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Vertical Restraints:
Federal and State Enforcement of Vertical Issues

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I. WHY VERTICAL ENFORCEMENT MATTERS

Most consumers buy manufactured goods from someone other than the manufacturer. By the time an individual consumer purchases a product, the item typically has passed through the hands of several middlemen in a chain of distribution stretching back, ultimately, to the manufacturer. Along the way, each link in the distribution chain is vulnerable to vertical restraints of trade that might cause consumers to pay higher prices. This overarching fact of life has made vertical restraints a perennial topic of interest to antitrust practitioners generally, and myself in particular. During my term as a Commissioner of the Federal Trade Commission ("FTC" or "Commission"), I hope to have many opportunities to exhort the continuing relevance of vertical enforcement, at both the federal and state levels.

Vertical enforcement is important, in short, because we do not live in a world with perfectly rational distribution channels. In a perfect world, the rights and interests of manufacturers, wholesalers, brokers, retailers and consumers always would be aligned. Goods would pass freely through various channels and levels of distribution unconstrained by unwanted conditions or terms. Further, because the rights and interests of channel participants always would be congruous, there would be little need for courts, legislatures, or law enforcement officials to expend significant public resources on distribution. Even academia would regard distribution issues as an intellectual near-wasteland, worthy of only occasional commentary to express wonderment at how well things were working despite minimal attention or resource commitment.

In the real world, however, the interests of manufacturers, wholesalers, brokers, retailers and consumers rarely exist in harmony, to say the least. As goods travel through the distribution chain, and as each participant seeks to protect its narrow economic self-interest, opportunities arise for the imposition of vertical restraints that may harm consumers.

Vertical distribution issues matter because they affect consumers so fundamentally. The antitrust laws promise consumers the mix of goods, services, products, prices and options that would be delivered by a competitive economy, unfettered by the actions and decisions of parties unlawfully exercising market power.[2] Every day, consumers engage in multiple business transactions, relying on the expectation that the basic antitrust promise has been kept and is working in their favor. While consumers may be skeptical of the intentions of those who claim to be looking out for their best interests,[3] consumers generally understand that they benefit from competition not just between manufacturers, but also between retail outlets.[4] Consumers want the pricing alternatives only competition will deliver, not just the manufacturer's "suggested retail price."[5] They want the results of competitive markets, not results that depend on the prescience of a manufacturer[6] or on the misplaced incentives of a retailer.[7] Ultimately, the goal of consumers is to buy the

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[2]Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 76 (". . . Congress decided that consumers were entitled to the benefits of a competitive economic system.").

[3]Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the* Microsoft *Case*, 11 GEO. MASON L. REV. 37, 108 (2002) ("An overarching principle of the American system of government is distrust of power in both the public and the private sector.").

[4]Kenneth G. Elzinga, *Controversy: Are Antitrust Laws Immoral? A Response to Jeffrey Tucker*, 1 J. MARKETS & MORALITY 83, 86 (1998) ("To John Q. Public and Mary Q. Public, free enterprise connotes not only freedom of contract among sellers but the freedom to shop among alternative sources of supply. . . . To tell John Q. Public and Mary Q. Public, whose freedom to shop among alternative sources of supply has been curtailed by mergers, . . . 'that no monopoly is permanent' may be true, but not fully responsive to their concerns."), *available at* http://www.acton.org/publicat/m_and_m/1998_mar/elzinga.html.

[5]Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L. J. 713, 719 (1997). Of course, sometimes the manufacturer's preferred price is the competitive price.

[6]*See, e.g.*, Sharon Oster, *The FTC vs. Levi Strauss: An Analysis of the Economic Issues*, *in* IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINT CASES 48 (Ronald N. Lafferty et al. eds., 1984) (finding that imperfect information on the part of a clothing manufacturer led it to continue using resale price maintenance longer than was optimal).

[7]*See* Warren S. Grimes, *Spiff, Polish and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CAL. L. REV. 815, 834-36 (1992) (resale price maintenance can provide larger dealer margins, which in turn, create an incentive for a merchant to "push" consumers towards particular brands of product, even when those brands might be inferior to competing brands within the same price range).

most desirable products at the lowest prices.[8] All of these consumer expectations are furthered by effective antitrust enforcement, directed specifically at vertical restraints of trade that otherwise would artificially foreclose legitimate consumer options.[9]

II. VARIABILITY OF FOCUS AND OUTCOME

Product distribution is a continually evolving area of antitrust policy and legal doctrine. Tensions frequently arise because channel participants, with their inherently different views of the market, have differing notions of what types of competition best serve their economic interests. Both federal and state enforcers, as well as courts and legislatures, must take into account these conflicting perspectives on competition. At various times, any of these policymakers may make decisions that favor certain channel participants. For example, legislatures have been known to attempt to tip the scales in favor of one or another set of market players.[10] The courts, in turn, have been equally inconsistent in their approach to vertical issues.[11]

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[8]*See* Toys "R" Us, Inc. v. Fed. Trade Comm'n, 221 F.3d 928 (7th Cir. 2000) (dominant retailer used its purchasing power to coerce toy manufacturers into agreements limiting availability of particularly desirable toys to low-priced warehouse clubs).

