Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

ANTITRUST WIRE

SPRING 2007 VOLUME 7, ISSUE 1

Inside this Issue

1-2 Supreme Court Holds Allegations of Parallel Conduct "Without More" Insufficient to Survive Motion to Dismiss

2-6 "If the Merger Is Closed, Why Are We Here Then?"

5-7 Antitrust Modernization Commission Issues Report

7-9 *Credit Suisse Securities v. Glen Billings*

9-12 FTC Issues Horizontal Merger Data Report

13-14 Supreme Court to Re-Examine Per Se Treatment of Minimum Resale Price Maintenance

SUPREME COURT HOLDS ALLEGATIONS OF PARALLEL CONDUCT "WITHOUT MORE" INSUFFICIENT TO SURVIVE MOTION TO DISMISS

In *Bell Atlantic Corp. v. Twombly*, the U.S. Supreme Court granted certiorari to consider whether a complaint alleging a violation of Section 1 of the Sherman Act can survive a motion to dismiss when it alleges parallel conduct "unfavorable to competition" without any other facts to support an agreement. The Court reversed the decision of the Second Circuit and held that such a complaint must allege "enough factual matter (taken as true) to suggest that an agreement was made," demonstrating that the claim is not only "conceivable," but is "plausible on its face." The Court also noted that "[e]ven 'conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions' is 'not in itself unlawful'" (quoting *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 227 (1993)). The Court concluded that a "bare assertion of conspiracy will not suffice," because "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of an agreement at some unidentified point does not supply facts adequate to show illegality."[1]

In the aftermath of the 1984 divestiture of AT&T and the subsequent passage of the Telecommunications Act of 1996, the Regional Bell Operating Companies carved out from AT&T—the "Baby Bells" or Incumbent Local Exchange Carriers (ILECs)—were required by the act to share their networks with competitive local exchange carriers (CLECs). Plaintiffs representing a putative class of all "subscribers of local telephone and/or high-speed Internet services" alleged that ILECs conspired to restrain trade by inflating charges for local telephone service and high-speed Internet services, by engaging in "parallel conduct" to restrain the growth of CLECs, and by refraining from competition with one another. The complaint alleged that such an agreement not to compete could be inferred from the "absence of meaningful competition between [the ILECs] in one another's markets." Plaintiffs also noted that the CEO of Qwest was quoted as stating that competing in another ILEC's territory "might be a good way to turn a quick dollar but that doesn't make it right."

In deciding the case, the Court clearly was concerned about the high cost of discovery in antitrust cases. Justice David Souter wrote for the majority that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be quite expensive." In this case in particular, the Court observed that the putative plaintiff class represented 90 percent of all subscribers to local telephone or high-speed Internet service, while the defendants were the largest telecommunications firms in the U.S., "with many thousands of employees generating reams of business records." Anticipating detractors on this point, the Court also expressed doubt that courts can "weed out"

Continued on page 2...

Supreme Court Holds Allegations of Parallel Conduct "Without More" Insufficient to Survive Motion to Dismiss

Continued from page 1...

meritless claims early on in the discovery process and explained the obvious point that stricter scrutiny of the evidence at summary judgment similarly does nothing to curtail discovery abuse and therefore "push cost-conscious defendants to settle even anemic cases before reaching those proceedings."

The Court also overruled the "no set of facts" principle in *Conley v. Gibson*, 355 U.S. 41, 47 (1957), which the Second Circuit articulated in upholding the complaint. This principle holds that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Court explained that such a rule "can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings." The Court concluded that the "no set of facts" language in *Conley* "is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."

In applying the Court's analysis to the set of facts in the case, the Court observed that the ILECs each had incentives to act unilaterally to keep their regional dominance and also not to compete outside their own territories. Each ILEC certainly had an incentive to resist CLECs in its own market, and given the history of the telecommunications industry, in which monopoly was the norm, ILECs understandably could stick to their prior way of doing business. Although the plaintiffs alleged that ILECs passed up lucrative opportunities to compete with one another, the Court countered that the plaintiffs did not allege that such competition was any more lucrative than other opportunities being pursued by ILECs during the same period. In this context, the Court was particularly troubled by the fact that if "decisions to resist competition were enough to imply an antitrust conspiracy, pleading a §1 violation against almost any group of competing businesses would be a sure thing."

Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg in part, dissented from the majority and wrote that in accordance with *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*¸ 346 U.S. 537 (1954), parallel conduct is circumstantial evidence of conspiratorial conduct. Therefore, limited discovery should have been allowed to find out whether the conduct at issue actually was independent or the result of a conspiracy. The dissent argued that the majority decision is inconsistent with liberal pleading standards in the Federal Rules and suggested that if defendants are unhappy with liberal pleading standards permitting high-cost discovery, the defense bar ought to seek to amend the Federal Rules, not their interpretation by the Supreme Court.

The decision in *Twombly* is a clear victory for defendants in antitrust cases in which bare-bones allegations of conspiracy are made in the complaint. The high cost of discovery in antitrust cases is well known to those who have had to defend these types of allegations. By requiring plaintiffs to make specific allegations of conspiracy, the Court limits fishing expeditions in search of an unlawful conspiracy.

[1] The Court's slip opinion is available at http://supremecourtus.gov/opinions/06pdf/05-1126.pdf.

"IF THE MERGER IS CLOSED, WHY ARE WE HERE THEN?"

Amended Tunney Act Raises Issues for Merger Partners

In some of the first proceedings held pursuant to the recently amended Tunney Act, Judge Emmet Sullivan of the District Court for the District of Columbia found himself asking a number of questions—and raising a number of potentially problematic issues—relating to mandatory, and now more rigorous, judicial review of consent decrees. The proceedings concern Judge Sullivan's now-complete review of SBC's and Verizon's respective acquisitions of AT&T and MCI in 2005, and serve to highlight some of the problems inherent in the Tunney Act and its 2004 amendments.

While Judge Sullivan's questions during the hearings often were rhetorical in nature (e.g., "Don't I have to scrutinize that merger to determine if it's in the public interest?"), he raised a number of issues that potentially expose merger partners to several risks inherent in a lingering review of consummated transactions. Moreover, the proceedings raise issues for the antitrust agencies, as well as for interested third parties.

Background

The Tunney Act was enacted in 1974 to ensure that the entry of antitrust merger consent judgments is in the "public interest." While the act always required that a court make this public-interest determination, recent amendments to the act now require that judges engage in a more rigorous analysis, requiring them to consider:

- the competitive impact of the judgment and its provisions relative to the alleged violations;
- the anticipated effects of alternative remedies actually considered and any other competitive considerations bearing upon the adequacy of such judgment; and
- the impact of entry of such judgment upon competition in the relevant market and upon the public.

Continued on page 3...

“If the Merger Is Closed, Why Are We Here Then?”

