\$15 million for 498 days – 97 days during the first period and 401 during the second period.³ The DOJ claims an HSR Notification was required twice – once for each transaction that took Smithfield over the \$15 million threshold.⁴

B. Passive Investor Exemption

The complaint notes that during both series of voting securities acquisitions, “Smithfield was also considering and taking steps toward a Smithfield-IBP combination.”⁵ The allegation undermines the defendant’s invocation of the passive investor exemption, which allows buyers of voting securities to avoid the HSR notification and waiting period requirements if the acquisition is “made solely for the purpose of investment.”⁶

The passive investor exemption is subjective in nature: it looks to the acquiring person’s intent in holding the shares. However, the DOJ and Federal Trade Commission (“FTC”) will look to objective indicia to evaluate claimed exemptions. For example, an acquiring person who will hold a management or board position with the target is deemed to be in a position to influence the direction of the acquired person. Such a management role is inconsistent with the passive investor exemption.

Similarly, the agencies interpret the exemption as not applying if the acquiring person intends to later acquire the whole of the target company. In the late 1980s, the FTC challenged several creeping acquisitions as a precursor to hostile takeovers. According to the FTC, even if the acquiring person has no ability to influence the direction of the acquired company, if there is an intent at the time of the acquisition to later acquire such an influence – such as through the

acquisition of the whole company – the passive investor exemption cannot be relied upon. Failure to file an HSR notification will then lead to sanctions like those threatening Smithfield Foods.

II. \$5.67 Million Settlement in Gun-Jumping Suit (Gemstar-TV Guide)

On February 6, 2003, the DOJ settled a suit that it had brought for pre-merger conduct violations in connection with Gemstar’s acquisition of TV Guide—a merger that was consummated in July 2000. Gemstar-TV Guide agreed to pay \$5.67 million in civil penalties—the largest sum ever obtained by the antitrust agencies in a pre-merger coordination lawsuit.⁷

The DOJ Complaint alleged that the parties agreed to stop competing for customers in the interactive television programming guide market after they signed the merger agreement, but before the merger actually closed. In addition, the DOJ contended that the parties agreed upon pricing and service terms for customers and jointly managed their interactive program guide businesses before the expiration of the HSR Act.⁸

The government alleged that once the merger negotiations commenced, the parties almost entirely ceased competing for business. The DOJ alleged that the parties agreed to

- stop aggressive negotiations with customers until the merger closed—what the parties themselves coined as “slow-rolling” customers (*i.e.*, stalling);
- allocate their customers and stop competing in certain markets; and

- “adhere to ‘standard terms’ that they had previously agreed upon, with details and responses to counter-offers to be worked out through further discussion between the merging parties.”

Thus, according to the DOJ, competition “ceased pursuant to a general agreement that Gemstar would phase out its marketing operations in the relevant markets,” so that TV Guide could pursue those opportunities without concern that Gemstar would undercut their offers. Each of these activities, apart from violating the HSR Act, is generally considered *per se* illegal under the Sherman Act.

Last year, the DOJ settled similar charges against Computer Associates for pre-merger conduct violations in connection with its acquisition of Platinum Technology.⁹ Computer Associates agreed to pay a \$638,000 civil penalty.¹⁰

Gemstar-TV Guide and *Computer Associates*, while fairly straightforward cases, contain important guidance for companies navigating the delicate waters between execution of a merger agreement and closing.¹¹

Below, we outline the legal principles for two sensitive areas covered by both *Computer Associates* and *Gemstar-TV Guide*: (1) the scope of permissible information exchange between merger partners, and (2) the extent to which a buyer may exert operational control over a merger target.

⁹ See *Computer Assocs.*, Complaint at ¶ 1.

¹⁰ See Press Release, Justice Department Files Lawsuit Against Computer Associates for Illegal Pre-merger Coordination (Sept. 28, 2001), available at http://www.usdoj.gov/atr/public/press_release/2001/9189.htm.

¹¹ See *United States v. Computer Assocs. Int’l, Inc.*, Proposed Final Judgment and Competitive Impact Statement, 67 Fed. Reg. 41,472 (2002). See also *Gemstar-TV Guide*, Competitive Impact Statement available at <http://www.usdoj.gov/atr/cases/f200800/200848.htm>.