[9]*E.g.*, Grimes, *supra* note 7, at 853 ("Vertical restraints are frequently harmful to competition."). *But see* Elzinga, *supra* note 4, at 86 ("Most of the history of antitrust against vertical arrangements . . . has had no connection to promoting competition. Thus, consumers have seen little benefit from this kind of antitrust effort and often have been harmed.").

[10]*See, e.g.*, Robinson-Patman Act, Act of June 19, 1978, Ch. 392, 49 Stat. 1526, 15 U.S.C. § § 13, 13a, 13b, 21a (prohibits discrimination in price); Petroleum Marketing Practices Act, Act of June 19, 1978, Pub. L. 95-297, 92 Stat. 322, 15 U.S.C. § 2801 (governs the creation, renewal and termination of franchises to sell motor fuels); Miller-Tydings Act and McGuire Fair Trade Act, *see infra* note 13 (exempted from federal antitrust law prohibitions certain state fair trade laws allowing resale price maintenance); New Jersey Unfair Cigarette Sales Act, NJ Stat. Ann. 56:7-18, *et seq.* (prohibits sales below costs, rebates or concessions in price in the sale of cigarettes in New Jersey); NJ Stat. Ann. 56:10-27 (prohibits automobile manufacturers from making direct sales of automobiles to New Jersey consumers).

[11]*Compare* White Motor Co. v. United States, 372 U.S. 253 (1963) (non-price vertical restrains subject to rule of reason) *with* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (non-price vertical restraints *per se* illegal) *and with* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (non-price vertical restraints subject to rule of reason).

Manufacturers typically wish to focus the distribution network on the competing products of other manufacturers and in the process eliminate, insofar as permitted, competition between their own distributors with respect to the sale of their own products. In other words, manufacturers frequently wish to enhance competition between brands (interbrand competition) and limit competition between distributors of their branded products (intrabrand competition). Often, this can best be accomplished through the establishment and enforcement of price and non-price restraints on product distribution.

Retailers and consumers, on the other hand, typically are concerned with both interbrand and intrabrand competition. Indeed, when a consumer already has made the decision to buy a particular brand, the only competition that really matters is intrabrand. A retailer may decide to respond to manufacturers' interbrand focus in different ways, including actions that a retailer can take alone, actions it can take in conjunction with other retailers, or actions that it may wish the manufacturer (or other distribution intermediary) to undertake for the benefit of particular retailers.

Consumers, for their part, generally want to maximize goods and services obtained, spend the fewest possible dollars, and buy from the most conveniently situated sources. From the consumer perspective, modern technology and high-speed transportation systems have significantly altered the purchasing calculus. Fixed-location distribution outlets simply are not necessary for the distribution of many consumer products these days, as evidenced by the explosive growth of electronic commerce. In response, however, manufacturers and their bricks-and-mortar distributors may find certain vertical restraints even more attractive – for example, to counter the potential impact of widespread comparison shopping via the Internet.

III. HISTORICAL PERSPECTIVES ON VERTICAL ENFORCEMENT: FEDERAL VS. STATE

Vertical restraints have long been a part of the antitrust lexicon. The oldest constant in this area is the Supreme Court's 1911 bedrock decision in *Dr. Miles*,[12] which prohibited minimum resale price-fixing. The prohibition has continued since that date, except during certain periods when the (so-called) fair trade laws

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

intervened.[13] In contrast, maximum resale price-fixing and non-price vertical restraints have been subject to various swings in judicial policy, being judged at some times according to the *per se* illegality standard of the antitrust laws, and at other times under the rule of reason.[14] Indeed, changes in non-price vertical jurisprudence have occurred over particularly short time spans.[15]

Swings in enforcement policy, at least on the federal side, have been equally radical.[16] State attorneys general, on the other hand, have consistently viewed most

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[13]Until repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, 15 U.S.C.A. § 1, 45(a), the Miller-Tydings Resale Price Maintenance Act (Act of Aug. 17, 1937, Pub. L. 314, ch. 690, Title III, 50 Stat. 693, 15 U.S.C.A. § 1) and McGuire-Keogh Fair Trade Enabling Act (Act of July 14, 1952, Pub. L. 543, ch. 745, 66 Stat. 631, 15 U.S.C.A. § 45), allowed the laws of most states to permit resale price maintenance contracts prescribing minimum prices for certain commodities. Such contracts held substantial sway over much of the American economy.

[14]*See* State Oil Co. v. Khan, 522 U.S. 2 (1997) (maximum resale price maintenance); *Continental T.V.*, 433 U.S. 36 (1977) (non-price vertical restraints).

[15]*See supra* note 11.

