Friend of the Court: The Federal Trade Commission's *Amicus* Program

Remarks of

R. Ted Cruz[1]
Director, Office of Policy Planning
Federal Trade Commission

Before

Antitrust Section
American Bar Association

Washington, DC

December 12, 2002

The statutory mission of the Federal Trade Commission is to promote competition and to protect consumers. That mission is achieved through a panoply of means: vigilant law enforcement, careful study and empirical research, and consistent advocacy supporting a greater role for competition throughout the economy. By employing all of these approaches, the FTC can make the best and most effective use of its unique institutional capabilities to maximize consumer welfare.[2]

Under the leadership of Chairman Timothy J. Muris, the Commission has continued a long tradition of marshalling all of these tools is support of its statutory goals. One tool that the Commission has long relied upon, and has used with increasing frequency in recent months, is

---

[1] I would like to acknowledge the assistance of FTC attorneys John T. Delacourt and Mark E. Nance in the preparation of these remarks. The views expressed herein are my own and do not necessarily reflect the views of the Commission or any individual Commissioner.

[2] *See* Timothy J. Muris, Chairman, Federal Trade Commission, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, Prepared Remarks for the Milton Handler Annual Antitrust Review, New York, NY (Dec. 10, 2002) *available at* <http://www.ftc.gov/speeches/muris/handler.htm>.

the targeted filing of *amicus* briefs. Over the past eighteen months, the Commission has filed ten such "friend of the court" briefs,[3] and we expect to file many more.

I. *Past FTC Amicus Efforts*

A. *Supreme Court Briefs*

The FTC has a long history of *amicus* participation at various levels of litigation. Our goal as a friend of the court has been, and will continue to be, to make a contribution on important competition law issues. In the past, FTC *amicus* efforts have led courts to consider

[3] In addition to the five briefs discussed in greater detail herein, the Commission filed *amicus* briefs in: (1) *Ryan v. Telemarketing Associates, Inc.* -- *see* Brief for the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioner (Dec. 24, 2002) *available at* <http://www.ftc.gov/ogc/briefs/taibrief.htm> (Supreme Court brief arguing that the First Amendment does not preclude a state from pursuing a fraud action against a professional fundraiser that intentionally misleads potential donors by misrepresenting how charitable donations will be used.); (2) *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko. LLP* -- *see* Brief for the United States and the Federal Trade Commission as *Amici Curiae* (Dec. 16, 2002) *available at* <http://www.ftc.gov/ogc/briefs/02-682.pdf> (Brief in support of petition for *certiorari* arguing that, in order to establish a violation of Section 2 of the Sherman Act under a "monopoly leveraging" or "essential facilities" theory, an antitrust plaintiff must demonstrate "exclusionary" or "predatory" conduct on the part of the alleged monopolist); (3) *Statoil ASA v. HeereMac V.O.F.* -- *see* Brief for the United States and the Federal Trade Commission as *Amici Curiae* (Jan. 3, 2002) *available at* <http://www.ftc.gov/ogc/briefs/ statoil.pdf> (Brief in opposition to petition for *certiorari* arguing that the Sherman Act and the Foreign Trade Antitrust Improvements Act grant the federal courts jurisdiction over a foreign plaintiff's claim that it has been injured by a conspiracy having direct, substantial, and reasonably foreseeable anticompetitive effects on United States trade or commerce only if the claimed injury arises from those domestic effects.); (4) *State of Minnesota v. Fleet Mortgage Corp.* -- *see* Memorandum of Law of *Amicus* Curiae the Federal Trade Commission (Sept. 6, 2001) *available at* <http://www.ftc.gov/ogc/briefs/fleetmort.pdf> (District court brief arguing that the FTC Act exemption for "banks" does not apply to a subsidiary of a bank, and does not preclude a state from bringing suit under the Telemarketing Act to enforce the Commission's Telemarketing Sales Rule.); and (5) *TRW Inc. v. Andrews* -- *see* Brief of the United States and the Federal Trade Commission as *Amici Curiae* Supporting Respondent (May 30, 2001) *available at* <http://www.ftc.gov/ogc/briefs/andrews.pdf> (Supreme Court brief arguing that the language of the Fair Credit Reporting Act permits the use of a discovery rule in determining when the statutory limitation on private enforcement actions begins to run.).

