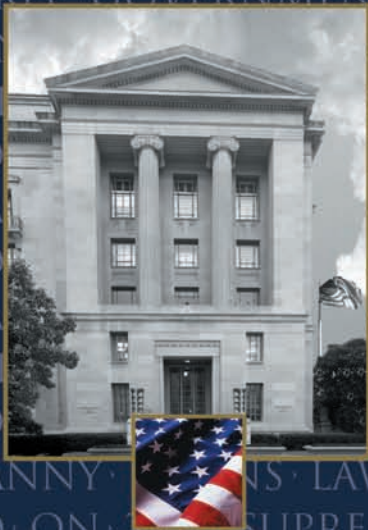

U.S. Department of Justice

ANTITRUST DIVISION *update*

Protecting and Promoting Competition

Spring 2007

Thomas O. Barnett, Assistant Attorney General, speaks at Yonsei University in Seoul, Korea.

MESSAGE FROM THE AAG

The Division has been at the forefront of antitrust enforcement during the last year with near record criminal fines, the most merger challenges since 2001, improved efficiency in merger review, exceptional success in advocating competition before the Supreme Court and in such areas as the real estate industry, and expanding international outreach.

Cartels

The Division's cartel enforcement program remains extraordinarily successful. In 2006, our Office of Criminal Enforcement (OCE) obtained the second highest amount of fines — $473 million — in the Division's history, achieved the longest sentence for a foreign national in an international antitrust case, and made significant progress toward its first extradition of a foreign national for an antitrust offense. Already this year, we have set a new record for jail time imposed on Antitrust Division defendants.

The success does not appear likely to abate any time soon. The Division has a robust pipeline of grand jury investigations that include everything from suspected major international cartels to investigations of price fixing in a single city. Two observations arise from these circumstances. First, the OCE is doing a terrific job of developing leads, pursuing investigations, and prosecuting cartels. Second, we need to continue our efforts to increase both the risk of detection for cartel participants and the penalties imposed on them once they are convicted.

We have been enhancing our cartel enforcement by encouraging and supporting the expansion of criminal cartel enforcement in other jurisdictions around the world. As more jurisdictions adopt criminal cartel penalties and implement effective cartel enforcement programs, the likelihood of detection increases along with our ability to collect evidence. And, of course, the expected penalties increase as well. Through these efforts, we are making the world increasingly risky for price fixers.

Mergers

Merger enforcement is one of the Division's core priorities, and the talent, dedication and sophistication of our merger review personnel is second to none. The Division is committed to challenging any merger where the evidence developed in a thorough investigation demonstrates that the merger is likely to harm U.S. consumers and businesses. Indeed, the Division filed 10 merger enforcement actions in district court in FY 2006, and an additional six transactions were restructured by the parties in response to Division investigations. This marks the highest level of merger enforcement activity since the end of 2001 — a time when the Division was receiving many more pre-merger notifications than today. The Division has obtained divestitures or other relief to prevent harm to competition from mergers in such industries as steel, newspapers, dairies, telecommunications, banking, and movie theaters.

At the same time that the Division has seen increased enforcement activity, it has improved the efficiency of its merger review process. In December 2006, the Division announced amendments to its Merger Review Process Initiative. The initiative helps us to identify more quickly those transactions that are not likely to harm competition so that we can devote increased resources to those transactions that should be challenged.

Non-Merger Activities

The Division promotes competition through a range of non-merger matters. During 2006, for example, the Division continued its efforts in the real estate industry. Those efforts encouraged several states to modify proposed or existing laws and regulations to enhance competition to the benefit of consumers. Delaware, Ohio, Tennessee, and Wisconsin all passed bills that included a provision that empowered individual consumers to choose not to purchase unwanted types of real estate brokerage services. In the last few years, real estate commissions in West Virginia, Tennessee, Kentucky, and South Dakota, and the state of South Carolina, lifted bans on consumer rebates and other inducements to consumers in real estate transactions. Consumers in these states now have the potential to save thousands of dollars on the purchase or sale of a home.

The U.S. Supreme Court has shown increased interest in antitrust cases in recent years, taking nine cases over the last four terms. The Court has taken these opportunities to update older antitrust precedents in light of modern antitrust analysis that focuses on harm to competition, not competitors, and that incorporates rigorous economic analysis. One remarkable fact has been the lack of dissenting views on the outcomes. For five of the six cases decided as of this writing, all of the participating justices either joined the majority opinion or concurred in the result. In the one other case, seven justices joined the majority opinion. These decisions reflect the consensus that has been forged in the United States across a broad range of antitrust issues, including refusals to deal, price discrimination, international jurisdiction, and the role of the per se rule in joint venture analysis.

International

The Division has been particularly focused on strengthening international cooperation and promoting antitrust policy convergence. In the last year, the Division has engaged the European Commission and the International Competition Network (ICN) on merger enforcement and unilateral conduct issues and has sent delegations to more than two dozen countries on five continents. With a global economy and competition regimes in more than 100 countries, such global engagement has become a necessity, and the Division will continue to expand its international outreach and cooperation efforts.

The Year Ahead

The Division will continue its leadership role during the next year to ensure that consumers reap the benefits of competition. The pipeline of cartel cases and continuing rise in pre-merger filings will keep our enforcement personnel busy. We also expect a flurry of activity on the policy front. The Antitrust Modernization Committee (AMC), for example, has issued its report, which confirms that U.S. antitrust laws and policies are soundly and appropriately based on protecting competition and consumer welfare. We are reviewing the AMC's specific recommendations to determine appropriate next steps. The Section 2 hearings that we are conducting jointly with the FTC will end soon, and the agencies will focus on how to benefit from the information and discussions generated by those hearings. The ICN working groups will be addressing unilateral conduct issues and substantive and procedural convergence in merger review. We look forward to meeting these and many other challenges.