Continued from page 2...

These 2004 amendments lie at the heart of the controversy surrounding the now-complete Tunney Act proceedings.

In January of 2005, SBC agreed to acquire AT&T for $16 billion. Just two weeks later, Verizon agreed to acquire MCI for $8.5 billion. Both deals sparked interest in Washington and across the country. Over the course of most of 2005, the deals were reviewed by the Federal Communications Commission (FCC) and the Department of Justice (DOJ), as well as by state regulatory agencies. According to the agencies, the FCC and DOJ considered the potential competitive effects of the two deals in the markets on wholesale special access, retail enterprise, mass market, Internet backbone, wholesale inter-exchange, and international services.

In late October 2005, the DOJ announced that, subject to court approval, it would require SBC and Verizon to divest portions of certain local fiber-optic network facilities in order to proceed with their respective acquisitions. More specifically, the DOJ found that SBC and AT&T were the only two firms that owned or controlled a direct wireline connection to certain buildings in the metropolitan areas of Chicago, Dallas-Fort Worth, Detroit, Hartford-New Haven, Indianapolis, Kansas City, Los Angeles, Milwaukee, San Diego, San Francisco-San Jose, and St. Louis. Similarly, the DOJ found that Verizon and MCI were the only two firms that owned or controlled a direct wireline connection to hundreds of buildings in the metropolitan areas of Washington-Baltimore, Boston, New York, Philadelphia, Tampa, Richmond, Providence, and Portland, Maine. In the absence of new entry, the DOJ believed the mergers would eliminate competition for facilities-based, local private-line service to those buildings and thus required Verizon and SBC to each divest connections to more than 350 buildings in their respective territories.

Shortly thereafter, the FCC issued orders approving each of the deals, noting that the consent decrees executed between the DOJ and the parties adequately addressed the FCC’s anticompetitive concerns. Accordingly, SBC closed its acquisition of AT&T in November of 2005, with the newly merged company adopting the AT&T name. Similarly, Verizon closed its acquisition of MCI in January of 2006.

However, the filing of the DOJ’s proposed consent decrees and associated complaints with the U.S. District Court for the District of Columbia set in motion a series of Tunney Act proceedings that raised a cloud of uncertainty over the mergers. Both decrees were consolidated before Judge Sullivan, who began proceedings in late 2005. Over the next six months, the court mainly appears to have dealt with procedural matters, often entertaining third-party motions to intervene or participate as *amicus curiae*. Though the Tunney Act does not require the court to permit anyone to intervene, Judge Sullivan ultimately granted *amicus curiae* status to a number of parties, including: Comptel, a telecommunications industry association representing communications service providers; the Alliance for Competition in Telecommunications (ACTel), an alliance of smaller telecom providers; Sprint/Nextel; Eliot Spitzer, the New York Attorney General; the National Association of State Utility Consumer Advocates; and the New Jersey Division of Rate Payer Advocates.

At a motions hearing in July of 2006, Judge Sullivan turned his focus to more substantive issues, outlining for the parties the questions central to the review process and giving the DOJ, the parties, and *amici* the opportunity to address a number of issues, including:

- What authority does the court have to inquire as to what alternative remedies were considered and why they were rejected?
- What weight should the court give to the legislative history of the amended Tunney Act in its determination of the appropriate standard of review?
- The government and the parties contend that the court should continue to be deferential to the government in its Tunney Act review. Is that consistent with the legislative history of the amended act, which purports to overturn precedents that employed what Congress considered to be too deferential a standard in evaluating consent decrees?
- What specific evidence is the government relying on for its assertion that its proposed remedies would replace the competition that would be lost as a result of the two mergers?
- Has the government provided the court with sufficient information for it to make an independent determination as to whether entry of the proposed consent decrees is in the public interest? If not, what other information should the government have provided to the court?
- What weight should the court give to the findings of the FCC?
- Why isn’t the government’s selected remedy broader in time and in substance?
- What consideration should the court give the arguments of the attorney general of New York?
- What criteria did the government use in determining which buildings should be covered by the proposed final judgments?

The heart of Judge Sullivan’s public-interest concern seemed to be how the public viewed the mergers, as expressed in the following question he posed:

“Through the eyes of a layperson, the mergers appear to be against public interest given the apparent loss in competition. In layperson’s terms, why isn’t that the case?”

Somewhat ironically, Judge Sullivan ended the July hearing with a request that the DOJ provide more information to help him decide whether to approve the two deals. At that time, the judge also entered a protective order setting forth the procedures for handling confidential material and allowing designated material to be filed under seal. Although there was some disagreement as to

Continued on page 4...

Continued from page 3...

the extent of protection afforded to the materials, the judge ultimately ruled that confidential materials could be obtained by outside counsel for the parties and *amici* (whereas Verizon also sought to allow in-house counsel access to confidential information).

In a late November 2006 hearing, the judge questioned whether the DOJ had provided enough information and documents. The DOJ responded that what had been provided to the court was a fair representation of the thousands of documents and interviews it had gathered while reviewing the acquisitions.

At times, it was unclear where the proceedings were heading or when they might come to a conclusion, but it appeared that the judge was determined to make a decision. In one of the more recent hearings, in December of 2006, Judge Sullivan was quoted as saying to one of the parties:

"You say it's a done deal, a fait accompli. . . . The merger's not finished, either. The merger has not been approved by this court."

Finally, on March 29, 2007, Judge Sullivan concluded his Tunney Act review proceedings, ultimately finding that the proposed final judgments were in fact in the public interest. Importantly, he found that "a close reading of the law demonstrates that the 2004 amendments effected minimal changes, and that [the] Court's scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." Judge Sullivan noted that the government need not prove that settlements perfectly remedy the alleged antitrust harms. Instead, he held that the standard should be that the government need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.

Ramifications of a More Rigorous Tunney Act Review

While the review of the AT&T and Verizon mergers now is complete and the standard for conducting those proceedings does not appear to have dramatically changed, it nevertheless is apparent that judicial review of post-close mergers can raise a number of problematic issues for future merging parties and other interested parties.

Shadow of Uncertainty and Diversion of Resources

While most insiders did not believe that the AT&T and Verizon mergers would be blocked as a result of Judge Sullivan's proceedings, a lingering Tunney Act review nevertheless creates at least some shadow of uncertainty, even over deals that have been closed for more than a year. This uncertainty potentially could affect shareholders, customers, or even employees. Moreover, the merged company must devote some measure of resources to dealing with the Tunney Act review—resources that instead could be devoted to further integration of the two companies or generation of any planned efficiencies or synergies.

Evidentiary Issues Could Curb Otherwise Competitive Behavior

While the new Tunney Act does not necessarily require that the judge conduct an evidentiary hearing to determine whether the consent judgment is in the public interest, it does require the judge to consider "any other competitive considerations bearing upon the adequacy of such judgment." Such a broad requirement reasonably could encompass any post-close behavior of the merged entity.