[16]Sandy Litvack, as the Assistant Attorney General ("AAG") in charge of the Antitrust Division of the U.S. Department of Justice ("DOJ") under President Carter, indicted Cuisinarts for resale price maintenance. *See* In re Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 29 (2nd Cir. 1981). Similarly, the State of New York prosecuted and obtained criminal convictions of a group of milk dealers for vertical price fixing in 1981. *See* New York State v. Dairylea Cooperative, Inc., 187 N.Y.L.J., No. 107 at 13, 1982-83 Trade Cases (CCH) ¶ 65,072 (NY Sup. Ct., Tr. Term, Bronx 1982) (denial of motion to dismiss indictment). William Baxter, the next head of the DOJ Antitrust Division under President Reagan, would have made vertical price restraints subject to the rule of reason analysis and most non-price vertical restraints of trade subject to a rule of presumptive legality, as demonstrated by the government's *amicus* brief in the *Monsanto* case. Brief for the United States as *Amicus Curiae* at 19 ("[R]esale price maintenance should not be deemed per se unlawful.") and at 11, 16 and 22 (*citing* Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981)), Montsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, *rhg. denied*, 466 U.S. 994 (1984); *see also Oversight Hearings on Antitrust Div. of the Dept. Of Justice Before the Subcomm. on Monopolies and Commercial Law of the House Comm. On the Judiciary*, 97th Cong., 1st & 2nd Sess. (1981-82) (in 1981, AAG Baxter advised Congress that "there is no such thing as a harmful vertical practice"). The U.S. Supreme Court made elliptical reference in its opinion, 466 U.S. at 761 n.*7*, to the fact that Congress had inserted language into DOJ's appropriation (Act of Nov. 28, 1983, Pub. L. No. 98-166, § 510) prohibiting argument of

vertical restraints with a cautious, if not jaundiced, eye. As a result, state enforcement against vertical restraints historically has tended to be more aggressive than federal enforcement.

Relations between state and federal enforcement officials regarding vertical restraints have been characterized by conflict and, at times, outright hostility. For example, in 1985, the Antitrust Division of the U.S. Department of Justice ("DOJ") adopted Vertical Restraint Guidelines[17] urging courts to treat virtually all vertical restraints under the rule of reason except express, narrowly circumscribed resale price maintenance agreements.[18] The issuance of these DOJ Guidelines prompted the National Association of Attorneys General ("NAAG") to issue its own, far more aggressive, Vertical Restraint Guidelines later that same year.[19] More recently, federal and state vertical enforcement philosophies substantially have converged. Relations between federal and state enforcers, while not perfectly tranquil, now seem both cordial and mutually productive.

As a former state antitrust enforcement official, I am among those who lived through the most tumultuous years. I remember when federal-state relations degraded

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the brief's position that vertical price restraints should be subject to the rule of reason. *Baxter Will Not Urge Abandonment of* Per Se *Rule In Spray-Rite Argument*, 45 ANTITRUST & TRADE REG. RPT. (BNA), No. 1142 at 888 (Dec. 1, 1983).

[17]*Reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,105 (1985); *see also* Pamela Jones Harbour, *Non-Price Vertical Restraints: Toward a Rule of Per Se Legality?*, in Electronic Newsletter of the Corporate Counseling Committee, ABA Section of Antitrust Law (Dec. 13, 1999). The federal guidelines were withdrawn by Anne Bingaman early in her tenure as President Clinton's first AAG of the Antitrust Division. Anne K. Bingaman, Antitrust Enforcement, Some Initial Thoughts and Actions, Address Before the Antitrust Section of the American Bar Association (Aug. 10, 1993) (rescinding the DOJ Vertical Restraint Guidelines), *reprinted in* 65 ANTITRUST & TRADE REG. RPT. (BNA) 250 (Aug. 12, 1993).

[18]The DOJ Guidelines only covered non-price vertical restraints, and Section 2.3 of the Guidelines took the position that only "explicit agreement as to the specific prices at which goods or services would be resold" would be considered *per se* unlawful by DOJ. DOJ Vertical Restraint Guidelines, *supra* note 17.

[19]The NAAG Guidelines were first adopted in December 1985, and amended in December 1988 and again in March 1995. NAAG Vertical Restraint Guidelines, *reprinted in* 4 TRADE REG. REP. (CCH) ¶ 13,400, *available at* http://www.naag.org/issues/pdf/at-vrest_guidelines.pdf.

from enthusiastic cooperation to straight-out antagonism, then witnessed their improvement to studied indifference and, finally, grudging respect and cooperation. There remains, however, a significant gap in their relative enthusiasm for challenging vertical restraints of trade. State enforcement officials are still much more likely than their federal counterparts to pursue serious vertical enforcement cases. This phenomenon may be caused, in large part, by the different remedies available to state versus federal enforcers.

IV. INFLUENCE OF VERTICAL RESTRAINTS REMEDIES

As the appended cases demonstrate, states, in recent years, have tended to file cases where significant monetary recoveries for individual and governmental consumers were possible. This is no accident. An important provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 gave state attorneys general authority to sue as *parens patriae* to recover treble damages suffered by natural persons injured in their property by a violation of the federal antitrust laws.[20] As far back as the early 1970s, state attorneys general had been asserting consumer claims in antitrust litigation.[21] In fact, many state attorneys general already had gained significant experience in federal treble damage litigation regarding proprietary claims that had been filed in various multidistrict litigations.[22] However, it was not until the *parens patriae* provision was enacted that this type of litigation became a truly viable option for most state enforcers. The provision supplemented the state attorneys' general existing authority to sue for treble damages suffered by the state and its political subdivisions, without their having to resort to class action litigation.[23] By enabling the states to recover significant monetary relief, *parens patriae* encouraged states to pursue antitrust violations.

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[20] 15 U.S.C.A. § 15c

[21] *See* California v. Frito-Lay, Inc., 474 F. 2d 774 (9th Cir. 1973).