> *"The Division has been at the forefront of antitrust enforcement during the last year with near record criminal fines [and] the most merger challenges since 2001..."*
>
> *– Thomas O. Barnett*

SIGNIFICANT EVENTS APRIL 2006 - APRIL 2007

- MA-RI-AL Corp. and two executives indicted on charges of conspiring to fix prices of ready mixed concrete in Indianapolis, bringing the total to three companies and eight individuals charged, and more than $30 million in fines collected *(April 2006)*
- Qualcomm Inc. and Flarion Technologies Inc. charged with illegal premerger coordination in violation of section 7A of the Clayton Act and fined $1.8 million in civil penalties *(April 2006)*
- In response to Division investigations, both the West Virginia and Tennessee real estate commissions began to allow real estate brokers to offer rebates and other discounts to consumers in their states *(May & July 2006)*
- International Competition Network finalizes merger guidelines workbook, establishes working group to study unilateral conduct, and adopts suggested best practices for enforcement in the telecommunications sector *(May 2006)*
- U.S. District Court in Washington, D.C. extends the term of certain portions of the Microsoft Final Judgment by at least two years, due to ongoing problems with the company's technical documentation in the FJ's communications protocol licensing program *(May 2006)*
- The Division and FTC begin a series of joint public hearings to examine the antitrust implications of single-firm conduct *(June 2006)*
- Consent decree requires divestiture of six electricity generating plants in Pennsylvania and New Jersey, to resolve competition concerns arising from the merger of Exelon Corp. and PSEG Inc. *(June 2006)*
- Consent decree requires Inco Limited to sell a nickel refinery and related assets to resolve competition concerns in the high-purity nickel market arising from Inco's proposed acquisition of Falconbridge Limited *(June 2006)*
- Consent decree requires The McClatchy Company and Knight Ridder Inc. to divest the *St. Paul Pioneer Press* in order to proceed with their proposed merger *(June 2006)*
- Consent decree requires divestiture of Dofasco Inc. or alternative assets to resolve competition concerns in the tin mill products industry arising from Mittal Steel's proposed acquisition of Arcelor S.A. *(August 2006)*
- Stolt-Nielsen S.A., two subsidiaries, and two executives indicted for participating in a conspiracy to allocate customers, fix prices, and rig bids on parcel tanker shipping contracts *(September 2006)*
- On the eve of trial, Dairy Farmers of America Inc. agrees to divest its interest in Southern Belle Dairy Co., restoring competition for milk contracts in 100 school districts in Kentucky and Tennessee *(October 2006)*
- In a business review letter, Division announces that it will not oppose a patent disclosure policy proposal by VITA, a standard-setting organization, to implement a policy on the disclosure and licensing of patents *(October 2006)*
- Denial of motion filed by the National Association of Realtors seeking to dismiss the antitrust case filed against it by the Division, allowing the case to proceed *(November 2006)*
- Amendments to the Division's 2001 Merger Review Process Initiative to further streamline the merger review process *(December 2006)*
- U.S. Supreme Court *Weyerhaeuser* decision holds that the *Brooke Group* standard for predatory pricing also applies to predatory buying claims *(February 2007)*
- U.S. District Court in Washington, D.C. finds proposed consent decrees in SBC/AT&T and Verizon/MCI mergers in the public interest *(March 2007)*

CRIMINAL ENFORCEMENT — THE YEAR IN REVIEW

The detection, prosecution and deterrence of cartel offenses continue to be the Antitrust Division's highest priority. The Division places particular emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of the harm they inflict on American businesses and consumers. This enforcement strategy has succeeded in cracking dozens of international cartels, securing convictions and jail sentences against culpable U.S. and foreign executives, and obtaining significant corporate fines. And, because of the importance of global cooperation among competition agencies, the Division actively promotes convergence and devotes significant resources to working with competition agencies around the world toward increasingly aggressive anti-cartel enforcement.

Case Highlights

In 2006 and early 2007 the Division brought numerous cases involving violations of the Sherman Act and related federal statutes, resulting in significant fines and stiff prison sentences for individuals.

Dynamic Random Access Memory

The Division continued to produce record results from its investigation of the price-fixing cartel for high-tech dynamic random access memory (DRAM) products. To date the investigation has yielded total fines of more than $730 million and charges against four companies and 18 executives. One executive pleaded guilty to obstructing the investigation and 11 foreign executives, including three German nationals and eight Korean nationals, have served or agreed to serve time in U.S. prisons for their participation in this price-fixing conspiracy. In November 2006, the Division obtained an $84 million criminal fine against Japanese manufacturer Elpida Memory Inc. In February 2007, Y.H. Park, an executive of Samsung Electronics Company Ltd., was sentenced to serve 10 months in jail after pleading guilty to participating in the conspiracy. Park's sentence is the longest jail sentence ever imposed on a foreign national for participation in an international price-fixing cartel. Two Samsung executives and one Hynix executive were also indicted in October 2006, and the trial is pending.

Ready Mixed Concrete

The Division's highly successful investigation of price fixing among ready-mixed concrete producers in Indiana continued to net significant results. To date the investigation has yielded total fines of more than $35 million, including a $29.2 million criminal fine — the largest ever obtained in a domestic cartel investigation — against Irving Materials Inc., a ready-mixed concrete producer doing business in the Indianapolis metropolitan area, and charges against five companies and 10 executives. Eight of the executives pleaded guilty and two were convicted after trial; all were sentenced to serve between five and 27 months in jail.

Chicago Field Office, Ready-Mixed Concrete Team.

Back Row (L-R): Trial Attorneys Jonathan Epstein, Frank Vondrak (Assistant Chief), Eric Schleef, and Michael Boomgarden. Front Row seated (L-R): Economist Donald Brown and Paralegals Carly Blakeman and Janice Swallow.