Thus, while Tunney Act proceedings are pending, a merged company may have to consider how its post-close actions and integration could be perceived by the court, and may feel the need to compete somewhat less aggressively, lest its more muscular competitive actions be taken by the court, *amici,* or the public at large to be the actions of a merged company exercising enhanced market power. Such a distortion in conduct probably was not contemplated by the Tunney Act's drafters, but merger partners will need to be cognizant of how their post-close actions may be perceived during Tunney Act review.

Delay in Subsequent Deals

Extended Tunney Act proceedings not only have an impact on the deal at issue, but could have an impact on any future or pending deals that the merged entity may be contemplating or pursuing. As an example, some observers believe that Judge Sullivan's proceedings may have impacted the timing of both the DOJ's and the FCC's decisions to approve a subsequent AT&T acquisition—its acquisition of BellSouth—as both agencies wanted an opportunity to see how Judge Sullivan would rule before completing their respective reviews of the BellSouth acquisition. AT&T and BellSouth announced their plans to merge in March of 2006, with the DOJ clearing the deal without requiring any divestitures in October of 2006. In late December of 2006, the FCC approved the deal, noting that significant public-interest benefits were likely to result.

Increased Risk of Disclosure of Confidential Materials

In the AT&T and Verizon proceedings, Judge Sullivan entered an order permitting confidential materials produced by the parties and third parties to be filed under seal and limiting access to those confidential materials to outside counsel for the parties and *amici*. However, there can be disagreement among the merging parties themselves as to the extent of access afforded to those materials. Moreover, it is not hard to imagine that a different judge presiding over a different proceeding might want to conduct a more open Tunney Act proceeding—one in which the public itself had access to at least some of the materials in order to give the public an opportunity to comment in furtherance of the public interest.

While the chances of disclosure appear to be relatively small, merging parties should be aware that judicial review of their deal may require them to consider at least the marginally increased risk that their

Continued on page 5...

"If the Merger Is Closed, Why Are We Here Then?"

Continued from page 4...

confidential business documents may find themselves in the hands of their fiercest competitors, or even their customers. Likewise, the same holds true for third parties to merger investigations—ranging from competitors who produce materials pursuant to an agency subpoena to customers who give information during informal conversations with the agencies.

Higher-Profile Mergers Face the Greatest Risk

One thing is certain—parties to high-profile mergers, such as AT&T and Verizon, most likely will find themselves facing the increased risks attendant to a lingering Tunney Act review. For instance, the recently announced merger of equals between XM and Sirius, announced on February 19, 2007, and already the subject of congressional hearings, is exactly the type of merger that is most exposed to the recently amended Tunney Act. High-profile mergers that at least facially present anticompetitive concerns almost always can be guaranteed lengthier judicial review under the Tunney Act if the antitrust agencies approve such a merger conditioned on remedial relief.

Conclusion

Strong public policy considerations underlie both the Tunney Act and the Hart-Scott-Rodino (HSR) Act, which established a strict time frame within which the antitrust agencies are allowed to conduct pre-close investigations before the assets of the merging parties become too scrambled to adequately address any anticompetitive concerns. Now, the issue is whether the Tunney Act can peacefully coexist with the HSR framework. Judge Sullivan's proceedings have shed some light on that question, and give potential merger partners some significant issues to consider.

ANTITRUST MODERNIZATION COMMISSION ISSUES REPORT

After three years of research and deliberation, the Antitrust Modernization Commission issued its report on April 2, 2007. This highly anticipated report recognizes that, for the most part, the antitrust laws are working well. The report proposes no changes to the substantive statutory provisions of Sections 1 and 2 of the Sherman Act, Sections 3 and 7 of the Clayton Act, and Section 5 of the FTC Act. However, significant recommendations were made, including the repeal of the Robinson-Patman Act, the reform of indirect purchaser litigation, the repeal of existing judicial rules forbidding claim reduction and contribution by alleged joint tortfeasors, the reform of merger clearance and the process for issuing "second requests" under the Hart-Scott-Rodino Act, and narrowing the number and scope of antitrust exemptions and immunities. Given that the complete set of recommendations is extensive, this Client Alert provides a brief overview of some of the most significant proposed changes.

The Commission

The commission was created pursuant to the Antitrust Modernization Act of 2002. Congress charged the commission to: (1) examine whether the U.S. antitrust laws need to be modernized and to identify and study related issues; (2) solicit views of all parties concerned with the operation of the antitrust laws; (3) evaluate the advisability of any proposals with respect to the modernization of the laws; and (4) prepare and submit a report to Congress and the president. In pursuit of these objectives, the commission sought input from interested members of the public who provided comments and witness testimony at the committee's hearings.

Repeal of the Robinson-Patman Act

As predicted by many in the antitrust bar, the commission recommended the repeal of the Robinson-Patman Act in its entirety. The act initially was passed in response to the concern of small businesses that were having difficulty competing with larger businesses and chain stores. Small store owners were concerned that they could not obtain the same price discounts from suppliers that larger businesses received. Addressing this concern, the act prohibited sellers from offering different prices to different purchasers of "commodities of like grade and quality" where the difference injures competition (15 U.S.C. §§13-13a). The act permits different price or discount levels only where: (1) the same discount is practically available to all purchasers; (2) the lower price is justified by the lower per-unit cost of selling to the favored buyer; (3) the lower price is offered in good faith to meet, but not beat, the price of a competitor; or (4) the lower price is justified by changing conditions that affect the market.

The commission recommended that Congress repeal the act because it has the effect of harming consumers by limiting the available discounts and ultimately forcing consumers to pay higher prices. The commission found that an act "that restricts price and other forms of competition is fundamentally inconsistent with the antitrust laws, which protect price and other types of competition that benefit consumers." Rather than protecting competition, the act protects competitors, with the end result being higher prices for consumers. In addition to consumers, the commission noted that small businesses also could be harmed by the act because manufacturers might avoid liability for price discrimination between large and small retailers by choosing to sell their products exclusively to large retailers.

Continued on page 6...

Continued from page 6...

Reforming Merger Clearance and Second Requests

The commission recommended that the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) implement a new merger-clearance agreement for the purpose of clearing all transactions to one of the agencies in a short period of time. Further ensuring the expediency of clearance, the commission recommended that Congress enact legislation to require the two agencies to designate mergers reported under the Hart-Scott-Rodino Act for clearance to one of the two agencies within nine days after the filing of the pre-merger notification.