³ *U.S. v. Smithfield Foods*, Complaint, filed February 28, 2003 ¶¶ 18 and 26.

⁴ *Id.* at ¶¶ 19 and 23.

⁵ *U.S. v. Smithfield Foods*, Complaint, filed February 28, 2003 ¶¶ 18 and 26.

⁶ 16 C.F.R. § 802.9.

⁷ See Press Release, Justice Department Reaches Settlement with Gemstar-TV Guide for Illegal Pre-Merger Coordination, available at http://www.usdoj.gov/atr/public/press_releases/2003/200740.htm.

⁸ See *Gemstar-TV Guide Complaint* at ¶¶ 42-55.

A. Permissible Information Exchange

The antitrust laws are concerned about restricting the flow of competitively sensitive information to protect competition during the interim period before a closing—and in the event that a merger ultimately is abandoned. If a merger were not consummated after competitively sensitive information is shared between merger partners, the quality of competition between those competitors-turned-merger-partners-turned-competitors would diminish if the flow of such competitively sensitive information were not adequately regulated.

That is not to say that merging parties cannot collect competitively sensitive information that is necessary and appropriate for due diligence or evaluation of a potential transaction. In fact, both *Computer Associates* and *Gemstar-TV Guide* make clear that such information sharing indeed may be necessary to properly value and execute a merger.

Specifically, the DOJ set forth in *Computer Associates* and *Gemstar-TV Guide* that the merging parties were permitted to:

- Conduct “reasonable and customary due diligence.”
- Share competitively sensitive bid information with a competitor-target where such information was necessary to understand “the future earnings and prospects of the other party.”
- Share “pending contacts in the pipeline.”

However, the DOJ provided bounds on the sharing of competitively sensitive information. According to the DOJ’s statements:

- the information should reasonably relate to a party’s understanding of future earnings and prospects for valuation purposes;
- disclosure should occur pursuant to a non-disclosure agreement (NDA);

Recent & Upcoming Events

February 26, 2003

BASF Antitrust & Business Regulation Program, San Francisco

Scott Sher presented at a program entitled “Software Mergers: Government Scrutiny of Mergers in a Consolidating Industry.” The program addressed special issues of market definition and entry analysis as well as the FTC’s aggressive examinations of previously consummated software mergers, as well as those mergers that are not reportable under the HSR Act.

March 14, 2003

Clayton Act Committee presented: Concurrent Federal and State Merger Investigation, San Francisco

Scott Sher moderated this brown bag program that considered the procedural and substantive issues that arise when federal and state antitrust agencies simultaneously initiate merger investigations. The panel discussed problems surrounding dual investigations that often involve differing and sometimes conflicting legal standards.

March 18-19, 2003

The Conference Board’s Antitrust Issues in Today’s Economy, New York City

Chris Compton spoke at The Conference Board’s annual review of antitrust developments in the U.S. and abroad. His panel addressed issues at the intersection of IP and antitrust, such as standard setting, aggressive patenting and litigation settlements with implications for competition.

June 5-6, 2003

The Stanford Conference on Antitrust in the Technology Economy, Palo Alto

Chris Compton will be moderating a panel on “Business Perspectives on Antitrust in a High Technology Economy,” composed of business leaders and antitrust practitioners examining the critical business issues in high-tech antitrust.

- the information should be used only in the course of due diligence;
- disclosure should not be made to any employee of the person receiving the information who is directly responsible for the marketing, pricing or sales of the Competing Products.

Thus, as set forth in these suits, sharing even competitively sensitive information may be permissible if the parties have a legitimate business purpose (*e.g.*, diligence or post-close planning) and they take efforts to limit dissemination of that information

to those with a real need to know.¹²

B. Operational Restrictions on the Target Company

Under the HSR Act, there are two distinct restrictions upon the transfer of operational control of the target to the buyer:

- (1) the target cannot transfer “beneficial ownership” or indicia of “operational control” to the acquiring party prior to receiving HSR clearance, and
- (2) where the target and buyer

¹² See *Gemstar-TV Guide*, Final Judgment.

compete, they cannot lessen competition prior to expiration of the HSR waiting period.