Nationwide E-Rate Investigation

The Division continued its nationwide investigation of bid rigging and fraud in the E-Rate program, which was created by Congress to subsidize the provision of Internet access and telecommunications services to economically disadvantaged schools and libraries. To date, 14 individuals and 12 companies have been charged in connection with anticompetitive and fraudulent acts affecting dozens of schools in 10 states. A total of six companies and four individuals have either pleaded guilty, agreed to plead guilty or entered civil settlements, and have agreed to pay criminal fines and restitution totaling approximately $40 million. Two individuals have each been sentenced to serve more than five years in prison. In 2006 the Division charged four companies and four individuals with defrauding the E-Rate program; more than $4 million in criminal fines and restitution have been imposed as a result of these cases. In February 2007, in the first E-Rate matter to go to trial, a federal jury in McAllen, Texas convicted Rafael Adame, the former president and owner of ATE Tel Solutions Inc., on seven of nine counts of wire fraud in a scheme to defraud the E-Rate program in a Weslaco, Texas school district. Trials are pending in three additional E-Rate cases: *United States v. Video Network Communications, Inc.; United States v. Cynthia Ayer; and United States v. Douglas Benit.*

Increased Emphasis on Jail Sentences for Individuals

The Division, having long believed that individual incarceration has a greater deterrent effect than fines alone, continues to emphasize prison terms for individuals who participate in price-fixing conspiracies. Antitrust offenders are being sent to jail with increasing frequency and for longer periods of time. And, we have heard firsthand accounts from cartel members about international cartels that chose not to expand their cartel to the United States because of the risk of going to jail. In FY 2006 the Division obtained criminal sentences for 19 individuals totaling 5,383 days of jail time. Already in just the first half of FY 2007 the Division has obtained criminal sentences for 21 individuals totaling 17,235 days of jail time; the average jail sentenced imposed is 27.3 months. Recently, the Division has also increased the number of foreign nationals prosecuted and sent to jail in connection with its cartel investigations. Approximately 30 foreign defendants from Canada, France, Germany, Japan, South Korea, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom have served, or are currently serving, prison sentences in U.S. jails as a result of the Division's cartel investigations.

International Cartel Enforcement

The global reach of modern cartels, as illustrated by the DRAM investigation, means that criminal conspiracies outside U.S. borders often have significant effects on U.S.

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COMPETITION ADVOCACY AND TRANSPARENCY

In addition to its traditional law enforcement role, the Antitrust Division regularly seeks to promote competition by educating businesses and through its competition advocacy efforts by providing transparency in its enforcement decisions. The Division's efforts at both transparency and competition advocacy can take many forms. Transparency results from policy documents, business review letters, and closing statements, among other vehicles. The Division advocates the benefits of competition by providing advice and analysis concerning a variety of matters, participating in Supreme Court cases, engaging in international efforts, and offering its views regarding legislation and regulation at both the federal and state levels.

Anticompetitive constraints imposed by government action can affect entire sectors of the economy and can therefore have a much broader negative impact on consumers than any single cartel or merger. Such constraints, however, are generally exempt from direct challenge under the antitrust laws. The Division believes that robust competition advocacy is an important part of its mission to protect competition on behalf of American consumers and businesses. The Division therefore educates policymakers and the general public about the benefits of competition in a variety of markets in an effort to ensure that competition in those markets is not constrained. For example, the Division has devoted substantial competition advocacy efforts to two markets that are vitally important to the United States economy and affect virtually every consumer – real estate and health care. With respect to real estate, the Division provides assistance and information to entities considering rules—such as rules that prohibit rebates to consumers or that undermine online brokerage models—that would inhibit some types of competition that can lower the cost of buying or selling a home. During 2006, several states modified proposed or existing laws and regulations to enhance competition to the benefit of consumers as a result of the Division's advocacy. In health care, the Division pursues the objective of promoting competition as a means to hold down health care costs. A recent example of this type of advocacy was the appearance of Mark Botti, Chief of the Division's Litigation I Section, before the Georgia legislature, where he explained why certificate of need requirements can stifle innovation and increase health care costs to the detriment of consumers.

Transparency is readily achieved when the Division brings an enforcement action. Theories and evidence of anticompetitive harm are available to the public through complaints, press releases, and competitive impact statements. The public often has as much, if not greater, interest, however, in why the Division decides not to bring an enforcement action in particular cases. While confidentiality restrictions place significant limits on what the Division can say publicly about its Hart-Scott-Rodino investigations, the Division has been active and intends to remain active in issuing closing statements in mergers that it does not challenge after extensive investigations. These statements describe the Division's rationale for the enforcement decisions within confidentiality limits. Thus, for example, the Division issued closing statements detailing its decisions not to challenge the AT&T/Bellsouth and Maytag/Whirlpool mergers. The Division will continue to issue such statements where appropriate to help the public better understand its actions.

The Division's transparency efforts also have included the release of a joint Department of Justice/Federal Trade Commission (FTC) Commentary on the Horizontal Merger Guidelines, which was issued in March 2006. The commentary is the latest chapter in the antitrust agencies' ongoing efforts to provide guidance to the antitrust bar and businesses regarding how the agencies enforce section 7 of the Clayton Act. The analytical framework and standards used to analyze the likely competitive effects of mergers are embodied in the Horizontal Merger Guidelines, which the Division and the FTC jointly issued in 1992 and revised in 1997. The commentary explains how the agencies have applied particular guidelines provisions relating to market definition, competitive effects (including coordinated interaction and unilateral effects analysis), entry conditions, and efficiencies. Included throughout the commentary are summaries of actual mergers that the agencies analyzed under the Merger Guidelines.