The commission found that there were high costs imposed on merging parties by the second-request process. To reduce these burdens, the commission recommended that agencies limit the number of custodians whose files must be provided, inform merging parties about the competitive concerns that led to the second request, limit requests for data that merging parties do not keep in the normal course of business, inform the merging parties of the basis for the agencies' economic analysis, and facilitate dialogue between the merging parties and the agencies' economists. In addition, the commission recommended that the agencies reduce the burden and expense involved in the translation of foreign-language documents for production.

Bundled Pricing

One of the areas of law in which the commission made a specific recommendation for consideration by the federal courts is with regard to bundled pricing—an area of law today that is quite unclear and in which business firms are in substantial need of greater clarity and guidance. The commission's recommendation is as follows:

> *Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.*

This standard, with the cost-based and recoupment safe harbors, should provide businesses greater clarity and freedom of action.

Reform of Indirect Purchaser Litigation

The commission recommended that Congress overrule the Supreme Court's decisions in *Illinois Brick, Inc. v. United Shoe Machinery Corp*, 392 U.S. 481 (1968), and *Hanover Shoe v. Illinois*, 431 U.S. 720 (1977), to allow both direct and indirect purchasers to recover actual damages under the federal antitrust laws. In *Hanover Shoe*, the Supreme Court held that a defendant in an antitrust action generally is precluded from asserting as a defense that the direct purchaser passed on the overcharge to an indirect purchaser and, therefore, suffered no damages. Similarly, in *Illinois Brick*, the Supreme Court held that plaintiffs who purchased goods indirectly from an antitrust violator could not recover damages for overcharges passed on to them through a chain of distribution (431 U.S. at 729). The commission said that overruling *Illinois Brick* and *Hanover Shoe* would allow both direct and indirect purchasers to recover actual damages suffered from antitrust violations.

Consistent with the recommendation that Congress allow indirect purchaser litigation, the commission recommended allocation of damages among direct and indirect purchaser claimants according to their actual damages, which would be based on the evidence. Acknowledging that such a determination may be challenging, the commission said that the federal courts have a demonstrated ability to handle such complex economic issues. Additionally, the consolidation of indirect purchaser actions from state courts and direct purchaser actions in federal courts would allow a single judge to oversee and manage the case, thereby avoiding duplicative litigation and inconsistent results.

The commission also recommended that class certification be permitted, in appropriate cases, for classes of both direct and indirect purchasers. Recognizing that the passing-on addressed in *Hanover Shoe* affects both indirect and direct purchasers' claims, the commission said that legislative overruling of *Hanover Shoe* could create the potential that no class of indirect or direct purchasers could be certified. To avoid this outcome, the report recommends that Congress specify that courts should certify direct purchaser classes without regard to whether direct purchasers passed on the alleged injury.

Repeal of Judicial Rules Forbidding Claim Reduction and Contribution by Joint Tortfeasors

The commission noted that the combination of a very limited claim reduction and no right of contribution can result in one defendant being held responsible for nearly all of the damages in an antitrust conspiracy, which it stated was "fundamentally unfair." To solve this problem, the commission recommended that Congress enact a statute allowing non-settling defendants to obtain reduction of the plaintiff's claim by either the amount of the settlement or the allocated share of liability of the settling defendant, whichever is greater. The commission also proposed that claims for contribution among non-settling plaintiffs be permitted. The commission said that by permitting claim reduction, Congress would ensure that defendants are held responsible only for their properly allocated share of damages. The recommendation also ensures that non-settling defendants are not put in a worse position than if they had settled, due to settlements between plaintiffs and other defendants. The commission said

Continued on page 7...

Antitrust Modernization Commission Issues Report

Continued from page 6...

that permitting contribution among non-settling defendants will ensure that defendants will not be deterred from settling because of the threat that their liability may later be increased through a contribution action. By enacting these measures, the commission said, defendants will be liable only for their fair share of the damages caused, no guilty party will be able to avoid damages, and the liability of non-settling defendants will be more equitably allocated.

Narrowing Antitrust Immunities

The commission noted that there are several outdated immunities that unnecessarily shield certain industries from antitrust law. The commission questioned the utility of antitrust exemptions, particularly the antitrust immunity for ocean carriers under the Shipping Act and the limited antitrust immunity under the Export Trading Company Act, which exempts U.S. companies that jointly export goods or services, provided that there is no substantial lessening of competition within the United States.

The commission stated that an immunity or exemption is warranted only when either: (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition. The commission said that immunities rarely should be granted and only when there has been a clear case made that the conduct at issue would normally shield a party from antitrust liability and that the conduct is necessary to satisfy a specific societal goal that is paramount to the benefit of a free market to consumers. Even if both of these conditions exist, the commission said Congress should consider granting only a limited form of immunity, include a "sunset" provision that would cause the immunity to expire unless it was renewed, and consult with the FTC and DOJ prior to granting these renewals.

Conclusion

The commission's report provides an extensive overview of the current challenges that exist in antitrust law. The recommendations to Congress respond to these challenges by providing a necessary update to outdated cases and statutory provisions that no longer are consistent with the fundamental principles of modern antitrust law.

For more information on the commission's full report or the implications that the report will have for business, please contact Jonathan Jacobson or another member of Wilson Sonsini Goodrich & Rosati's antitrust and trade regulation practice. Mr. Jacobson was appointed by Congress in 2002 to serve as a commissioner of the Antitrust Modernization Commission.

CREDIT SUISSE SECURITIES V. GLEN BILLINGS

The Supreme Court is considering the applicability of antitrust law to securities activities governed by the Securities Exchange Commission (SEC). In *In re Initial Public Offerings Antitrust Litigation*, Glen Billings, along with other members of two putative classes in a consolidated class action, brought suit against Credit Suisse First Boston and other underwriters. The plaintiffs alleged that the defendants conspired to inflate the aftermarket prices of class securities by: (1) using the fixed-price equity underwriting system to create anticompetitive charges, and (2) creating illegal tie-in arrangements that harmed the direct purchasers of initial public offering (IPO) shares. In deciding this case, the Supreme Court is likely to explain how the securities regulations and possibly other regulatory schemes should be reconciled with the antitrust laws when there is overlap or direct conflict between the two.

Facts of the Case

The complaint alleged that 10 leading investment banks conspired to impose anticompetitive charges on prospective stock purchasers in approximately 900 IPOs of equity securities. The complaint also alleged that the defendants conspired to inflate the prices of those securities in the aftermarket. The defendants moved to dismiss the complaint on the grounds that the regulatory scheme under the securities laws precludes application of the antitrust law, by implication. The district court granted the defendants' motion to dismiss. However, the Second Circuit reversed the dismissal, holding that the alleged conspiracy to inflate prices by engaging in tie-in and laddering practices was not shielded by the securities regulatory scheme.