Additionally, Section One of the Sherman Act requires that merger partners continue to compete until the time of closing (even after HSR clearance). Integration activities that affect the parties' competition with one another — such as joint sales calls or bids, or customer allocation — may subject the parties to serious antitrust liability.

Merging parties may agree to certain “ordinary course” restrictions prohibiting the target, for example, from materially changing its business model or diminishing the value of its assets during the pendency of a merger. Thus, limiting a target's ability to declare dividends, issue securities, amend by-laws, enter into material contracts, and undertake “new large capital expenditures” does not contravene the letter or intent of the antitrust laws. On the other hand, restricting a company's ability to offer discounts, make ordinary sales to customers, or offer new services constitutes “extraordinary” restrictions that are “not reasonably ancillary to any legitimate goal.”

Pursuant to the *Gemstar-TV Guide* Consent Decree, which limits the scope of the company's pre-closing conduct in future transactions, Gemstar cannot:

- influence a transaction partner's ability to set prices or discount;
- require its approval before the target could enter into contracts with customers;
- agree with its transaction partner to slow or delay negotiations with customers;
- improperly use competitively sensitive (*e.g.*, pricing) information.

Computer Associates provides further guidance as to what merging parties may do pre-close. Computer Associates may:

- enter into “interim covenants” to protect the value of a business, *e.g.*, requiring a target company “to operate in the ordinary course of business”;
- prohibit a target company from engaging “in conduct that would cause a material adverse change in the business”;
- secure pending bid information of the other party for due diligence purposes, where material to the understanding of the other party's future earnings and prospects and limited in disclosure pursuant to an NDA to review by employees who are not responsible for competitive decision-making;
- submit joint bids where “the joint bid would be lawful in the absence of the planned acquisition” (*i.e.*, where the parties would not otherwise compete);
- enter into “a buyer/seller relationship and the agreement would be lawful in the absence of the” transaction.

Merging parties that are competitors must be careful to ensure that they are not lessening competition in the period before closing.

The antitrust laws do not require buyers to assume complete risk with regard to potential acquisition targets. Instead, the laws require parties to carefully contemplate the necessity of such limitations on a target's conduct and the likely impact on competition of such restrictions. Reasonable, tempered and legitimate restrictions on business conduct likely will survive antitrust scrutiny. ♦

EU Focus on Conglomerate / Vertical Issues in Merger Review of IBM/Rational Software

The recently concluded European Commission review of the IBM acquisition of Rational Software reflects continued European interest in

vertical and conglomerate theories of antitrust enforcement. For technology companies, the issues of concern include the threat of tying — *i.e.*, product bundling — and restricted access to critical information necessary to interoperability.

As the Commission's decision¹ reveals, the investigators' primary focus was the effect on competition resulting from the combination of IBM's and Rational Software's complementary products. This focus on vertical and conglomerate effects is one feature of European Union competition law that distinguishes it from U.S. antitrust law.

On December 6, 2002, IBM and Rational Software announced the proposed acquisition of Rational by IBM for approximately \$2.1 billion. On January 17, 2003, the parties formally notified the Commission of the transaction, triggering the Commission's one-month antitrust review. The transaction concerns software development tools, *i.e.*, software that facilitates the development of software applications by Independent Software Vendors, enterprises, and other software developers. The parties' products include tools that enable a developer to analyze application requirements and develop software models, generate code, manage version changes, and test the written code.

On February 20, 2003, the European Commission issued its decision clearing the transaction within the one-month Phase I stage under the European Commission's Merger Regulation, No. 4064/89. In doing so, the Commission undertook a substantive analysis of not only the horizontal — or competing — products of the two companies, but also the

¹ See EU decision at http://europa.eu.int/comm/competition/mergers/cases/decisions/m3062_en.pdf. Wilson Sonsini Goodrich & Rosati, P.C. represented Rational in this transaction. This article, however, is based entirely upon facts of public record.

complementary relationship of the merging parties' product lines.

Horizontal Issues

The Commission's horizontal analysis focused on five types of software development tools offered by IBM and Rational. The investigation revealed little overlap in the parties' product lines. And where there was overlap, the parties' sales shares and the existence of strong competition from other vendors resolved any horizontal issues addressed by the Commission.