Another important form of transparency is the business review letter. Persons concerned about the legality under the antitrust laws of proposed business conduct may ask the Department of Justice for a statement of its current enforcement intentions with respect to that conduct under the Business Review Procedure. See 28 C.F.R. Section 50.6. The Division believes that the business review process provides the business community an important opportunity to receive guidance from the Department of Justice with respect to the scope, interpretation, and application of the antitrust laws to particular proposed conduct. Six business review letters were issued in 2006, including letters addressing ex ante disclosure of patent licensing terms in standard-setting, joint ventures for services to the healthcare industry, and model broker agreements in transportation.

The Antitrust Division's competition advocacy and transparency efforts help consumers, businesses and policy makers understand antitrust law and the importance of competition in our economy. These efforts will continue to be an important part of the Division's mission.

MEET DENNIS W. CARLTON, DEPUTY ASSISTANT ATTORNEY GENERAL FOR ECONOMIC ANALYSIS

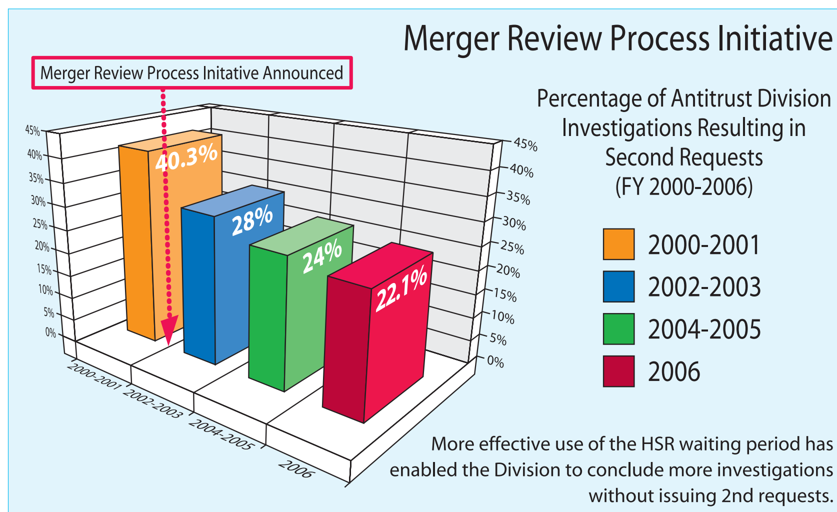
Since October 2006, Dennis W. Carlton has served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division. He is on leave from the University of Chicago, where he has for many years been a professor of economics at the graduate school of business. Dennis has also taught in and has been a faculty member of the university's economics department and law school. He specializes in microeconomics, industrial organization and antitrust economics, and he has published more than 80 research papers on a variety of topics, including behavior under uncertainty, price rigidity, vertical integration, network economics, durable goods, and the telecommunications industry. In the antitrust area, his recent papers address merger policy, the economics of tie-in sales, exclusive conduct, and market definition. Dennis is co-author, with Jeffrey Perloff, of one of the nation's leading industrial organization textbooks, "Modern Industrial Organization." He is co-editor of the Journal of Law and Economics, and of Competition Policy International. He has served as the sole economist on the Antitrust Modernization Commission, a congressional commission whose report evaluating and issuing recommendations concerning U.S. antitrust laws is due out this spring.

In addition to his academic experience, Dennis has been one of the country's leading antitrust consultants and has served frequently as an expert witness in antitrust litigation. Prior to joining the Division, Dennis consulted for about 30 years through Lexecon, an economics consulting firm, where for several years he served as president. He has worked on many of the largest and most public mergers to come before the Division and Federal Trade Commission (FTC) during that time, and his experience and expertise cover a wide range of industries, including telecommunications, insurance, payment mechanisms, transportation and energy. He has served as a consultant to both the Division and FTC on several matters, including various revisions to the Merger Guidelines.

Deputy Assistant Attorney General for Economic Analysis, Dennis W. Carlton.

Since joining the Division, Dennis has interacted extensively with foreign antitrust agencies on a wide range of antitrust issues, including appropriate vertical and horizontal merger policy. He has given several presentations abroad on antitrust topics and recently participated in a public forum in London where the U.S. and European approaches to antitrust and regulation were debated.

On the domestic front, Dennis coordinates closely with the Division's staff of career economists on both policy development and analysis of mergers and other business practices. Dennis has also assisted in the analysis of antitrust-related matters before the U.S. Supreme Court. One of his interests, and a particular focus of his attention, has been to promote and encourage Economic Analysis Group research and to further the Division's efforts in the area of competition advocacy. In particular, Dennis has encouraged economic research bearing on the effects of antitrust policy and the consequences of regulations and legislation that constrain the competitive process. Through such efforts, he hopes to further competition advocacy projects in which the Division takes an active role in encouraging federal and state bodies to avoid laws and rules that harm consumers by interfering with competition.



Source: DOJ Antitrust Division

MERGER ENFORCEMENT—THE YEAR IN REVIEW

Efficient merger enforcement — preventing the relatively few transactions that threaten harm to competition each year and quickly clearing those that do not — continues to be a top priority for the Antitrust Division. FY 2006 was the most active merger enforcement year the Division has had since the end of the "merger wave" in FY 2001. HSR pre-merger filings increased 8.9 percent over FY 2005, to 1,860, and parties already have notified the antitrust agencies of 873 transactions thus far in FY 2007. The Division filed 10 merger enforcement actions over the course of the year, and its investigations led to parties restructuring an additional six transactions — more merger challenges than the previous two years combined. These 16 matters also represented about 21 percent of the HSR-reportable transactions that the Division investigated in FY 2006.

At the same time, the Division continued to improve its efficiency in the review of HSR transactions: the percentage of HSR transactions resulting in a second request dropped from 1.5 percent to 1 percent, and the duration of the average second request investigation continued to decline.