In making its decision, the Second Circuit sought input from both the Department of Justice's (DOJ's) Antitrust Division and the SEC. The DOJ argued that Congress intended for both the SEC regulatory scheme and the antitrust laws to apply. Accordingly, the DOJ stated that the district court correctly held that the doctrine of implied immunity should bar antitrust challenges to syndication and related practices expressly or implicitly approved by the SEC under the securities laws. The DOJ explained that because the SEC views the alleged laddering and tie-in agreements as securities violations, enforcement of the antitrust laws prohibiting such agreements presents no basis for finding a conflict between the two regulatory schemes. As such, the DOJ concluded that the district court erred in its conclusion that the SEC's "sweeping power to regulate" was sufficient to create a potential conflict with the antitrust laws.

Contrary to the DOJ, the SEC's letter brief said that the SEC has broad authority over the

Continued on page 8...

Credit Suisse Securities v. Glen Billings

Continued from page 7...

registered securities-offering process, including "the authority to permit at least some agreements among underwriters that can have the effect of increasing the aftermarket price over the price that would prevail in the absence of those agreements, and which therefore could be viewed as coming within the terms of the question raised by the court." Despite the SEC's letter, the Second Circuit reversed the district court's decision and held that there was no implied immunity for tie-in and laddering practices because Congress did not specifically consider and decide to immunize tie-in agreements. The Supreme Court granted certiorari.

Petitioners' Brief

The petitioners argued that the Supreme Court should adopt the district court's dismissal of the Sherman Act and Robinson-Patman Act complaints on the grounds of implied immunity. The petitioners' brief asserts that the Supreme Court's decision in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), holding that immunity applies where the SEC has been given regulatory authority over an issue, should govern. The brief also referred to the Supreme Court's decision in *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975), in which the Court stated that antitrust immunity must be implied where the SEC has specific regulatory powers, but also where the regulatory scheme the SEC has established is so pervasive that there is a real potential for conflict with the antitrust laws. Finally, the petitioners' brief referred to the cost-benefit analysis used in *Trinko*, which states that "when 'a regulatory structure designed to deter and remedy anticompetitive harm,' such as the securities laws, is in place, 'the additional benefit to competition provided by antitrust enforcement' is 'small.'"

Based on these precedents, the petitioners asserted that they have implied immunity since the SEC has authority to regulate all of the conduct challenged in the complaint. Specifically, the SEC regulates the IPO process, oversees the National Association of Securities Dealers' (NASD's) rules governing syndicates, and prohibits manipulative acts in the sale of securities. Besides this active regulation, the petitioners argued that they are entitled to immunity because the activity at issue is "pervasively regulated by the SEC," a standard used by the Court in the *NASD* case. Finally, based on *Trinko*, the petitioners argued that the cost of permitting treble damages in antitrust suits is enormous because the SEC regulators are motivated by more than antitrust concerns, and it would be difficult for antitrust juries, lacking the perspective of the SEC regulators, to evaluate such claims. The threat of treble damages determined by antitrust juries rather than regulation by SEC and NASD experts could "chill protected conduct 'in ways harmful to the overall securities market.'" The plaintiffs highlighted the concern that antitrust litigation could be used to circumvent the heightened requirements for private securities class actions.

Respondents' Brief

The respondents' brief focused on the laddering and tie-ins, actions that it argued are illegal under both the securities laws and the antitrust laws. Citing several Supreme Court cases in which implied antitrust immunity was asserted, the respondents argued that the Court consistently has rejected antitrust immunity in cases in which the antitrust laws and the regulatory scheme both prohibit the challenged conduct.

The respondents referred to the Supreme Court's decision in *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963), in which the Court said that antitrust immunity may be implied "only if necessary to make the Securities Exchange Act work." The respondents argued that antitrust immunity for laddering and tie-ins was not necessary for the Exchange Act to work. Essentially, the respondents argued that the Securities Exchange Act will be more effective if the "doubly prohibited collusive conduct at issue" could be prosecuted under both the securities and antitrust laws.

The respondents further argued that the Second Circuit properly found that implied immunity does not exist under the two standards that have been used in the past to determine whether antitrust immunity exists. The first standard evaluates whether a "plain repugnancy" between the antitrust and securities laws with respect to the conduct at issue has been shown. The second standard assesses whether "regulation of the challenged conduct is so pervasive" that it displaces the antitrust laws altogether. The respondents argued that the Second Circuit properly found that the plain repugnancy test was not met, because there was no evidence that Congress intended to repeal the antitrust laws with respect to the challenged conduct. Similarly, they argued that the challenged conduct did not displace the antitrust laws because prosecution of the antitrust claims would not seriously compromise the SEC's regulatory authority.

Government Amicus Brief

Despite the different opinions they presented to the Second Circuit, the SEC and the DOJ filed a single amicus brief with the Supreme Court, urging the Court to vacate the Second Circuit's decision. The government concluded that antitrust immunity should not only extend to underwriting that is explicitly or implicitly authorized under the securities laws, but also to conduct that is inextricably linked to such activities. However, the government added that implied immunity does not preclude antitrust liability for all securities-related conduct.

In its brief, the government asserted that there should be "reconciliation of the regulatory and antitrust statutes" and that this reconciliation should give effect to both schemes. To do this, the United States said that antitrust immunity should not only extend to collaborative conduct such as underwriting that specifically is authorized under securities law, but also to activities that are "inextricably intertwined" with the permitted collaboration, whether or not the intertwined conduct itself is permitted under the securities laws. However, the government rejected the view that there should be a blanket exemption, stating that all conduct connected with an IPO should not be immune

Continued on page 9...

Credit Suisse Securities v. Glen Billings

Continued from page 8...

from antitrust liability simply because the SEC has regulatory authority over the offering process. The government argued that antitrust immunity should not extend to alleged antitrust violations that can be proven without reliance on activities permitted under the securities laws.

In keeping with this conclusion, the government proposed a requirement for pleading in implied immunity cases. The government stated that the complaint in an implied immunity case "must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory scheme or inextricably intertwined with such immune conduct." This requirement ensures that the protected conduct, permitted under the securities laws, cannot give rise to inferences of illegality.

Conclusion

The *Billings* case is significant not only in the securities context but potentially in every other regulatory scheme in which regulations may overlap with the antitrust laws. The outcome of the case holds the possibility that collaborative activities either implicitly or explicitly permitted by the securities laws will be subject to the treble damages provision of the antitrust laws. When the Supreme Court's decision is issued, corporations engaged in such collaborative activities should closely evaluate the decision to determine how it may affect their business activities.

FTC ISSUES HORIZONTAL MERGER DATA REPORT

On January 25, 2007, the Federal Trade Commission (FTC) released its staff report analyzing the horizontal merger investigations that the agency had conducted during its fiscal years 1996 through 2005. Most interestingly, the report analyzes those merger investigations and their outcomes based on (among other data) four critical factors, which are discussed below: (1) the number of competitors in the market;
(2) whether "hot documents" existed;
(3) whether customers had complained; and
(4) ease of entry into the market.