In each category addressed by the Commission, the transaction resulted in an increase of between less than 1% and 4% share of sales. As a result of the merger, IBM/Rational would account for no more than 38% of worldwide sales (and 36% of European sales) in any category. The Commission considered delineating these product categories further by the "target platform," *i.e.*, the platform upon which a software developer was writing its application to run, as opposed to a "host platform," or the platform upon which the parties' tools run. Even with these narrower market definitions, the increase in shares was nominal, and not deemed to raise market power concerns under either European Union or U.S. antitrust law. Additionally, the Commission noted several strong competitors, leading to its conclusion there was no risk of increased dominance in the European Community as a result of the overlapping products.

Conglomerate/Vertical Issues

The Commission's analysis did not stop with the horizontal overlaps. Because of the complementary nature of the parties' products, the Commission focused on the potential for "conglomerate/vertical effects." In this regard, the Commission investigated "whether the transaction would enable IBM to leverage Rational's presence on a given market on the neighboring markets, or vice-versa."² The Commission's decision

² *Id.* ¶ 34.

repeats concerns raised in other complementary M&A transactions.³ This focus often distinguishes merger reviews under European Union law from that of U.S. law. In particular, the decision reveals the Commission's concern that IBM post-close might seek to bundle the parties' complementary products and/or block competitors from accessing essential Application Protocol Interfaces (APIs) proprietary to IBM.

Under Community law, the Commission is directed to demonstrate that the combined entity will not have the incentive and ability to leverage the parties' respective market positions so as to achieve dominance in one or more product markets.⁴

In *IBM/Rational*, the Commission's analysis focused both on IBM's incentive and its ability to bundle the merging parties products in order to achieve a dominant position in software development tools.

With respect to the threat of bundling, the Commission concluded, "it seems unlikely that IBM will have the incentives to impose on the market a bundling of some of its software development tools with Rational's products."⁵ The Commission considered the following factors:

- the parties' market share of less than 40%;

³ The most notable decision in this regard was the Commission's decision to block the General Electric acquisition of Honeywell in July 2001. See Commission Decision, Case No COMP/M.2220. General Electric/Honeywell, 3 July 2001, available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf.

⁴ See *Tetra Laval BV v. Commission of the European Communities*, Case T-5/02, found in Lexis at 2002 ECJ Celex Lexis 3659. However, the Commission is not to presume the merging parties will violate Community law generally. Accordingly, the Commission is directed to focus only on leveraging conduct that is not independently actionable under Article 82 of the EC Treaty.

⁵ *IBM / Rational* ¶ 35.

- the existence of various competitors, including several "important" vendors competing in multiple product categories, who could also offer comparable bundles; and
- the existence of large and sophisticated buyers who pursue a "mix and match" purchasing policy (of not standardizing on a single vendor's product line, but instead buying products from various vendors).⁶

Together, these factors led the Commission to conclude that IBM would not have been able to exclude its competitors in any given category through a policy of product integration (bundling).

Because of the importance of interoperability in software markets, the Commission also focused on the need for access to APIs in the development and sale of software development tools. Again, the Commission "examined whether the transaction would bring the capacity and incentives to IBM to foreclose competing tool vendors to an appreciable extent by denying timely interface information to those willing to support IBM's application server."⁷

The Commission appears to have been less interested in the APIs necessary to make complementary tools interoperable with one another and more interested in ensuring interoperability between IBM's application server and the software applications developed for IBM's application server with the tools offered by the parties' competitors. Noting IBM's current policy of making available its proprietary WebSphere application server APIs to third parties, the Commission focused on whether or not "IBM would gain the incentive and capacity to change its policy."⁸

⁶ *Id.*

⁷ *Id.* ¶ 36.

⁸ *Id.* ¶ 37.