new analytical constructs or have highlighted important doctrinal errors in need of addressing.[4] At the Supreme Court in particular, the FTC has a long record of active *amicus* participation, including the briefs filed in *Associated General Contractors*,[5] *Copperweld*,[6] *NCAA*,[7] *State Oil v. Kahn*,[8] and many others. *Amicus* briefs by others can buttress the FTC's litigation efforts as well. In *Ticor Title*,[9] for example, the FTC – as petitioner – was joined by *amici* from 33 states, which enthusiastically supported the Supreme Court's rejection of Ticor's claims that the FTC, contrary to federalist principles, was meddling in state affairs.[10]

B. *Lower Court Briefs*

The FTC has also enjoyed some notable successes in the lower courts. For example, FTC *amicus* participation has helped to clarify the scope of antitrust immunity under the state action doctrine. The state action doctrine – first articulated by the Supreme Court in *Parker v. Brown*[11] – has its roots in federalism, and the specific notion that, in passing the Sherman Act,[12] Congress intended to protect competition, not to limit the sovereign regulatory power of the states. Thus,

---

[4] For an excellent and extended discussion of the history of FTC *amicus* briefs, *see* Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625 (2001).

[5] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

[6] *Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752 (1984).

[7] *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).

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

[9] *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992).

[10] *See* Brief of *Amicus Curiae* States of Wisconsin et al., *Ticor*, 504 U.S. 621 (1992).

[11] 317 U.S. 341 (1943).

[12] 15 U.S.C. § 1 *et seq.*

pursuant to the doctrine, actions that can be attributed to "[t]he state itself"[13] are immunized from antitrust scrutiny. This rule seems clear enough, but can become clouded when a state delegates authority to private actors or political subdivisions. In order to ensure that these non-sovereign agents are acting on behalf of the state, rather than on their own behalf, the Supreme Court has required them to demonstrate compliance with a "clearly articulated" state policy as a prerequisite to a grant of immunity.[14]

In September 1998, out of concern that this important limitation on the scope of state action immunity was being eroded, the FTC and the Antitrust Division of the Department of Justice filed a joint *amicus* brief[15] in *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1.*[16] The *Hammond* case involved allegations that North Oaks Medical Center – a political subdivision of the state of Louisiana – had violated Section 2 of the Sherman Act by entering into exclusive contracts with five managed care plans, as well as through a variety of other actions and refusals to act. The district court, however, dismissed the case on grounds of state action immunity. The district court held that the statutory language authorizing the hospital to enter into contracts, and to otherwise function as a private market participant, provided a sufficiently "clearly articulated" state policy, in light of which the hospital's alleged

---

13 *Parker*, 317 U.S. at 352.

14 *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 45 U.S. 97, 105 (1980).

15 *See* Brief for the United States and the Federal Trade Commission as *Amici Curiae* in Support of Suggestion of Rehearing *En Banc* (Sept. 9, 1998) ("Hammond Brief") *available at* <http://www.ftc.gov/ogc/briefs/ surgical.htm>.

16 171 F.3d 231 (5th Cir. 1999), *cert. denied sub nom,* 528 U.S. 964 (1999).

anticompetitive conduct was foreseeable.[17] A three judge panel of the Fifth Circuit subsequently affirmed the district court's ruling.[18]

The joint FTC/DOJ *amicus* brief, which sought a rehearing *en banc* and reversal of the panel's opinion, emphasized that the purpose of the "clear articulation" requirement was to ensure that a state intended to displace competition with some alternative regulatory regime. State legislation granting a non-sovereign agent basic corporate powers was therefore insufficient to satisfy the requirement. Given that private actors imbued with identical powers – such as the power to contract, enter into joint ventures, and carry out acquisitions – are expected to abide by the antitrust laws, the mere provision of such powers simply does not make anticompetitive conduct inevitable, or even foreseeable.[19] In addition, the brief argued that the panel's decision would have dangerous consequences. In effect, it would convert state authorization for a political subdivision to function as a private firm into a license to violate the antitrust laws with impunity, thereby limiting the very competition that the authorization, ironically, was intended to promote.[20]

The joint FTC/DOJ *amicus* effort was ultimately successful. The Fifth Circuit, sitting *en banc*, reversed the panel's ruling and adopted much of the agencies' reasoning. The court explicitly recognized a distinction between a statute that "necessarily contemplates the anticompetitive activity" and one that "merely allows a [political subdivision] to do what other

[17] *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1*, No. Civ. 97-1840, 1997 WL 465289 (E.D. La. Aug. 11, 1997).