During these 10 years, the FTC issued 326 "second requests," or compulsory requests for additional information and documents issued at the conclusion of the initial Hart-Scott-Rodino waiting period. Of these 326 second requests, 188 were classified as horizontal mergers, as opposed to other theories of potential harm to competition (such as vertical foreclosure or potential competition). Because many merger investigations involve more than one relevant market, these 188 horizontal merger investigations resulted in the analysis of 976 total relevant markets. The FTC report also provides certain information by industry and by "HHI" data (the "Herfindahl-Hirschman Index," or the sum of the squares of the market shares of all competitors in a market, ranging from 0 to 10,000).

Number of Significant Competitors

The FTC report defines "significant competitors" as those firms "whose independence could affect the ability of the merged firms to achieve an anticompetitive outcome." There were 747 relevant markets in which this factor could be analyzed. As expected, the number of investigations in which the agency sought relief was inversely proportional to the number of "significant competitors" in the relevant market (see table 4.1 of the FTC report below):

- Where there were only two significant competitors in a relevant market merging

Table 4.1

FTC Horizontal Merger Investigations
Number of Significant Competitors
All Markets
FY 1996 through FY 2005

		Outcome		
		Enforced	Closed	TOTAL
Significant Competitors	2 to 1	192	5	197
	3 to 2	206	34	240
	4 to 3	114	44	158
	5 to 4	40	26	66
	6 to 5	15	24	39
	7 to 6	3	13	16
	8 to 7	6	7	13
	9 to 8	0	5	5
	10 to 9	2	1	3
	10 +	0	10	10
	TOTAL	578	169	747

Continued on page 10...

FTC Issues Horizontal Merger Data Report

Continued from page 9...

into one (a so-called "2-to-1" market), 192 such markets were classified as "enforced"—i.e., markets in which the agency sought relief (or the transaction was abandoned). In contrast, only five markets were classified as "closed," meaning the investigation was completed without (significant) relief being sought (representing only about 2.5 percent).

- For markets classified as "3-to-2," 206 were enforced and 34 were closed (about 14 percent).
- For markets classified as "4-to-3," 114 were enforced and 44 were closed (about 28 percent).
- For markets classified as "5-to-4," 40 were enforced and 26 were closed (about 39 percent).
- For markets classified as "6-to-5"or greater, few investigations were brought to begin with, and the majority (or in some categories, all) were closed without enforcement.

Hot Documents

The FTC report defines "hot documents" as those that "predict that the merger will produce an adverse price or non-price effect on competition." For all full investigations involving three or fewer relevant markets (121 cases, representing 174 markets), data regarding the presence or absence of hot documents was gathered (see tables 6.1 and 6.2 of the FTC report at right). In the 25 markets in which hot documents existed, only three were closed without enforcement (12 percent). By comparison, in the remaining markets in which no hot documents were identified, 95 were enforced and 54 were closed (about 36 percent). So, while not dispositive, the absence of hot documents made closing the merger without enforcement about three times more likely.

Table 6.1

FTC Horizontal Merger Investigations
Number of Significant Competitors
All Markets
FY 1996 through FY 2005

Hot Documents Identified

		Outcome		
		Enforced	Closed	TOTAL
Significant Competitors	2 to 1	10	0	10
	3 to 2	4	1	5
	4 to 3	7	2	9
	5 to 4	0	0	0
	6 to 5	1	0	1
	7 to 6	0	0	0
	8 to 7	0	0	0
	9 to 8	0	0	0
	10 to 9	0	0	0
	10 +	0	0	0
	TOTAL	22	3	25

Table 6.2

FTC Horizontal Merger Investigations
Number of Significant Competitors
All Markets
FY 1996 through FY 2005

No Hot Documents Identified

		Outcome		
		Enforced	Closed	TOTAL
Significant Competitors	2 to 1	41	1	42
	3 to 2	32	7	39
	4 to 3	15	14	29
	5 to 4	2	17	19
	6 to 5	4	6	10
	7 to 6	1	4	5
	8 to 7	0	1	1
	9 to 8	0	2	2
	10 to 9	0	0	0
	10 +	0	2	2
	TOTAL	95	54	149

Continued on page 11...

FTC Issues Horizontal Merger Data Report

Continued from page 10...

Strong Customer Complaints

The FTC report defines "strong customer complaints" as cases in which customers expressed a "credible concern that a significant anticompetitive effect would result if the transaction were allowed to proceed"—and such complaints play a significant role in the analysis (see tables 8.1 and 8.2 of the FTC report at right). In the 158 total markets in which this factor was studied, 73 markets had strong customer complaints and within these markets, only one transaction closed without enforcement. On the other hand, in the 85 markets without strong customer complaints, 49 transactions were closed without enforcement (about 57 percent).

Entry Ease

Finally, with regard to the same cases for which hot documents were studied (121 cases, representing 174 markets), the FTC also analyzed whether entry into such markets is "easy"—defined as whether the timeliness, likelihood, and sufficiency of entry criteria under the horizontal merger guidelines are satisfied. If any of these criteria were not met, entry was defined as "difficult." This factor also is compelling: Entry could be shown to be easy in 30 of the 174 markets, and in *all* 30 of these the merger closed without enforcement. On the other hand, for the remainder of the markets in which entry was difficult, 117 mergers were enforced and only 27 were closed (about 19 percent; see tables 10.1 and 10.2 of the FTC report on page 12).

The FTC's press release and its entire report, both dated January 25, 2007, are available through the FTC's website and at the following link:

http://www.ftc.gov/opa/2007/01/horizmerger.htm

Table 8.1

FTC Horizontal Merger Investigations
Number of Significant Competitors
All Markets
FY 1996 through FY 2005

Strong Customer Complaints

		Outcome		
		Enforced	Closed	TOTAL
Significant Competitors	2 to 1	36	0	36
	3 to 2	22	1	23
	4 to 3	11	0	11
	5 to 4	0	0	0
	6 to 5	3	0	3
	7 to 6	0	0	0
	8 to 7	0	0	0
	9 to 8	0	0	0
	10 to 9	0	0	0
	10 +	0	0	0
	TOTAL	72	1	73

Table 8.2

FTC Horizontal Merger Investigations
Number of Significant Competitors
All Markets
FY 1996 through FY 2005

No Strong Customer Complaints

		Outcome		
		Enforced	Closed	TOTAL
Significant Competitors	2 to 1	12	1	13
	3 to 2	10	5	15
	4 to 3	10	14	24
	5 to 4	1	17	18
	6 to 5	2	6	8
	7 to 6	1	1	2
	8 to 7	0	1	1
	9 to 8	0	2	2
	10 to 9	0	0	0
	10 +	0	2	2
	TOTAL	36	49	85

Continued on page 12...

