

CLIENT ALERT

APRIL 2007

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.

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

Continued on page 2...

Antitrust Modernization Commission . . .

Continued from page 1...

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 any class of indirect or direct purchasers could not 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 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

Continued on page 3...

Antitrust Modernization Commission . . .

Continued from page 2...

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.



Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

This Client Alert was sent to our clients and interested parties via email on April 3, 2007. To receive future Client Alerts and newsletters via email, please contact Marketing at wsg_r_resource@wsgr.com and ask to be added to our 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
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsg_r_resource@wsgr.com

www.wsgr.com

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