[22] *See* New Jersey v. Chas. Pfizer & Co, Inc., 1973-1 Trade Cas. (CCH) ¶ 74,343 (S.D.N.Y. 1973).

[23] Florida ex rel. Shevin v. Exxon Corp. 526 F.2d 266 (5th Cir. 1976); In re Chicken Antitrust Lit., CA No. C74-2454A (N.D. Ga. 1974) (Massachusetts) and C75-362A (N.D. Ga. 1977) (New Jersey); Nash Co. Bd. of Ed. v. Biltmore Co., 640 F. 2d 484 (4th Cir. 1981) (North Carolina).

As part of this trend, state attorneys general frequently have brought civil treble damage litigation in the vertical restraints area on behalf of both individual and governmental consumers. Building on their existing foundation of consumer litigation experience, the states have developed and honed their skills in damages litigation. It is, therefore, not at all surprising to find that states are more aggressive in pursuing vertical restraint cases than are their federal counterparts. And while all differences between federal and state vertical enforcement cannot be explained by the availability of remedies, the states' ability to use *parens patriae* authority to extract monetary relief arguably makes it comparatively more efficient to allocate greater antitrust enforcement to the states.[24]

In contrast, federal authorities have tended to focus their vertical efforts on cases where injunctive relief was needed or where the law might be clarified, as opposed to cases seeking monetary remedies. Therefore, while they may have less experience than the states when it comes to damages litigation, federal enforcers have greater experience in the areas of economic analysis, injunctive remedies, and litigation of the fact of an antitrust violation, both civilly and criminally.

I would argue that, over the last two decades, the relative gap in expertise and resources between federal and state enforcers has narrowed. Even so, many complainants take their claims to state attorneys general first, in large part because the states continue to maintain such a high profile in the area of vertical restraints, and also because large monetary recoveries may be more understandable and impressive to the public (and get better press coverage) when compared to injunctions.

V. RECENT VERTICAL ENFORCEMENT ACTIVITY

Our economy is extremely dependent on smoothly functioning distribution channels. Given how often disputes occur in those channels, I am reasonably certain that both federal and state law enforcement agencies could find a steady stream of vertical distribution cases to keep them busy for the foreseeable future. With that in

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[24] *See* Stephen Calkins, *Perspective on State and Federal Antitrust Enforcement*, 53 DUKE L.J. ___ (2004) (forthcoming) (finding that states possess three comparative advantages in antitrust enforcement: familiarity with local markets; familiarity with and representation of state and local institutions; and ability to compensate parties injured by antitrust violations).

mind, let me review some of the key state and federal vertical enforcement cases from the past year.

A. State Cases

Within the last year, the states have pursued enforcement actions related to resale price maintenance (RPM) and minimum advertised prices (MAP).

1. *New York v. Salton, Inc.*[25]

Salton, the manufacturer of George Foreman grills, entered into RPM agreements with resellers. The manufacturer characterized these agreements as a MAP program. Forty-five states, plus the District of Columbia and Puerto Rico, joined in an enforcement action against the manufacturer, alleging that the manufacturer coerced retailers into agreements to fix retail prices of George Foreman grills. As part of the court-approved settlement, the defendant is prohibited from requiring dealers to exclude competing products and from fixing resale prices to consumers. For a period of five years, the defendant is prohibited from suggesting any resale price to its dealers. Additionally, the defendant will pay the settling states $8 million in consumer damages, which will be distributed (subject to court approval) to otherwise unfunded state-specific health and nutritional programs.[26]

2. *In re Compact Disc Minimum Advertised Price Antitrust Litigation*[27]

In 2001, 42 states joined private plaintiffs in filing federal complaints against the five largest U.S. distributors of compact discs and three large music retailers, alleging that defendants illegally conspired to fix the minimum resale prices of compact discs, in violation of the Sherman Act. The defendants filed a motion to

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[25]265 F. Supp. 2d 310 (S.D.N.Y. 2003)

[26]Additional information and materials are available on the NAAG website at http://www.naag.org/issues/20020909-multi-salton.php.

[27]2003 U.S. Dist. LEXIS 12663 (D. Me. July 9, 2003) (settlement approved and final judgment entered) [hereinafter *CD MAP Litigation*].

dismiss for failure to state a claim upon which relief could be granted. Among other things, the defendants pointed out that the FTC had reached its own settlement with the five largest distributors of music only two years prior.[28] Defendants argued that there was evidence neither of an agreement to fix prices nor that retailers or distributors were coerced to set higher prices for CDs.

The district court found that there was sufficient evidence of a price-fixing agreement between the music companies, distributors, and retailers. "At trade association meetings, there was explicit discussion of remedies such as 'retailer, distributor and music company partnerships.' The distributors agreed to the retailers' requests and established or strengthened MAP policies."[29]

Shortly thereafter, the states entered into a $143 million nationwide antitrust settlement with the defendants. The final settlement was accepted on June 13, 2003. Currently, the settlement is under appeal, but only with respect to attorneys fees and compensation.[30]

B. Federal Cases

Within the last year, the federal agencies have pursued a number of matters with vertical distribution implications.[31]

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[28]The consent order entered in the Commission's compact disc MAP case is discussed in the Appendix of Selected Cases, *infra*.