Here, the Commission focused on Java-compatible applications servers, ignoring the competition from Microsoft's competing .NET platform. Still, even with this narrow product market definition, IBM accounted for no more than 34% market share in a tie with BEA. Faced with BEA and additional competition from Oracle and Sun (with shares ranging from 6% to 12%) as well as Sybase, Macromedia and Borland, the Commission concluded IBM did not have sufficient competitive strength (or market power) to discriminate in its provision of its proprietary APIs to Rational's tool competitors.⁹ The Commission also recognized that historically, Rational and other competing tool vendors did not avail themselves of IBM's proprietary APIs, but have relied entirely on the open-standard J2EE APIs.¹⁰

Finally, the Commission considered whether Rational's support for development for non-IBM application servers would benefit IBM. The Commission concluded that such a change in Rational's policy would not be in the interest of IBM. The Commission recognized that much of Rational's value was its sales to software developers who write applications for application servers other than IBM's and that Rational would risk becoming less attractive to these developers who demand support for multiple application servers.

While the Commission's decision reflects a continuing desire to police the effects of a merger on complementary product lines, the decision also reveals Commission recognition of the need to predict the effect of the merger on the structure of competition in software development tools by assessing the merging parties capability and incentive to leverage product sales in one area so as to reduce competition in another area. To do so, the Commission in

⁹ *Id.* ¶ 38.

¹⁰ *Id.* ¶ 39.

IBM/Rational took into account the presence of strong competitors in each possible product market, the open-standards on which Java-based application servers mostly rely, the fast pace of innovation in the related markets and the purchasing power of customers employing "mix and match" policies. All of these factors were found to make such leveraging strategies unsustainable.¹¹ The merger was therefore cleared. ♦

Supreme Court Will Not Review \$1.05 Billion Antitrust Judgment in Conwood

On January 13, 2003, the United States Supreme Court rejected an appeal by United States Tobacco Company that let stand the largest judgment ever won by an antitrust plaintiff. U.S. Tobacco now owes one of its fiercest rivals, Conwood Co., \$1.05 billion dollars.

Conwood filed a complaint against U.S. Tobacco on April 22, 1998, alleging in part that U.S. Tobacco had unlawfully monopolized the U.S. market for moist snuff in violation of Section 2 of the Sherman Act. The case went to trial.

At trial Conwood produced evidence establishing that U.S. Tobacco had deliberately provided retailers false or misleading information to induce them to carry its products instead of competing products; that it had trained sales personnel to take advantage of inattentive store clerks to destroy Conwood racks; and that it had convinced retailers to allow U.S. Tobacco to have "exclusive racks" that would compel competitors to display their products in U.S. Tobacco racks. Conwood also produced evidence that U.S. Tobacco had entered into

¹¹ European Commission Press Release, Commission clears acquisition of Rational by IBM, Feb. 20, 2003, available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/270|0|RAPID&lg=EN.

Recent Publications

Scott Sher, *Navigating Troubled Waters: Managing the Relationship Between Merging Companies*, M&A Lawyer, February 2003. In this article, Scott Sher discusses the important legal principles that limit merging parties' behavior during the period between reaching an agreement to merge and ultimately closing the transaction.

Scott Sher, *Non-structural Remedies in High-technology Markets*, Clayton Act Newsletter, Fall 2002. Scott Sher explores recent agency attempts to remedy competitive concerns in high-tech markets using non-structural relief and discusses problems associated with implementing such remedial schemes.

Scott Sher's article, *In re Napster Inc. Copyright Litigation: Defining the Contours of the Copyright Misuse Doctrine*, has been judged "one of the best intellectual property law review articles" published in 2002, and thus has been selected for inclusion in the 2003 edition of the Intellectual Property Law Review, an anthology published annually by the West Group of New York.

EACH ARTICLE IS AVAILABLE ON WSGR'S WEBSITE.

exclusive agreements with retailers. Conwood also introduced numerous documents drafted by U.S. Tobacco personnel to establish U.S. Tobacco's anticompetitive intent. These documents stated:

- “We will continue to focus on merchandising rights to . . . inhibit competitive growth (to the best of our ability);”
- “We stressed in our Department Meeting the importance of cutting competitive distribution. In many stores, especially supermarkets, distribution of competitive brands is much too high....”;
- “Even though Conwood does not like the fact that we sometimes house their product in our vending, I have encountered more and more retailers that are surprised when I include the comp[etitions’] products. I feel it is better for them to be lost in our vending th[a]n to have their own and no point of sale on the vendor.”;
- “With arrogance and grace, I have taken a personal vendetta against the Conwood Reps. in my areas. I am devoting an extra effort toward eliminating as many laggard Conwood brands at retail as possible ... Since I am offering a cash counter payment for exclusive UST vending on our 2908 displays, I am giving Kodiak ... [a Conwood brand] one facing...”).