[18] *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1*, 153 F.3d 220 (5th Cir. 1998).

[19] Hammond Brief, *supra* note 15, at 6.

[20] *Id*.

businesses can do."[21] The court further observed that the statutory authorizations in the latter category – which it characterized as "naked grants of authority" present in "the enabling statutes by which myriad instruments of local government across the country gain basic corporate powers" – do not constitute a sufficient "clear articulation" to confer state action immunity.[22] Holding otherwise, the court concluded, would essentially grant political subdivisions sovereign status and "stand federalism on its head."[23]

II. *Current FTC Amicus Efforts*

A. *Noerr-Pennington Issues*

Last year, Chairman Muris directed the Office of Policy Planning to organize a task force to look at the effect that the *Noerr-Pennington* doctrine had on competition policy, and to suggest appropriate courses of action related to our findings. The *Noerr-Pennington* doctrine springs from two Supreme Court cases: *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*[24] and *United Mine Workers v. Pennington*.[25] Informed by First Amendment concerns, the doctrine immunizes from antitrust scrutiny activity that can be legitimately classified as "petitioning the government." Specifically excepted from *Noerr* immunity is any petitioning conduct that is deemed to be a "sham."[26]

---

[21] *Surgical Care Center of Hammond*, 171 F.3d at 235.

[22] *Id.* at 236

[23] *Id.*

[24] 365 U.S. 127 (1961).

[25] 381 U.S. 657 (1965).

[26] *Noerr*, 365 U.S. at 144. *See also Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 508 U.S. 49 (1993).

The breadth of *Noerr-Pennington* immunity has been an ongoing interest for the FTC. Recently, it has become a particular concern in the context of generic drug approvals. In January of this year, lawsuits relating to Bristol-Myers's alleged monopolization through improper listing of a patent on its branded drug BuSpar – consolidated in the Southern District of New York as *In re Buspirone*[27] – presented the Commission with an opportunity to help clarify the *Noerr* doctrine and to have a significant impact on the Commission's ongoing pharmaceutical cases. Specifically, plaintiffs alleged that, through fraudulent patent filings with the Food and Drug Administration ("FDA"), Bristol-Myers caused the agency to list the patent in question in an administrative publication known as the "Orange Book," thereby blocking generic competition with its BuSpar product, in violation of Section 2 of the Sherman Act.

As anticipated, Bristol-Myers responded to these allegations by filing a motion to dismiss that raised, principally, a claim of *Noerr-Pennington* immunity. Given the importance of the issue to competition in the pharmaceutical industry, as well as to the Commission's ongoing investigations, the Commission filed an *amicus* brief, opposing the motion to dismiss[28] On February 14, 2002, the court issued an opinion denying Bristol-Myers's immunity claim and accepting most of the Commission's reasoning on the *Noerr-Pennington* issue.

---

[27] *In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002) ("*In re Buspirone*"). Some of the same plaintiffs had previously brought suit under the Food, Drug and Cosmetic Act ("FDC Act"), requesting that the court issue an order compelling Bristol-Myers to de-list the objectionable patent. Although plaintiffs prevailed at the district court level, the Federal Circuit reversed that decision, holding that the FDC Act did not provide a private right of action to compel de-listing of a patent from the Orange Book. *See Mylan Pharmaceuticals, Inc. v. Thompson*, 268 F.3d 1323, 1331-32 (Fed. Cir. 2001).

[28] Memorandum of Law of *Amicus Curiae* the Federal Trade Commission in Opposition to Defendant's Motion to Dismiss (Jan. 8, 2002) *available at* <http://www.ftc.gov/os/2002/01/busparbrief.pdf>.