The cases that the Division filed in 2006 included challenges to transactions in the steel and nickel industries (the Mittal/Arcelor and Inco/Falconbridge transactions, respectively, which are discussed elsewhere in this newsletter), as well as the telecommunications (Verizon/MCI and SBC/AT&T), newspaper (McClatchy/Knight Ridder), health insurance (United Health Group/PacifiCare Health Systems), electricity (Exelon/PSEG), banking (Regions Financial/AmSouth Bancorporation), and mobile wireless services (Alltel/Midwest Wireless) industries, among others. The Division's challenge of Dairy Farmers of America Inc.'s acquisition of Southern Belle Dairy Co. was also resolved through a settlement favorable to the Division.

Exelon/PSEG

In the energy industry, the Division investigated the proposed $16 billion merger of Exelon Corporation and Public Service Enterprise Group Inc. (PSEG). The merger would have combined two of the largest electricity generating companies in the eastern U.S., and as originally proposed likely would have caused higher prices for wholesale electricity to consumers in the mid-Atlantic region, particularly in New Jersey, Philadelphia, central Pennsylvania, and eastern Maryland. In this area, with some $30 billion in yearly sales, the combined firm would have had about a 40 percent share of generating capacity. The post-merger Herfindahl-Hirschman Index (HHI) would have been approximately 2,100, an increase of approximately 800. Beyond simple market shares, the Division determined that the proposed merger would combine groups of assets — different kinds of generation plants with widely differing marginal costs — in a way that would result in a firm that would have significantly more incentive and ability to withhold output from the market. The Division resolved its competition concerns through a consent decree that required the divestiture of six electricity plants in Pennsylvania and New Jersey that provide more than 5,600 megawatts of generating capacity. The case was ultimately withdrawn when the merger was abandoned by the parties.

Maytag/Whirlpool

When the Division investigates a merger, high market shares for the merging parties and high levels of concentration give rise to an initial presumption of a competitive problem. In some such cases, like Exelon, a detailed factual investigation strengthens those structural presumptions. In other cases involving high market shares, detailed fact-finding rebuts the initial presumption and the Division determines that the deal is not likely to result in a substantial lessening of competition. The Division's investigation of Whirlpool's acquisition of Maytag was such a case.

The investigation focused on residential clothes washers and dryers. The Division found that despite the two companies' high market shares in the U.S., any attempt to raise prices likely would be unsuccessful. Whirlpool and Maytag represented two well-known brands in the industry, but rival appliance brands such as General Electric, Frigidaire, and Kenmore are also well established. Also, new brands such as LG and Samsung have quickly established themselves in the U.S. In fact, large retailers like Sears, Lowe's, The Home Depot, and Best Buy have had significant success introducing LG laundry products and, in the case of Best Buy, displacing Maytag laundry products altogether. The Division concluded that the combination of strong rival suppliers with the ability to expand sales significantly and the large cost savings and other efficiencies that the parties were able to substantiate made it unlikely that the transaction would harm consumer welfare. Thus, the initial presumption having been rebutted, the investigation was closed.

DFA/Southern Belle

After a victory in the court of appeals, a settlement negotiated on the eve of a district court trial that required Dairy Farmers of America Corp. (DFA) to divest its interest in Southern Belle Dairy Co. successfully ended the Division's lawsuit challenging DFA's acquisition of a 50 percent interest in Southern Belle. The complaint charged that the partial acquisition of Southern Belle reduced competition for school milk contracts in 100 school districts in Kentucky and Tennessee because it gave DFA substantial ownership interests in two dairies — Southern Belle and the nearby Flav-O-Rich dairy — that competed for the contracts. The acquisition reduced the number of independent bidders for school milk contracts from two to one in 45 school districts in eastern Kentucky, and from three bidders to two in 55 school districts in eastern Kentucky and Tennessee.

Initially, the district court granted summary judgment for the defendants after they modified their ownership agreements to reduce DFA's legal rights to exercise control over Southern Belle. Without addressing the ownership arrangement that had been in effect for two years, the district court held that the government failed to establish a mechanism by which the acquisition was likely to affect competition adversely in the school milk markets under the defendants' modified agreement. In October 2005, the Court of Appeals for the Sixth Circuit agreed with the Division, and concluded that the lower court erred in ignoring the original ownership arrangement. The court also held that DFA's 50 percent ownership of the two competing dairies and the closely aligned interests of the dairies' managements could lead to anticompetitive behavior, violating Section 7 of the Clayton Act, even in the absence of formal DFA control rights. The court of appeals reversed the district court and remanded the case for trial. In October 2006, prior to trial, a consent decree was filed that required DFA to divest its interest in the Southern Belle Dairy. That divestiture has now been completed.

THE MERGER REVIEW PROCESS INITIATIVE ACHIEVES POSITIVE RESULTS

The Antitrust Division's 2001 Merger Review Process Initiative and its December 2006 amendments have succeeded in helping the Division achieve its goal of making the merger review process more efficient and transparent. The initiative improves the Division's ability to identify more transactions that do not threaten harm to consumer welfare during the initial Hart-Scott-Rodino (HSR) waiting period without issuing a second request, and describes practices designed to make second request investigations more efficient.

Merger Review Process

The HSR merger review process is applied sparingly by both the Division and the Federal Trade Commission. Of the 7,210 filed transactions during the fiscal years 2002-2006, second requests were issued in only 214 matters. Thus, 97 percent of the transactions that were filed with the agencies were cleared within the initial 15 or 30-day waiting period.

Today most federal merger challenges occur *before* deals close, when effective injunctive relief is available, structural relief is more practical and effective, and harm to consumer welfare has not yet occurred. However, the pre-merger review process can be costly and time-consuming, and it is often full of uncertainties. Recognizing that the vast majority of transactions that are notified to the agencies each year are either competitively neutral or beneficial to consumers and businesses, the Division strives to make the right enforcement decision as quickly and as efficiently as possible. This means clearing transactions that do not pose a threat to competition during the first 30-day waiting period wherever possible, so that the Division can concentrate its resources on those transactions that do threaten competitive harm.