Trial lasted one month. After four hours of deliberation, the jury returned a verdict in Conwood’s favor for \$350 million. The district court trebled the damages, entering a \$1.05 billion judgment in Conwood’s favor. U.S. Tobacco appealed.

On appeal, U.S. Tobacco conceded that the relevant product market was the nationwide market for moist snuff. It conceded that it had monopoly power in that market. U.S. Tobacco also conceded that its marketing practices had been *occasionally* improper.

It could do little else: The company’s chairman had testified at trial that “if his company’s ‘goal . . . was to go into a store and reduce . . . competitive facings, then that shouldn’t have happened. That’s not a legitimate goal.” U.S. Tobacco’s chairman even admitted to being embarrassed by the

International Developments

Canada

The Canadian Competition Bureau announced increases in the merger notification thresholds and filing fees for mergers and acquisitions that are reportable in Canada. Effective April 1, 2003, transactions will only be notifiable if the transaction value is C\$50 million or more, up from the current C\$35 million. The “size-of-party” threshold will remain C\$400 million. Additionally, filing fees will be set at C\$50,000.

European Union

The European Commission is reported to be reorganizing its merger review and cartel investigation organizations into industry-specific teams. Currently the Commission employs a single Merger Task Force and two cartel groups. The staff from these groups will be integrated into teams oriented around certain industries with the goal of increasing the depth of their industry expertise. The reorganization, subject to Commission approval, is planned to be implemented by May 1, 2004.

testimony presented at trial—especially the testimony of his company’s director of national accounts who apparently could not answer whether it was appropriate to mislead retailers. Moreover, the company had failed to offer a single valid business reason for its conduct.

U.S. Tobacco’s appeal rested on its contention that its “isolated” and “sporadic” bad acts could not support a monopolization claim under Section 2 of the Sherman Act. The Sixth Circuit, like the jury, disagreed.

“Because of restrictions on advertising in the tobacco industry, and the critical nature of POS advertising in the relevant market, efforts by USTC, a conceded monopolist, to exclude Conwood’s racks and [point-of-sale] advertising from retail locations through any means other than legitimate competition could certainly support Conwood’s § 2 Sherman Act claim.” The court found that U.S. Tobacco had “pervasively destroyed Conwood’s racks, and used its monopoly power to misrepresent sales activity of moist snuff products . . . to bury competitors’ products therein, all of which affected competition in the moist snuff market.”

The Court, like the jury before it, perceived U.S. Tobacco as a bully that misled its customers rather than competing on the merits, all in an effort to “inhibit competitive growth to the best of [its] ability.” That effort succeeded. The cost: \$1.05 billion.

Another is *Conwood* lesson: We live in a world where anything said in a casual meeting, done in the privacy of an office or written in an email or internal memorandum can be made public. Officers and employees should assume that everything they say, do and write may be subject to public scrutiny. That exposure may, in turn, lead to substantial litigation costs and penalties. ♦

Profile



Virginia King is a Senior Paralegal and HSR Specialist in Wilson Sonsini Goodrich & Rosati's Palo Alto office. A 15 year veteran of the firm, she was previously Manager of Legal Administration for CIBA-Geigy Corporation (now Novartis) in Ardsley, New York for nine years.

Virginia is one of the country's most experienced HSR Specialists, having prepared over 400 Hart-Scott-Rodino filings since the HSR Antitrust Improvements Act of 1976 first became effective. Virginia also coordinates international competition filings in more than 40 jurisdictions for the firm's clients. She has managed numerous responses to Requests for

Additional Information, and document production in response to third party CIDs, in her tenure at WSGR.

Ms. King attended VPI and State University and studied Antitrust Law under professor William F. Baxter at Stanford University School of Law in 1995. She speaks frequently on the topic of compliance with the Hart-Scott-Rodino Act at conferences, paralegal associations and as a guest lecturer at Cañada College's paralegal program.

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