The court's order was broad, rejecting Bristol-Myers's claim of *Noerr-Pennington* immunity on three independent and alternative grounds. The first, and perhaps most important, of these grounds was that Orange Book filings simply do not constitute protected "petitioning." The court agreed with the Commission's argument that an Orange Book filing is analogous to a tariff filing. In both cases, "the government does not perform an independent review of the validity of the statements, does not make or issue an intervening judgment, and instead acts in direct reliance on the private party's representations."[29] The court also agreed that an Orange Book filing is not incidental to petitioning, holding that Bristol-Myers could have listed its patent in the Orange Book "without subsequently bringing infringement suits . . . [and] could have brought these suits without relying on its Orange Book listing."[30]

The court further concluded that, even if Orange Book filings did constitute "petitioning," application of two specific exceptions to the *Noerr* doctrine – the *Walker Process* and "sham" exceptions – would preclude a finding of antitrust immunity. Under *Walker Process,*[31] a patent holder may be subject to antitrust liability for attempting to enforce a patent procured through fraudulent misrepresentations to the Patent and Trademark Office ("PTO"). The *Buspirone* court concluded that the Orange Book listing and patent prosecution processes were sufficiently analogous to warrant extension of the *Noerr* exception beyond the PTO context, and that plaintiffs' allegations satisfied *Walker Process*.[32]

[29] *In re Buspirone*, 185 F. Supp. 2d at 370.

[30] *Id.* at 372.

[31] *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

[32] *In re Buspirone*, 185 F. Supp. 2d at 372-75. Notably, the *Buspirone* court's decision is one of the first to apply the *Walker Process* exception outside the narrow PTO context.

Under the "sham" exception, the opponent of *Noerr* immunity must demonstrate that defendant's petitioning conduct – in this case, Bristol Myers's patent filing with the FDA – was "objectively baseless."[33] After an examination of the prosecution history of Bristol-Myers's patent, as well as the specification and claims, the *Buspirone* court concluded that the filing was, indeed, "objectively baseless." The court further observed that Bristol-Myers's argument to the contrary "ignores the law and tries to justify taking property that belongs to the public."[34]

In light of the *Buspirone* decision, and the underlying force of the court's reasoning, the *Noerr-Pennington* doctrine may not prove as large an obstacle to using the antitrust laws to remedy improper Orange Book filings as some may have anticipated. It is worth noting, and indeed emphasizing, that *Buspirone* does not mean that all improper Orange Book filings will give rise to antitrust liability. Any antitrust liability must necessarily be predicated on a clear showing of a violation of substantive antitrust law. The *Buspirone* decision simply stands for the proposition that Orange Book filings are not *immune* from those laws or exempt from their scrutiny.

B. *E-Commerce Issues*

The FTC has also recently redoubled it efforts to identify anticompetitive practices that may be impeding the growth of e-commerce. The Internet is changing how many goods and services are delivered. Consumers are likely to substantially benefit from the increase in convenience and choice, as well as the decrease in search costs, that the Internet promises to provide. Yet, in spite of the potential consumer gains, a variety of state laws and regulations – sometimes formulated and enforced at the behest of entrenched brick-and-mortar competitors –

[33] *Professional Real Estate Investors*, 508 U.S. at 60.

[34] *In re Buspirone*, 185 F. Supp. 2d at 376.

threaten to impair the growth of e-commerce by: (1) prohibiting, or increasing the costs of, the electronic provision of goods and services; (2) directly and negatively impacting nascent but thriving industries, such as Internet mortgage lending and real estate listing services;[35] and (3) restricting the ability of entrepreneurs to experiment with, and develop, new Internet products and services.

Indeed, the Commission recently held a three-day public workshop to examine potentially anticompetitive barriers to e-commerce in ten different industries: wine sales, cyber-charter schools, online legal services, telemedicine and online pharmaceutical sales, contact lenses, real estate/mortgages/financial services, auctions, retailing, automobiles, and online casket sales.[36] The FTC workshop considered whether states have enacted regulations that may have the effect of aiding existing brick-and-mortar businesses at the expense of new Internet competitors, and whether private companies may be curtailing e-commerce by employing potentially anticompetitive tactics. Congress has recently begun examining these issues as well, and has indicated it will continue to examine how legal restrictions may work to impede e-

---

[35] *See, e.g.*, FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) *available at* <http://www.ftc.gov/be/V020006.htm>; Second FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar (June 11, 2001) *available at* <http://www.ftc.gov/os/2002/07/non-attorneyinvolvment.pdf>; FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) *available at* <http://www.ftc.gov/be/v020013.pdf>.