Merger review is complicated by the fact that the agencies and the courts have shifted away from a static analysis of market shares and concentration toward a fuller analysis of the competitive process at work in each examined industry. While this decreased reliance on market shares and presumptions, along with the advances in economic analysis that make more precise investigations possible, lead to better enforcement decisions, such developments require significant quantities of data and information.

Thanks to recent technological advances there is typically no shortage of information. E-mail, electronic document creation and storage, and complex databases have led to an explosion in the volume of information that companies must sift through in order to comply with a second request and that Division staff must review under the time pressures of an HSR investigation. Until relatively recently, a document production that yielded a few hundred boxes of documents would have been considered a "large" production. Today, a virtually identical second request schedule will yield gigabytes, or even terabytes, of documents and data.

The Division is committed to its goal of utilizing investigative resources more efficiently to further reduce the burden placed on parties to transactions that it investigates consistent with its responsibility to enforce the antitrust laws. Since 2001, the Division has sought to meet this challenge through its Merger Review Process Initiative.

2001 Initiative

The 2001 Merger Review Process Initiative helps the Division identify more quickly critical legal, factual and economic issues regarding proposed mergers; to facilitate more efficient and more focused investigative discovery; and to provide for an effective process for the evaluation of evidence. In the five years since its launch it has enabled the Division to deploy its investigative resources more efficiently and effectively and has reduced the investigative burden placed on parties to transactions that are reviewed by the Division.

During FY 2000-2001, before the initiative was announced, approximately 40 percent of the Division's HSR preliminary investigations led to second requests. During the two years that followed the launch of the initiative that number fell to just under 28 percent, and in FY 2004-2006 only about 24 percent of investigations resulted in second requests. In addition, since the initiative was announced, the average number of days between the opening of a preliminary investigation and the closing of the investigation (either before or after issuance of a second request) in matters that do not lead to an enforcement action has fallen from about 93 days to 57 days. The average length of second request investigations dropped from 213 days for the two years before the initiative to 154 days during the last two years, a drop of over 25 percent.

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DFA/Southern Belle Team. Back Row (L-R): James Fredricks, Derrick Lam, Christopher Oropeza, Nora Terres, Tor Winston, Jonathan Jacobs, N. Christopher Hardee, Peter Mucchetti. Front Row (L-R): Carol Bell, Carolyn Pasternak, Richard Martin, Elizabeth Armington, Michael Klass, John Read, Ihan Kim, Alex Rohr. Not pictured: Mark Botti, Joseph Miller, Claudette Strange, Robert Nicholson, Gregory Werden.

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Criminal Enforcement

consumers. International advocacy and coordination efforts are therefore crucial to U.S. cartel enforcement, and increased cooperation and assistance from foreign governments continues to enhance the Division's ability to detect and prosecute international cartel activity. Over the past several years there has been a growing worldwide consensus that international cartel activity is pervasive and victimizes consumers everywhere. A shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world. The Division actively promotes convergence in the area of cartel enforcement and devotes significant resources to bilateral meetings, the International Competition Network and the Organization for Economic Cooperation and Development (OECD).

The Division continues to focus on the investigative benefits of leniency programs and frequently provides technical assistance to other enforcement agencies. The Division has recently been gratified to see enhanced enforcement powers and new or strengthened leniency programs in several jurisdictions in Europe, Asia, and around the world. The Division continues to advocate the deterrent effect of prison sentences — as opposed to a "fines only" approach — and the prospect of extradition to the locus of a cartel's economic harm. The decisions to date in *The Government of the United States of America v. Ian P. Norris* — part of the Division's carbon brushes matter — have been a major step toward such deterrence.

Extradition of Foreign Nationals – the Norris Case

In June 2005, an English magistrates' court found a United Kingdom national to be extraditable on a U.S. antitrust charge. The Bow Street Magistrates' Court ruled that the price-fixing and obstruction offenses filed against Ian Norris in 2004 were extraditable offenses under the U.K. Extradition Act of 2003. The magistrates' court then referred the case to the U.K. Secretary of State, who ordered the defendant's extradition in September 2005.

Norris filed multiple appeals in England's High Court of Justice. In February 2006, the High Court rejected an appeal under which Norris had challenged the designation of the United States under the U.K. Extradition Act due to the lack of ratification by the United States of the 2003 U.S./U.K. Extradition Treaty and the alleged lack of consistency between extraditions requested by the United States and extraditions requested by the United Kingdom. In January 2007, the High Court dismissed additional appeals based on human rights arguments, the passage of time since the commission of the offenses charged, the dual criminality requirement for extradition, and a claim that obstruction of foreign investigators is not an extradition offense. Norris has filed an application for leave to appeal the High Court's latest ruling to the House of Lords.

Conclusion

With approximately 130 criminal grand jury investigations throughout the United States currently looking into suspected cartel activity, the upcoming year looks likely to yield additional significant national and international antitrust prosecutions.

COMPETITION POLICY AND INTELLECTUAL PROPERTY LAWS WORK IN TANDEM TO PROMOTE GROWTH AND INNOVATION

Innovation is a key component of the U.S. economy. A significant driver of innovation is competition: firms striving to be the first to deliver new products to consumers that could allow them to be the first to capture a market by dint of their innovative efforts. A complementary driver of innovation are U.S. intellectual property (IP) laws, laws that encourage inventors and artists to participate in the marketplace by protecting their creative and inventive efforts. When enforcing the antitrust laws, the Antitrust Division seeks to maintain a competitive American marketplace, one that improves consumer welfare by encouraging innovative efforts and providing an environment in which these efforts may flourish. Maintaining this competitive market place means curtailing activities involving intellectual property rights that foster illegal collusive or exclusionary conduct. In most cases involving intellectual property rights, the appropriate approach to making this determination is to analyze activities involving intellectual property rights under the rule of reason, taking into account both the efficiencies of a particular activity as well as any anticompetitive effects.