[29]*CD MAP Litigation*, 138 F. Supp. 2d at 27.

[30]According to the settlement administrator's website, distribution of settlement funds is on hold pending resolution of the appeal. Information Web Site for the In re: Compact Disc Minimum Advertised Price Antitrust Litigation Settlement, *available at* http://musiccdsettlement.com/english/default.htm (update posted on Dec. 15, 2003).

[31]Neither the foregoing discussion nor the Appendix of Selected Cases highlights merger investigations that may have reflected vertical (as opposed to classic horizontal) theories of harm, such as vertical foreclosure. Rather, these materials focus solely on cases involving more traditional vertical distribution issues.

1. DOJ Investigation of Most Favored Nations Provisions Relating to Orbitz

On July 31, 2003, DOJ closed its three-year investigation of Orbitz, a website jointly owned by United Airlines, Continental Airlines, Delta Airlines and Northwest Airlines.[32] Orbitz offers discounted airfares for flights on its owner airlines as well as 40 other domestic and foreign airlines known as "charter associates." DOJ's investigation focused on whether a most favored nation ("MFN") agreement between the owner airlines and the charter associates reduced competition and increased prices for consumers. Additionally, DOJ considered whether the agreement might give Orbitz a dominant position and effectively eliminate competing channels of distribution for discounted airline tickets.

According to the DOJ press release and attached background information, the MFN agreement raised several concerns.

> First, in theory, the Orbitz MFN agreement undercuts the participating airlines' incentives to compete by offering discount airfares, because those fares must be offered on the Orbitz website where customers might instead buy from another carrier. Second, the MFN prevents these carriers from offering their best fares only on their individual websites, generally their lowest cost distribution channel. Third, the Orbitz MFN could provide a convenient means for the airlines to monitor each other's fares. By improving monitoring, Orbitz might facilitate collusion among the participating airlines and thereby curtail discounting. Fourth, the improved monitoring could also curtail discounting by allowing competitors to match a carrier's discounts more quickly. Rapid matching results in revenue dilution, thus reducing the sales bump or first mover advantage of offering a low web fare.[33]

During its investigation, however, DOJ found that there had been no decrease in the availability of discounted fares, either by Orbitz members or by non-member

[32]Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the Orbitz Investigation (July 31, 2003), *available at* http://www.usdoj.gov/atr/public/press_releases/2003/201208.htm.

[33]*Id*. (explanatory statement attached to press release).

airlines. DOJ also noted that Orbitz had not attained a dominant position in the marketplace, but was the number-three competitor, behind Expedia and Travelocity.

2. *Microsoft*[34]

In the ongoing *Microsoft* saga, the settlement decree between DOJ, a number of states and Microsoft Corporation remains under attack. On November 4, 2003, the U.S. Court of Appeals for the District of Columbia Circuit heard arguments on whether to uphold the trial court's endorsement of DOJ's settlement with Microsoft under the Tunney Act.[35] A decision is expected in early 2004.

3. Joint Hearings by FTC and DOJ on Healthcare and Competition Law and Policy – Hospital Group Purchasing Organizations ("GPOs")

In September 2003, during a series of joint FTC/DOJ hearings on healthcare,[36] a number of sessions focused on distribution issues including product bundling, lengthy manufacturer/GPO source contracts, hospital/GPO contracts requiring substantial purchase commitments, and whether the safety zone in Statement #7 of the agencies' joint Statements of Antitrust Enforcement Policy in Health Care (relating to joint purchasing arrangements among health care providers) should be modified.[37]

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[34]United States v. Microsoft Corp., 2002 WL 31654530 (D.D.C. Nov. 12, 2002) (entry of consent decree, as amended), appeal pending, No. 03-5030 (D.C. Cir.); *see also* http://www.usdoj.gov/atr/cases/ms_index.htm#settlement (DOJ index of documents relating to *Microsoft* settlement). While this case has been placed in the "federal" category of this paper, it just as easily could be classified as a "state" enforcement action due to the heavy involvement of the states.

[35]Jonathan Groner, *D.C. Circuit Debates Microsoft Decree*, LEGAL TIMES (Nov. 10, 2003); *see also* Brief of the United States, United States v. Microsoft Corp., No. 03-5030 (D.C. Cir) (final version filed Aug. 6, 2003), *available at* http://www.usdoj.gov/atr/cases/f201200/201212.htm.

[36]See Fed. Trade Comm'n & & Dep't of Justice, Hearings on Health Care and Competition Law and Policy, *available at* http://www.ftc.gov/ogc/healthcarehearings/index.htm (complete index of hearing materials).

[37]Dep't of Justice and Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care (1996), Statement 7 (Joint Purchasing Arrangements Among Health Care

A report of the findings of these hearings is forthcoming. GPO practices are also a continuing area of concern for the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights, which has held its own hearings on the subject.[38]

4. *Amicus* Brief in *3M Company v. LePage's Inc., et al.*[39]

The U.S. Supreme Court has invited the Solicitor General to express the views of the United States on 3M's pending *certiorari* petition from the 3rd Circuit's *en banc* decision in this matter. This case raises a host of interesting issues regarding the legal standards that should be applied when bundled rebates are utilized in a manner alleged to be exclusionary.