FTC Issues Horizontal Merger Data Report

Continued from page 11...

Table 10.1

FTC Horizontal Merger Investigations
Number of Significant Competitors
All Markets
FY 1996 through FY 2005

Entry Easy

		Outcome		
		Enforced	Closed	TOTAL
Significant Competitors	2 to 1	0	0	0
	3 to 2	0	6	6
	4 to 3	0	8	8
	5 to 4	0	6	6
	6 to 5	0	5	5
	7 to 6	0	3	3
	8 to 7	0	1	1
	9 to 8	0	0	0
	10 to 9	0	0	0
	10 +	0	1	1
	TOTAL	0	30	30

Table 10.2

FTC Horizontal Merger Investigations
Number of Significant Competitors
All Markets
FY 1996 through FY 2005

Entry Difficult

		Outcome		
		Enforced	Closed	TOTAL
Significant Competitors	2 to 1	51	1	52
	3 to 2	36	2	38
	4 to 3	22	8	30
	5 to 4	2	11	13
	6 to 5	5	1	6
	7 to 6	1	1	2
	8 to 7	0	0	0
	9 to 8	0	2	2
	10 to 9	0	0	0
	10 +	0	1	1
	TOTAL	117	27	144

SUPREME COURT RECONSIDERING PER SE TREATMENT OF MINIMUM RESALE PRICE MAINTENANCE

When dealing with retailers, manufacturers must walk a fine line. On the one hand, they want their product sold with as little retailer mark-up as possible so as to maximize per unit sales. On the other hand, if they push too hard on this front, retailers might retaliate by burying their product in the back corner of their stores. Indeed, retailers may not even stock the product if online retailers are undercutting brick-and-mortar stores. Accordingly, manufacturers must devise strategies to ensure that retailers have an incentive to stock their product, give it favorable floor placement, train their salespersons to sell the product, and include the product in their weekly advertisements. One way to foster these goals is to ensure a level of profitability through the use of vertical restraints.

Although a vertical restraint can take many forms, the most direct form is resale price maintenance (RPM). Courts separate resale price maintenance into two categories: minimum RPM, which involves the retailer agreeing with the manufacturer to sell the product at or above a certain minimum price, and maximum RPM, which involves the setting of a ceiling on retail price. Minimum RPM agreements prevent retailers from undercutting one another on price, which drives down retailer profits.

In 1911, the U.S. Supreme Court forbade the use of minimum RPM in *Dr. Miles Medical Co. v John D. Park & Sons.*[1] In *Dr. Miles*, the manufacturer of several proprietary medicines had made agreements with retailers and wholesalers to control the medicines' resale price. The Court ruled that any agreements between the manufacturer and retailers regarding a specific resale price would be subjected to a per se analysis. The plaintiff only would have to prove the existence of an agreement to prevail.

Initially, courts interpreted the ban in *Dr. Miles* to include all kinds of vertical restraints. However, over time the Supreme Court has permitted manufacturers and retailers to make agreements that have the effect of fixing prices so long as there is no express agreement on price.[2] The Court also has allowed the use of maximum RPM in some instances.[3] Indeed, *Dr. Miles'* ban on minimum RPM now is the exception, not the rule, and one it appears the Court is ready to overturn.

On December 7, 2006, the Supreme Court granted *certiorari* in the case of *Leegin Creative Leather Products v. PSKS, Inc.*[4] *Leegin* provides a classic example of minimum RPM, and the perfect fact pattern on which to overturn *Dr. Miles.* Indeed, it is difficult to understand why the Court would have agreed to hear *Leegin* unless it intended to overturn *Dr. Miles.* There is no split among the circuit courts in applying *Dr. Miles*' prohibition; courts around the country consistently have applied the *Dr. Miles* rule to minimum RPM claims.[5] The Court's more recent jurisprudence in *Business Electronics Corp*, *Continental TV*, and *Maricopa County*[6] also suggests that the Court may be looking to overturn *Dr. Miles* and instead subject claims of minimum RPM to the more business-friendly "rule of reason" standard.

Facts

Leegin Creative Leather Products (Leegin) is a family-run business that designs women's fashion accessories. Operating under the "Brighton" brand name, Leegin sells its product only in boutique stores and focuses on service as a way to distinguish itself from competing product lines. To this end, Leegin instituted a policy announcing its intention to conduct business only with retailers that adhere to its "suggested retail prices." Leegin's stated reasons for instigating this policy were: (1) to guarantee an "everyday fair price" whereby products never went on sale, so there would be no incentive for consumers to wait to buy products, and consumers would not feel cheated if they bought products right before a sale was announced; and (2) to give retailers an incentive to advertise the Brighton line without fear of another retailer free-riding on its advertising.[7] From all accounts, Leegin's policy has been successful: sales of Brighton products tripled between 1996 and 2003.[8]

The lawsuit in *Leegin* arose after a retail store, PSKS (operating as Kay's Kloset), began selling the products below Leegin's suggested retail price. When Leegin learned of this practice, it stopped all shipments of Brighton to PSKS in retaliation. At trial, the district court applied the per se rule from *Dr. Miles* to Leegin's conduct, and a jury subsequently awarded PSKS treble damages against Leegin. The Fifth Circuit affirmed,[9] stating that it was bound by *Dr. Miles* and its progeny.[10]

Analysis

The Supreme Court affirmed *Dr. Miles* as recently as 1984, though the Court otherwise has liberalized the standards for scrutinizing all other vertical restraints. In *Monsanto Co. v. Spray-Rite Service Corp.*,[11] the Court reaffirmed the rule in *Dr. Miles*, but specifically noted that this rule did not cover a manufacturer's independent decision to refuse to deal.[12] It did so by reemphasizing the "*Colgate* doctrine," under which "the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination."[13]

Since 1984, the Court has continued to liberalize its treatment of vertical restraints. The Court has held that vertical non-price restraints should not be illegal per se because such restraints have the potential to stimulate interbrand competition and do not facilitate cartel behavior.[14] The Court likewise has ruled that a vertical maximum price-fixing agreement should be considered under the rule of reason, even though it is a specific agreement on price, because these types of agreements can have both anti-competitive and pro-competitive effects.[15] Similarly, the Court has approved of a vertical agreement that was intended to, and did, raise retail prices, but did so without specifying a specific price.[16]

The holding in this last case, *Business Electronics,* is particularly relevant to the potential outcome in *Leegin* because of the similarities between the two cases. In *Business Electronics*, the defendant, Sharp Electronics, terminated the plaintiff, one of its retailers, after receiving complaints from

Continued on page 14...

Continued from page 13...

another retailer that the plaintiff retailer consistently was selling the product below the "suggested minimum retail prices." There also was evidence that the plaintiff was free-riding on the provision of pre-sale educational and promotional services offered by the complaining retailer, who was charging higher prices as a result of his increased service offerings.