The Division has devoted much time and effort to analyzing issues involving intellectual property and antitrust. It efforts have included, but are not limited to, business review letters, international working groups, bilateral discussions with important trading partners, interagency discussions, amicus briefs and speeches. The Division has focused on two particularly important areas in recent business review letters: patent pooling and standard setting.

The Division analyzes patent pooling agreements under the rule of reason because combining complementary patents within a pool can be an efficient and procompetitive way to disseminate those rights to would-be users of the technology or standard. Including substitute patents in a pool, however, does not make the pool presumptively anticompetitive. Rather, the Division considers the inclusion of substitutes as one of many factors when evaluating the competitive impact of pooling agreements.

The Division's recent business review letter to the standard-setting organization (SSO) known as VITA (VMEbus International Trade Association) also applied a rule of reason analysis when evaluating VITA's proposed patent policy. That policy will require licensors of patents necessary to implement VITA standards to provide standard setters with more information about potential patent licensing costs than a simple commitment to license on reasonable and nondiscriminatory terms before they decide which technologies to include in the standard. The Division concluded that this proposed policy was a "sensible effort" by VITA "to avoid unreasonable patent licensing terms that might threaten the success of the future standards and to avoid disputes over licensing terms that can delay adoption and implementation after standards are set." It should, therefore, "preserve, not restrict, competition among patent holders." To be sure, not all SSOs need implement the same, or even any, patent licensing policy. Different SSOs will reach different conclusions regarding the potential benefits and costs of such policies and the marketplace will indicate which SSOs have made the best choices.

INTERNATIONAL COOPERATION AND ANTITRUST POLICY CONVERGENCE — A TOP PRIORITY

The Antitrust Division continues to make international cooperation and antitrust policy convergence a top priority. In 2006-2007, the Division pursued these goals by continuing to work closely with multilateral organizations, strengthening its bilateral ties with antitrust agencies of other jurisdictions, and working with countries — such as China — that are in the process of adopting antitrust laws.

Multilateral Efforts

The International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD) continue to make important strides in achieving consensus on antitrust issues. ICN — a working collaboration of antitrust enforcement officials and non-governmental advisors from around the world — celebrated two important milestones this past year. October 2006 marked the fifth anniversary of the founding of ICN by the Division, the Federal Trade Commission (FTC), and 13 foreign agencies. And in March 2007, ICN welcomed its 100th member to the network.

In just five short years, ICN has made substantial progress on a number of fronts. Through its 13 recommended practices for merger notification and review procedures, the Merger Working Group — which is chaired by the Division — has brought much needed procedural coherence to multijurisdictional merger review. The Merger Working Group has also laid important groundwork for future convergence on substantive merger issues through its work analyzing the merger guidelines of various jurisdictions. In particular, the practical, user-friendly Merger Guidelines workbook that was adopted in May 2006 provides both new and established antitrust agencies with detailed insights into the basic framework used in the substantive assessment of mergers. On the cartel front, ICN has encouraged convergence by bringing cartel experts together annually to discuss practical enforcement issues, such as leniency, obstruction of justice, and the role of negotiated settlements. ICN has also made significant contributions in other areas by addressing issues of importance to new antitrust agencies and through its work on regulated sectors, particularly the suggested best practices for antitrust enforcement in the telecommunications sector, which ICN members adopted in 2006.

If the past five years are any guide, the future of ICN is bright, even as it turns its attention to more difficult policy issues. At the Moscow ICN conference in May 2007, under the Division's leadership as chair of the Merger Working Group, ICN is expected to begin work on substantive merger policies. ICN has already begun work on monopolization issues. At the ICN's most recent annual conference held in Cape Town, South Africa in May 2006, members launched a new working group — chaired by the FTC and Germany's antitrust agency — on unilateral conduct. Agency and non-governmental advisors have already begun a robust dialogue on objectives of competition laws and the definition of "dominance" and "substantial market power." In both the merger and unilateral conduct areas, the Division is strongly committed to promoting convergence based on sound antitrust principles.

Assistant Attorney General Thomas O. Barnett leads delegation in meeting with the National People's Congress in Beijing.

The OECD is another important forum for developing antitrust convergence among like-minded jurisdictions. The OECD provides a setting where its 30 member countries seek answers to common problems, identify best practices and coordinate antitrust policies. The Division continues to be actively engaged with the OECD in all phases of its competition work. Assistant Attorney General Barnett chairs the Competition Committee's working party on enforcement and cooperation. Under his leadership, this group held productive sessions on plea bargaining in cartel cases, private remedies (class actions and indirect purchaser rules), and evidentiary issues related to market power and merger review. The group also hosted two workshops to address issues that arise in countries where antitrust agencies and prosecutors work in separate agencies but nonetheless must work together to combat cartels. During the past year, the Competition Committee as a whole addressed such important topics as remedies in monopolization cases; competition, patents, and innovation; and vertical mergers. The committee also adopted a Competition Assessment Toolkit that provides guidance to regulatory bodies on how to assess the effect on competition of proposed or existing regulatory measures.