VI. CONCLUSION

On the federal side of the ledger, I hope to see cutting-edge initiatives in areas that clarify the law and impose appropriate remedies where justified. To my former state colleagues and friends, I hope you continue to seek new and sizeable recoveries on behalf of consumers. I also remind the states, in the wake of *Khan*, to update the NAAG Vertical Restraint Guidelines to reflect the fact that vertical maximum resale price maintenance must now be evaluated under the rule of reason.

Appendix of Selected Cases

Providers), *available at* http://www.ftc.gov/reports/hlth3s.htm.

[38] *Hospital Group Purchasing: Has the Market Become More Open to Competition?, Hearing Before the Subcomm. On Antitrust, Competition, and Consumer Rights of the Senate Judiciary Comm*. (July 16, 2003), *available at* http://judiciary.senate.gov/ hearing.cfm?id=859; *Hospital Group Purchasing: Lowering Costs at the Expense of Patient Health and Medical Innovations?, Hearing Before the Subcomm. On Antitrust, Competition, and Consumer Rights of the Senate Judiciary Comm*. (April 30, 20022), *available at* http://judiciary.senate.gov/hearing.cfm?id=236.

[39] Dkt. No. 02-1865 (Sup. Ct. 2003).

I. FEDERAL CASES

Nintendo of America Inc., 114 F.T.C. 702 (1991) (consent order).

The Commission prohibited Nintendo, for five years, from terminating dealers on the basis of the resale price they charge. Although I was not at the Commission when it considered the *Nintendo* matter, I do not think it is merely a coincidence that the complaint also alleged that Nintendo accounted for more than 80% of all home video game equipment sales. The presence of market power makes vertical restraints far more suspect because of the potential for even nonprice restraints to have anticompetitive effects. *Nintendo*-like relief also may be appropriate in egregious situations where a manufacturer demonstrates a willful disregard of the law on *per se* vertical price restraints – for example, if a manufacturer continues to engage in unlawful RPM after repeated enforcement warnings.

Kreepy Krauly, 114 F.T.C. 777 (1991) (consent order).

The Commission alleged that a Florida manufacturer of swimming pool cleaning equipment entered into written agreements with dealers to maintain resale prices. Kreepy Krauly settled with Commission and agreed to rescind the paragraph of its dealer agreements that required dealers to agree to maintain resale prices, and to cease including that paragraph in dealer agreements. The consent order also prohibited Kreepy Krauly from entering into agreements with dealers to maintain resale prices.

United States v. Delta Dental Plan of Arizona, Inc., 1995-1 Trade Cas. (CCH) ¶ 71,048 (D. Ariz. 1995) (final judgment).

DOJ alleged that the defendant and co-conspirators agreed to restrain or eliminate the discounting of fees for dental services to other dental plans or consumers in the state of Arizona in violation of the Sherman Act. Delta contracted with dentists to provide pre-paid dental services to employers. Delta's participating dentist agreements contained MFN clauses that required each dentist to charge Delta the lowest price the dentist charged any patient or competing dental care plan. If dentists wished to reduce their fees for dental services to any other plan or patient, the MFN required them to reduce their fees to Delta as well. Before the MFN was enforced, many Arizona dentists chose to reduce their fees to participate in various competing managed-care and other discount plans. For example, at one point a competing discount plan claimed to have contracts with over 1000 participating dentists. After Delta began enforcing the MFN clauses, participating dentists refused to discount their fees to non-Delta patients or competing discount dental plans because, if they did, the MFN would require them to also lower all of their fees to Delta. The consent judgment enjoined the defendant from maintaining, adopting, or enforcing a clause in dentists' contracts that would require a dentist to give the defendant the lowest fees offered to any person or dental plan.

United States v. California SunCare, Inc., 1994-2 Trade Cas. (CCH) ¶ 70,843 (C.D. Cal. 1994) (final judgment).

DOJ brought charges against California SunCare, an indoor tanning products manufacturer, alleging that, from November 1992 through April 1994, the defendant entered into agreements with certain dealers to fix and maintain the resale prices of its products. California SunCare settled with DOJ and agreed to refrain from price-fixing, announcing a pricing policy, or threatening to terminate or actually terminating for non-compliance with suggested retail prices for a period of five years.

Keds Corporation, 117 F.T.C. 389 (1994) (consent order).

The Commission settled charges that Keds Corporation allegedly had agreed with some dealers to maintain resale prices on certain types of athletic and casual shoes, solicited commitments from dealers regarding pricing, and encouraged dealers to report noncomplying dealers. The consent order required Keds to refrain from: fixing the prices at which any dealer may advertise or sell the product; coercing any dealer to adopt or adhere to any resale price; attempting to secure commitments from dealers about the prices at which they would advertise or sell the products; or requiring or even suggesting that dealers report other dealers who advertise or sell any Keds products below a suggested resale price. The order also required Keds to inform its dealers that they were free to advertise and sell Keds products at prices of their own choosing. For five years, the order required Keds to incorporate a similar statement in any materials sent to dealers suggesting resale prices.

Baby Furniture Plus Association, Inc., 119 F.T.C. 96 (1995) (consent order).

The Commission entered a consent order with a trade association, a buying cooperative and its members for allegedly threatening to boycott children's furniture manufacturers who sold their products to discount catalog merchants. The consent order prohibited coercion of baby furniture manufacturers by means of actual or threatened refusals to deal.