Although the *Business Electronics* Court reaffirmed the holding in *Dr. Miles*, it did so because "there was support for the proposition that vertical price restraints reduce interbrand price competition [by] facilitat[ing] carteli[zation]"[17] Since *Business Electronics* was decided, there has been significant scholarship suggesting that resale price maintenance is more likely to be used to enhance efficiency than for anticompetitive purposes,[18] and that it can foster consumer welfare by preventing free-riding[19] and allowing better retail service.[20]

The Department of Justice and a majority of the Federal Trade Commission[21] have submitted an amicus brief in support of *Leegin*. They argue that while "[resale price maintenance] may have anticompetitive effects in a particular case . . . there is widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote interbrand competition and consumer welfare in a variety of ways."[22]

The government's amicus brief also notes that the Supreme Court has identified two factors that must be present for a policy to receive per se treatment: (1) "per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive"[23] and (2) when "experience . . . enables the Court to predict with confidence that the rule of reason will condemn [such conduct]."[24] Because the Court never has considered a resale price maintenance case under a rule of reason standard, it has no evidence from which to judge either factor.

Given the Court's evolving jurisprudence in this area and the government's support, it appeared likely that the Court would overturn *Dr. Miles* when the Court granted certiorari. At the oral argument in March, however, Justices Breyer, Ginsburg, and Souter expressed reservations about overturning *Dr. Miles* while only Justice Scalia seemed to agree with the petitioner.[25] Justices Alito, Kennedy, Roberts, and Thomas did not tip their hand at the oral argument and that leaves open the possibility that *Dr. Miles* will survive despite FTC and DOJ support of a rule of reason standard.

[1] *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911).

[2] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

[3] *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

[4] Docket No. 06-480 (Dec. 7, 2006).

[5] 220 U.S. 373 (vertical price restraint is a per se violation of Section 1 of the Sherman Act due to the rule against alienation and because of similarity to horizontal price-fixing).

[6] *Business Electronics*, 485 U.S. 717; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982).

[7] Petition for Writ of Certiorari, *Leegin Creative Leather Products, Inc., v. PSKS, Inc.*, dba Kay's Kloset...Kay's Shoes, No. 06-480 (Oct. 4, 2006).

[8] *Id.* at Appendix D.

[9] *Id.* at Appendix A.

[10] See, *e.g. Dr. Miles*, 220 U.S. 373; *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13 (1964).

[11] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

[12] The Court's only stated rationale for continuing the rule in *Dr. Miles* appeared in Justice Brennan's concurrence: "*Dr. Miles* has stood for 73 years, and Congress has certainly been aware of its existence throughout that time. Yet Congress has never enacted legislation to overrule the interpretation of the Sherman Act adopted in that case" (*Id.* at 769-770).

[13] *Id.* at 763.

[14] *Cont'l T.V.*, 433 U.S. 36.

[15] *State Oil*, 522 U.S. 3.

[16] *Business Electronics*, 485 U.S. 717.

[17] *Id.* at 724-25.

[18] See Robert H. Bork, *The Antitrust Paradox* 289-90 (1978); Richard A. Posner, *Antitrust Law* 189 (2d ed. 2001); Kenneth G. Elzinga & David E. Mills, *The Economics of Resale Price Maintenance* 1-5 (forthcoming 2007), at http://www/virginia.edu/economics/papers/mills/RPM%20for%20ABA.pdf.

[19] See, *e.g.*, Lester G. Telser, *Why Should Manufacturers Want Fair Trade*?, 3 J.L. & Econ. 86, 91 (1960).

[20] See, *e.g.*, Frank Mathewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 Rev. Indus. Org. 57, 72 (1998).

[21] In an unusual move, one of the dissenting commissioners, Pamela Jones Harbour, published an open letter to the Court in which she urges the Court not to overturn *Dr. Miles* unless they replace its rule with "a clearly articulated legal framework that preserves . . . a strong presumption of illegality." (http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf).

[22] Brief for the United States as amicus curiae supporting the petitioner, *Leegin Creative Leather Products, Inc., v. PSKS, Inc.*, dba Kay's Kloset...Kay's Shoes, No. 06-480 (Jan. 22, 2007).

[23] *Continental T.V.*, 433 U.S. at 49-50.

[24] *Maricopa County Med. Soc'y*, 457 U.S. at 344.

[25] Transcript of the oral argument available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-480.pdf.

Contacts

New York
Charles E. Biggio
Partner
212-497-7780
cbiggio@wsgr.com

Jonathan M. Jacobson
Partner
212-497-7758
jjacobson@wsgr.com

Chul Pak
Partner
212-497-7726
cpak@wsgr.com

Kashana Cauley
Associate
212-497-7742
kcauley@wsgr.com

Sara B. Ciarelli
Associate
212-497-7759
sciarelli@wsgr.com

Kathryn A. Rubino
Associate
212-497-7775
krubino@wsgr.com

Palo Alto
Chris Compton
Partner
650-320-4882
ccompton@wsgr.com

Lisa A. Davis
Special Counsel
650-320-4526
ldavis@wsgr.com

Richard L. Woodworth
Special Counsel
650-849-3284
rwoodworth@wsgr.com

Washington, D.C.
Susan Creighton
Partner
202-973-8855
screighton@wsgr.com

Renata B. Hesse
Partner
202-973-8834
rhesse@wsgr.com

Scott A. Sher
Partner
202-973-8822
ssher@wsgr.com

Tom Krattenmaker
Of Counsel
202-973-8843
tkrattenmaker@wsgr.com

Seth C. Silber
Of Counsel
202-973-8824
ssilber@wsgr.com

Matthew J. Bye
Associate
202-973-8878
mbye@wsgr.com

Paul S. Jin
Associate
202-973-8858
pjin@wsgr.com

Michele C. Lee
Associate
202-973-8803
mlee@wsgr.com

Franklin M. Rubinstein
Associate
202-973-8833
frubinstein@wsgr.com

Scott D. Russell
Associate
202-973-8811
srussell@wsgr.com

David W. Thomas
Associate
202-973-8886
dwthomas@wsgr.com

Lindsey Wilson
Associate
202-973-8829
lwilson@wsgr.com

Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

This Antitrust Wire was sent to our clients and interested parties via email on May 22, 2007. To receive future Antitrust communications via email, please email antitrust@wsgr.com and ask to be added to the mailing list.

This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation.

650 Page Mill Road
Palo Alto, CA 94304-1050
Phone 650-493-9300 | Fax 650-493-6811
email: wsgr@wsgr.com

www.wsgr.com

© 2007 Wilson Sonsini Goodrich & Rosati,
Professional Corporation
All rights reserved.