[36] *See*, Federal Trade Commission, Public Workshop, *Possible Anticompetitive Efforts to Restrict Competition on the Internet* (Oct. 8-10, 2002) *available at* <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>.

commerce.[37] The Commission is still evaluating the testimony and evidence presented at the workshop. However, prior to commencement of the workshop, the Commission filed an *amicus* brief directly relevant to the matters being examined.

In September of this year, a case before the Western District of Oklahoma involving restrictions on the on-line sale of funeral goods was brought to the Commission's attention. *Powers v. Harris*[38] involved a provision of Oklahoma's Funeral Services Licensing Act ("FLSA") that required sellers of funeral goods, including caskets, to be licensed funeral directors. A group of Internet casket sellers, asserting that the imposition of this licensing requirement constituted discrimination against out-of-state competitors, challenged the provision on Commerce Clause grounds. While the Commission took no position on the Commerce Clause issue, it was drawn into the case by an argument raised by the State Board of Embalmers and Funeral Directors by way of defense. Specifically, the Board argued that the FLSA's licensing requirement was a logical and natural extension of the FTC's Funeral Industry Practices Rule ("Funeral Rule").[39]

The Funeral Rule requires funeral providers to provide consumers with certain categories of information – primarily itemized price information – as well as various other disclosures. This information assists consumers by enabling them to select only the goods and services that the actually want, rather than being locked into package pricing. It also permits consumers to

---

[37] *See* Testimony of the Federal Trade Commission before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection (Sept. 26, 2002) *available at* <http://www.ftc.gov/os/2002/09/020926testimony.htm>.

[38] No. CIV 01-445-F (W.D. Okla. 2002).

[39] 16 C.F.R. §§ 453.1-453.9 (2002). The Rule was challenged by funeral providers on various grounds and was upheld in *Harry and Bryant Co. v. Federal Trade Commission*, 726 F.2d 993 (4th Cir. 1984).

engage in more effective comparison shopping. The Oklahoma Board acknowledged these important underlying consumer protection objectives, but argued that they should not be unnecessarily curtailed by limiting application of the Rule to "funeral providers." The Board asserted that sellers of funeral merchandise pose at least as great a threat to consumers as funeral providers. Therefore, requiring these individuals to be licensed funeral directors – thereby bringing them with the scope of the Rule – was a logical extension of the FTC's consumer protection objectives.

In response to this argument, the Commission filed an *amicus* brief to correct the Board's misreading of the Funeral Rule and to clarify the Rule's underlying objectives.[40] The Commission's brief stressed the fundamental point that the Funeral Rule was intended to *increase* competition. The Rule's required disclosures promote pricing transparency, which enables consumers to more easily pick and choose among competing funeral providers. Indeed, in the Funeral Rule's 1982 Statement of Basis and Purpose, the Commission expressly confirmed that the goal of the Rule was to "lower existing barriers to price competition in the funeral market and to facilitate informed consumer choice."[41] The FLSA's licensing provision, in contrast, actually functioned to *prohibit* competition, to the benefit of Oklahoma's funeral directors, by depriving consumers of the potentially lower-cost option of taking their business to third-party casket sellers. The Commission consequently concluded that "[w]hatever ends the FLSA can be said to be advancing, it is not advancing the ends of the FTC's Funeral Rule."[42]

---

[40] Memorandum of Law of *Amicus Curiae* The Federal Trade Commission (Aug. 29, 2002) ("Powers Brief") *available at* <http://www.ftc.gov/os/ 2002/09/okamicus.pdf>.

[41] 47 Fed. Reg. 42,260 (1982).

[42] Powers Brief, *supra* note 40, at 1.

C. *Class Action Reform Issues*

Class action reform issues have also been a focus of the Commission's current *amicus* program. The FTC's interest in this area derives from the agency's core mission of protecting injured consumers. Although class actions can serve as an effective vehicle to remedy consumer injury where the financial harm to each class member is too small to justify the filing of individual lawsuits, they can also raise thorny conflict-of-interest issues. Not infrequently, the interests of a private class action attorney may substantially diverge from the interests of the class. The FTC's recent *amicus* efforts have focused on two aspects of class action settlements that tend to bring this conflict to center stage: attorney fee requests and the use of non-pecuniary "coupon" settlements.