Reebok International, 120 F.T.C. 20 (1995) (consent order).

The FTC alleged that Reebok and Rockport fixed the resale prices of their products. The settlement prohibited both companies from fixing the prices at which dealers advertised or sold athletic or casual footwear products to consumers. The settlement also prohibited the companies from coercing or pressuring any dealer to maintain or adopt any resale price, or from attempting to secure their commitment to any resale price. The order required Reebok and Rockport to inform their dealers in writing that dealers were free to advertise and sell Reebok and Rockport products at any price they chose, despite any suggested retail price established by the companies.

United States v. Playmobil USA, Inc., 1995-1 Trade Cas. (CCH) ¶ 71,000 (D.D.C. 1995) (final judgment).

Playmobil USA had maintained a Retailer Discount Policy that provided for the termination of any Playmobil dealer that failed to adhere to certain Playmobil suggested price ranges. In January 1995, DOJ filed a civil suit that alleged that Playmobil enforced this policy in a manner that violated the antitrust laws by reaching agreements with some of its retailers about what their retail prices would be. DOJ and Playmobil entered a settlement decree prohibiting Playmobil from reaching agreements with its dealers on retail price levels, and also from threatening dealers with termination for discounting off the retail price.

Onkyo U.S.A. Corporation, 1995-2 Trade Cas. (CCH) ¶ 71,111 (D.D.C. 1995) (final judgment).

Onkyo U.S.A. Corporation, a manufacturer of audio components, agreed to settle FTC charges that it violated a 1982 FTC order under which it agreed not to fix prices or engage in unlawful resale price maintenance. The complaint alleged that Onkyo sales representatives violated the terms of the order by: agreeing with a dealer to establish resale prices for the Onkyo products the dealer outlets sold to consumers; requesting that the dealer adhere to specified resale prices or price levels, informing the dealer that its prices were too low; directing the dealer to raise those prices, asking retailers to report other dealers who deviated from Onkyo's pricing policy; and responding to such deviations with threats and intimidation. Under the settlement, Onkyo paid $225,000 in civil penalties for violation of the original order.

RxCare of Tennessee, Inc., 121 F.T.C. 762 (1996) (consent order).

The Commission settled charges involving the use of an MFN clause by RxCare, the leading pharmacy network in Tennessee. The Commission concluded that a most-favored-customer clause in RxCare's contracts with participating pharmacies tended to keep reimbursement rates high by discouraging selective discounting and the development of rival networks. The primary theory of the case was that the most-favored-customer provisions facilitated horizontal coordination by the pharmacists. This "facilitating practices" theory is distinct from the equally interesting"raising rivals' costs" theory behind some recent DOJ cases involving most- favored-customer provisions.

New Balance Athletic Shoe, Inc., 122 F.T.C. 137 (1996) (consent order).

The Commission charged that New Balance entered into RPM agreements with some of its retailers, in which such dealers agreed to raise retail prices on New Balance’s products, maintain certain prices or price levels set by New Balance, or refrain from discounting New Balance’s products for a certain period of time. New Balance induced dealers to enter into these agreements by monitoring retailer prices, threatening to terminate or suspend shipments to discounting retailers, and demanding that retailers raise their prices. New Balance also assured retailers that New Balance would secure similar price agreements from other competing retailers or otherwise prevent unapproved discounting of New Balance athletic shoes. The settlement prohibited New Balance from fixing or controlling the prices at which retailers could sell the company’s athletic footwear.

American Cyanamid Corp., 123 F.T.C. 1257 (1997) (consent order).

The Commission alleged that, between 1989 and 1995, American Cyanamid entered into written agreements with its retail dealers under its rebate programs, pursuant to which American Cyanamid offered to pay its dealers substantial rebates on each sale of its crop protection chemicals that was made at or above specified minimum resale prices. This conditioning of financial payments on dealers' charging a specified minimum price amounted to an agreement on resale prices. The consent decree enjoined the defendant from seeking agreements by retailers to fix prices.

Fair Allocation System, Inc., 126 F.T.C. 626 (1998) (consent order).

An association of auto dealers settled charges that it threatened to boycott Chrysler if the manufacturer did not agree to change its vehicle allocation system to restrict vehicle supply to discounters engaged in Internet sales.

Nine West Group, Inc., 65 Fed. Reg. 13386 (March 13, 2000) (proposed consent agreement).
The Commission ordered a manufacturer of women's shoes to cease seeking agreements by retailers to fix, raise or stabilize shoe prices to consumers.

In the Matter of Sony Music Entertainment, Inc.; In the Matter of Time Warner, Inc; In the Matter of BMG Music, d.b.a. "BMG Entertainment"; In the Matter of Universal Music & Video Distribution Corp. and UMG Recordings, Inc.; and In the Matter of Capitol Records, Inc., d.b.a. "EMI Music Distribution" et al., 65 Fed. Reg. 31319 (May 17, 2000) (proposed consent agreements).
The Commission settled charges that the five largest manufacturers of CDs and the three largest distributors of CDs entered into MAP agreements to fix CD prices at higher than competitive levels, thereby forcing retailers to charge higher CD prices to consumers.