1. *Excessive Attorney Fees*

Class action attorneys that represent their clients zealously and effectively are entitled to a reasonable fee, and the Commission has never suggested otherwise. It bears repeating, however, that the fee must be *reasonable.*[43] Excessive class action attorney fee awards represent a substantial source of consumer harm. Such fee awards are not a costless windfall to lawyers, but rather serve to diminish the total compensation available to injured consumers. To the extent that such fees no longer accurately reflect the amount of work performed by the lawyer, or the value of the settlement to the class, they may also create distorted incentives, thereby promoting

[43] In addition to the *amicus* efforts discussed herein which, to date, have only addressed excessive attorney fees in the class action context, the FTC has attempted to mitigate the harm resulting from excessive fees through consumer education. For example, the staff of the Bureau of Consumer Protection recently published an educational brochure entitled "Need a Lawyer? Judge for Yourself" (June 2002) *available at* <http://www.ftc.gov/bcp/conline/pubs/services/lawyer.pdf>, which informs consumers of their rights and options with respect to a variety of fee arrangements, including contingency fee agreements.

litigation that is not only contrary to the interests of the class, but unnecessarily raises the cost of goods and services to consumers generally.

In January of this year, the FTC was confronted with such an excessive fee request in *In re First Databank*,[44] and promptly objected.[45] Although the FTC's brief was not technically an *amicus* filing, as the Commission had intervenor status in that case, I include it here because the Commission was essentially performing a "friend of the court" role. Class counsel's attorney fee request was not the central issue in the case, but rather a matter on which the Commission believed the agency's consumer protection expertise would be of substantial assistance to the court.

In re First Databank involved antitrust claims arising from Hearst Corporation's acquisition of Medi-Span's integratable drug information database business. Pharmacies, hospitals, doctors, and third-party payors rely on such databases for information about drug prices, drug effects, drug interactions, and the eligibility for drugs under various payment plans. At the time of the acquisition, Hearst already owned First Databank – Medi-Span's only competitor. The Commission reviewed the merger pursuant to the Hart-Scott-Rodino Act ("HSR Act"), and ultimately elected not to challenge the transaction. However, the Commission subsequently learned that its favorable view of the transaction was due in large part to Hearst's failure to produce important internal company documents that it was obligated to provide under § 4(c) of the HSR Act, and brought suit under a merger to monopoly theory.

---

[44] *In re First Databank Antitrust Litigation*, 205 F.R.D. 408 (D.D.C. 2002).

[45] *See* Federal Trade Commission's Memorandum of Points and Authorities in Opposition to Class Plaintiffs' Petition for Award of Counsel Fees and Reimbursement of Expenses (Jan. 2, 2002) ("First Databank Brief") *available at* <http://www.ftc.gov/os/2002/01/hearstbrief.pdf>.

After settlement negotiations were already underway in the Commission action, a series of follow-on, or "piggyback," private class actions were filed. This was not unusual in and of itself, as the filing of "piggyback" class actions is common practice.[46] Indeed, such actions can provide an efficient mechanism for directing compensation to injured consumers, particularly where the underlying Commission action seeks only injunctive relief. The size of the fee sought by class counsel, however, was unusual.

Class counsel sought fees and expenses in excess of $5 million based on a common fund of $24 million. Their fee petition neglected to mention, however, that before a single private action had been filed the Commission had already negotiated a settlement consisting of $16 million in disgorgement and $2 million in civil penalties. Thus, when properly calculated, the petition sought fees representing over 60% of the portion of the common fund that class counsel were responsible for creating.[47] In addition to bringing this fact to the district court's attention, the Commission's brief noted that class counsel had conducted no formal pre-trial discovery. In contrast, during the course of the investigation, Commission staff expended over 25,000 hours of time, reviewed over 400 boxes of documents submitted in response to approximately 40

---

[46] In addition to the *amicus* efforts discussed herein, the FTC has addressed the potential consumer harm resulting from "piggyback" litigation in a recent advocacy comment on proposed revisions to the Federal Rule governing class actions. *See* Letter to the Judicial Conference on Proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure (Feb. 15, 2002) ("Rule 23 Comment") *available at* <http://www.ftc.gov/os/2002/02/ rule23letter.pdf>. The Commission comment specifically recommended that that the Rule be revised to urge courts to "take into account the existence of related actions conducted by the government when calculating awards of attorney fees." *Id.* at 1.