Toys R Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000).
A major toy retailer unlawfully enforced multiple vertical agreements in which each manufacturer promised the retailer that it would restrict distribution of its products to low-priced warehouse club stores, on the condition the other manufacturers would do the same.

II. STATE CASES

New York, et al v. Nintendo of America, Inc., 775 F.Supp. 676 (S.D.N.Y. 1991).
RPM suit against the manufacturer of Nintendo game machines, filed by all states, was settled with $5 rebate coupons distributed to over five million consumers.

In re Clozapine Antitrust Litigation, MDL 874 (N.D. Il. 1992).
Settlement of claims against a drug manufacturer that tied the sales of its prescription drug to the purchase of patient diagnostic services. The 35 litigating states and private class representatives settled the claims with injunctive relief, a 15% discount for future sales to patients on Social Security Disability Income until September 16, 1994 (almost two years), cash payments to each qualified purchaser in the amount of $38.92 per week purchased (up to a total of $10 million), $3 million credits to state mental health agencies, $3 million to a patient advocacy group earmarked for the treatment of new patients, and $2.08 million for attorneys fees and costs of litigation.

Maryland, et al v. Mitsubishi Electronics of America, Inc., 1992-1 Trade Cases (CCH) ¶ 69,743 (D. Md. 1992).
Fifty states and the District of Columbia obtained *parens patriae* damages and injunctive relief against an electronics manufacturer that engaged in resale price maintenance.

Defendant was enjoined for five years from fixing resale prices, and also paid $7 million to settle damages and litigation cost claims.

New York, et al v. The Keds Corp., 1994-1 Trade Cases (CCH) ¶ 70,549 (S.D.N.Y. 1994).
Settlement of RPM claims by 50 states and the District of Columbia against manufacturer of women's athletic shoes. Defendant was enjoined from RPM for five years, and also paid $5.7 million for states to use *cy pres* to fund charitable programs benefitting women ages 15-44. Another $1.5 million went to costs of investigation and fees.

Pennsylvania, et al. v. Playmobil USA, Inc., 1995-2 Trade Cases (CCH) ¶ 71,215 (M.D. Pa. 1995).
Nine states obtained a consent decree banning future RPM activities by manufacturer of children's toys, as well as payment of $675,000 as costs, fees and *parens patriae* damages.

New York, et al v. Reebok International, 96 F. 3d 44 (2nd Cir. 1996).
Settlement of RPM claims by 50 states plus the District of Columbia for *parens patriae* damages, injunctive relief and costs and fees against manufacturer of Reebok and Rockport shoes. Defendants paid $9.5 million, of which $8 million was distributed by the states for charitable purposes to fund otherwise unfunded recreational programs. The remaining $1.5 million was distributed to cover costs of investigation and fees.

Missouri, et al v. American Cyanamid Co., 1997-1 Trade Cases (CCH) ¶ 71,712 (W.D. Mo. 1997).
Settlement of RPM claims by 49 states and the District of Columbia against manufacturer of crop protection chemicals. In addition to injunctive relief, the states received $7.3 million to be used either for agricultural purposes or to fund future antitrust enforcement activities.

Texas, et al v. Zeneca, Inc., 1997-2 Trade Cases (CCH) ¶ 71,888 (N.D. Tx. 1997).
Settlement by 49 states and the District of Columbia of *parens patriae* damage claims for RPM by a manufacturer of crop protection chemicals. In addition to injunctive relief, the states received $3.9 million dollars, of which $1.2 was reimbursement of costs and fees and the remainder was a contribution to the states.

In re Toys "R" Us Antitrust Litigation, MDL 1211 (E.D.N.Y. 1999).
Settlement of *parens patriae* damage claims against toy retailer that used its purchasing power to limit competing discount outlets' ability to obtain certain highly desired toy products. Forty-four states, the District of Columbia and Puerto Rico participated in the settlement. The settlement also included class actions, including some pending in various state courts. In addition to injunctive relief, defendant paid $13.5 million for costs of suit and fees, and also was required to make charitable distributions of toys having a total value of $27 million during the three-year period from 1999 to 2001.

Florida, et al v. Nine West Group, No. 00-Civ-1701 (S.D.N.Y. 2000).
Settlement of RPM claims by all states and territories of the United States against manufacturer of Nine West products. The settlement included injunctive relief, payment of *parens patriae* damage claims of $30.5 million, and an additional $3.5 million for costs of

suit and fees. The consumer portion of the funds was distributed in proportionate shares by the states for charitable purposes related to women's health, women's educational/vocational training, and/or safety programs.

In re Disposable Contact Lens Antitrust Litigation, MDL 1030 (M.D. Fl. 2001).

Settlement of state *parens patriae* claims plus class action claims for all states other than Tennessee and Georgia against contact lens manufacturers who restricted the distribution of their products in distribution channels that competed with eye care professionals. In addition to injunctive relief the court approved a settlement of cash and benefits worth over $90.5 million, to be delivered to consumers.

New York et al v. Salton, Inc., 265 F. Supp. 2d 310 (S.D.N.Y. 2003).

See supra page 10.

In re Compact Disc Minimum Advertised Price Antitrust Litigation, 2003 U. S. Dist. LEXIS 12663 (D.Me. July 9, 2003).

See supra page 11.