[47] First Databank Brief, *supra* note 45, at 1.

subpoenas, conducted 20 investigational hearings, and completed 60 interviews. Commission staff also worked with several experts to develop the case and prepare for litigation.[48]

The Commission's brief achieved its objective. In May 2002, in an opinion that discussed the FTC's brief at length, the district court awarded class counsel a fee of $2.4 million, calculated as 30% of the $8 million that their efforts added to the common fund.[49] The court specifically noted that "class plaintiffs filed their suit after a predecessor litigant – in this case, the FTC – had already expended substantial effort to establish . . . liability" and that "class counsel's litigative efforts . . . were devoted entirely to persuading defendants to increase their offer, facilitated by unresisted discovery."[50]

Shortly after the *First Databank* opinion issued, in the summer of 2002, another excessive class action fee petition was brought to the Commission's attention. This time the case – *Carter v. ICR Services, Inc.*[51] – involved sales of credit repair services in violation of the Credit Repair Organizations Act. Although the *Carter* case was not initiated by the Commission, and cannot accurately be characterized as a follow-on class action, it did raise "piggyback" litigation issues. For example, although class counsel sought to calculate their fee as a percentage of the recovery generated for all class members, over 80,000 of those class members – more than half the class – were identified though the Commission's efforts, in spite of initial resistance from

---

[48] *Id.* at 3.

[49] *In re First Databank Antitrust Litigation*, 209 F. Supp. 2d 96, 101 (D.D.C. 2002).

[50] *Id.*

[51] No. CV-00-C-2666-W (N.D. Ala. 2000).

class counsel. The "piggyback" issue, however, was not the focus of the Commission's objection, which this time took the form of a true *amicus* brief.[52]

The primary target of the Commission's brief was the substantial disparity between class counsel's fee request and class members' recovery. Class counsel purported to have negotiated a settlement consisting of monetary payments to the class, valued at slightly less than $8.5 million, and the provision of credit counseling services, valued at slightly less than $2.5 million. Based on this total recovery of well over $10 million for the class, counsel requested a $1.2 million fee and $35,000 in expenses.[53]

A closer look, however, revealed that the settlement was never worth anything close to $10 million. To begin with, by the terms of the settlement itself, defendants were only obligated to deposit $1.85 million into the "claims fund," from which individual class members would be paid. Defendants were also required to deposit $950,000 into a "fee and expense" fund, creating a total common fund of, at most, $2.8 million – assuming full compliance.[54] But full compliance was not something that could be assumed. Defendants breached even these minimal obligations. At the time the Commission filed its *amicus* brief, the total deposited in both funds was only $1,575,000. Thus, as the Commission's brief pointed out, class counsel's request for $1.2 million in attorney's fees constituted a whopping 76% of the existing common fund, leaving less than one quarter of the total recovery for injured class members.[55]

---

[52] *See* Brief of Federal Trade Commission as *Amicus Curiae* (Aug. 16, 2002) *available at* <http://www.ftc.gov/os/2002/08/icrsiamicusbrief.pdf>.

[53] *Id.* at 6.

[54] *Id.* at 6-7.

[55] *Id.* at 1

2. *Coupon Settlements*

In addition to the excessive attorney fee issues addressed in *First Databank* and *Carter*, the Commission's *amicus* efforts in the class action reform area have also focused on a more controversial issue: the use of non-pecuniary "coupon" settlements. Such settlements may be appropriate in certain, limited circumstances, particularly where the size of each class members' individual recovery is likely to be *de minimis*. Under such circumstances, the cost of distributing each class members' cash award may exceed the total settlement amount, making coupons one of the few options available for providing relief of any kind. As mentioned previously, however, the use of coupon settlements raises serious conflict-of-interest concerns. There are strong incentives for "sweetheart" deals between class counsel and defendants, pursuant to which class counsel bases a sizable fee request on an inflated valuation of coupons that defendants understand offer consumers little real value, and are therefore not likely to be redeemed. Indeed, in certain circumstances, the use of coupons may actually make consumers worse off than no settlement at all.[56]

The Commission confronted such a settlement in *Erikson v. Ameritech Corp.*,[57] and promptly filed an *amicus* brief in opposition.[58] The *Erikson* case involved consumer fraud

[56] In addition to the *amicus* efforts discussed herein, the FTC has addressed the potential consumer harm resulting from coupon settlements in its comment on the proposed revisions to the Federal Rule governing class actions. *See* Rule 23 Comment, *supra* note 46, at 8-10. The Commission comment observed that "[b]ecause coupon settlements may provide little meaningful compensation to injured class members, we think it important that courts be urged to give . . . close attention to this form or relief in the settlement review process – not just when calculating attorney fees – to ensure that such a settlement is, in fact, 'fair, reasonable and adequate.'" *Id.* at 8 n.16.

[57] No. 99 CH 18873 (Consolidated with 99 CH 11536, 00 L 011474, 00 L 00500, 01 CH 3373) (Ill. Cir. Ct. 1999).

claims arising from Ameritech's sale of voicemail service. Plaintiffs alleged that Ameritech had failed to disclose that some consumers would incur additional costs over and above the monthly charge for the service. Specifically, consumers that did not subscribe to an unlimited local calling plan would incur local telephone usage charges, both for calls transferred from the consumer's phone to the consumer's voice mailbox and for calls made to retrieve messages from the voice mailbox.[59] Ameritech ultimately agreed to resolve the allegations via settlement, pursuant to which the company pledged to make certain additional disclosures regarding the local telephone charges and to provide compensation to injured consumers in the form of coupons.

The coupon portion of the settlement consisted of an offer of one month of free speed dial service, having a retail value of approximately $5.[60] As the Commission's *amicus* brief pointed out, the proposed compensation provided class members with little real value. The proffered speed dial service was a separate product, wholly unrelated to the voicemail service that class members had originally purchased from Ameritech. Yet neither class counsel nor Ameritech made any showing that a significant number of class members desired speed dial service, or attempted to estimate the percentage that would likely accept the specific speed dial offer.[61] Indeed, given the ubiquity of the product, it was likely that a large number of class members already had some form of speed dial service.

---

[58] Memorandum of Law of *Amicus Curiae* the Federal Trade Commission in Opposition to Class Action Settlement (June 21, 2002) *available at* <http://www.ftc.gov/os/2002/06/eriksonmemo.pdf>.

[59] *Id.* at 5.

[60] *Id.* at 8.

[61] *Id.*

What was even more troubling, however, was that the speed dial offer itself included a "negative option" feature that arguably constituted a form of consumer deception. Pursuant to the offer, class members that accepted the free month of service, at the end of the first month, would be enrolled as permanent subscribers, at the full monthly rate, until they affirmatively cancelled the service.[62] As the Commission's brief noted, such an arrangement actually had the potential to make class members *worse* off, as at least some percentage were likely to neglect to cancel the service, thereby incurring additional, unwanted charges.[63] In fact, the "negative option" feature appeared to transform the settlement into a net gain for the defendant, thereby vitiating any possible deterrence component. It is hard to imagine that a settlement that, in essence, functioned as an Ameritech marketing plan, and stood a substantial chance of generating bonus sales for the company, would discourage future consumer deception by this defendant or others.

III. *Conclusion*

As these examples suggest, the Federal Trade Commission, in its role as consumer advocate, will continue to preach the virtues or vigorous competition at every opportunity and in every forum. The FTC's *amicus* program, with its long and storied history of success, will continue to be a key element of these competition advocacy efforts. We will continue to seek out promising *amicus* opportunities that permit us to positively influence the development of the law and to substantially advance the interests of consumers. I urge the private Bar to aid the Commission in these efforts by continuing to bring important *amicus* opportunities to our

[62] *Id*. at 12.

[63] *Id*.

attention, and I will conclude by commending the Bar for its exemplary past assistance in doing so.