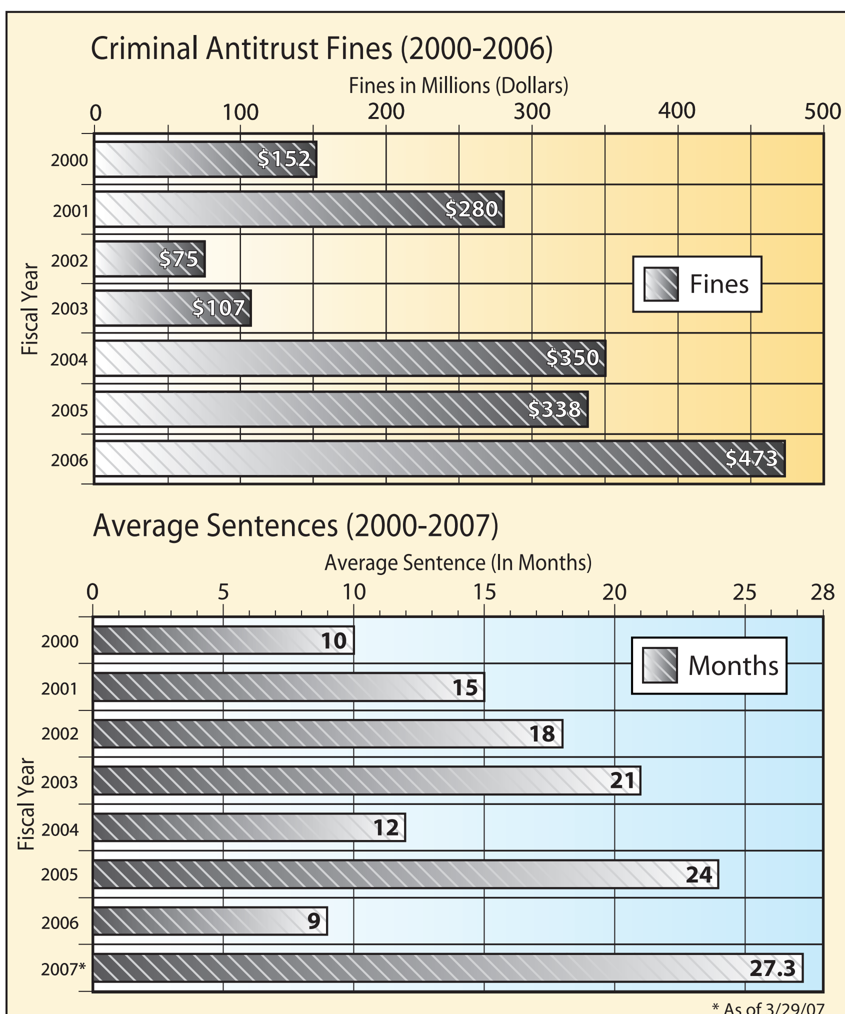
China

One important way the Division encourages convergence is by working with other nations' enforcement institutions as they draft antitrust laws. Working with China as it continues its efforts to enact its first comprehensive antitrust law remains a high priority for the Division. The Division has commented on several draft versions of China's antimonopoly law over the past three years. In addition, the Division has sent several high-level delegations to China to discuss the draft law and competition policy generally, including a visit by Assistant Attorney General Barnett in September 2006 and several trips to Beijing by Deputy Assistant Attorney General Gerald F. Masoudi. Closer to home, Division officials moderated discussions with government officials from China in a U.S.-China Legal Exchange Program held in Seattle, Cleveland and Washington, D.C. in December 2006. Both Chinese and United States officials agree on the importance of continued dialogue, and additional work with Chinese officials is expected in the coming year.

Bilateral Relationships

The Division also remains committed to strengthening its working relationships with foreign antitrust agencies. In the enforcement area, the Division worked closely with Canada, the European Commission (EC), Japan and Korea to conduct simultaneous searches in its ongoing cartel investigation of the air cargo industry. On the policy front, monopolization/abuse of dominance and intellectual property took center stage. During the past year, the Division has consulted closely with the EC as it seeks to refine its approach to abuse of dominance cases. The Division also participated in working groups on intellectual property and monopolization issues with Canada and Mexico. The working groups explored in detail each of the three countries' enforcement approaches, and significantly improved all three jurisdictions' understanding of common problems. On the other side of the world, the Division has been consulting with the Japan Fair Trade Commission on revisions to its IP licensing guidelines and merger guidelines.

International cooperation is also fostered by the Division's technical assistance program. In the past 15 years, the Division and the FTC — often with USAID funding — have conducted close to 400 missions to scores of countries on short-term trips and multi-month advisory missions. This past year, the Division's technical assistance program focused on Egypt, India, Russia and Southeast Asia.



Source: DOJ Antitrust Division

CIVIL NON-MERGER ENFORCEMENT

In addition to its cartel and merger priorities, the Antitrust Division enforces the antitrust laws against civil non-merger conduct that harms competition, which may involve agreements or single-firm activity. The Division has brought recent enforcement actions in several important sectors of the economy.

Real Estate

In the real estate industry, the Division investigates rules that reduce competition between real estate brokers and lead to higher commissions and reduced consumer choice. Many such rules have been removed as the result of the Division's efforts. For example, in response to a Division investigation, the West Virginia Real Estate Commission rescinded a regulation that prohibited real estate brokers from offering discounts to consumers. The amended regulation took effect in May 2006. The Division has also presented its views in more than a dozen states in which minimum service legislation and rebate laws were under consideration. Finally, the Division also has an ongoing lawsuit against the National Association of Realtors (NAR), challenging certain NAR rules that limit competition from real estate brokers who use the Internet to serve their customers. In November 2006, the U.S. District Court in Chicago denied NAR's motion to dismiss the lawsuit. The lawsuit is now in the discovery phase.

Health Care

Competition in health care helps reduce cost and increase choice and quality as it does in other areas of the economy, and the Division works to prevent a range of anticompetitive practices in the industry. For example, the Division filed suit against the Cincinnati-area Federation of Physicians and Dentists, alleging that the federation conspired to share pricing information and raise rates to insurers. The Division is seeking a ruling from the Federal District Court for the Southern District of Ohio on a motion for partial summary judgment for liability under Section 1 of the Sherman Act.

Business Review Letters

In technology licensing, the Division issued an important statement of its enforcement intentions through its business review procedure, under which parties can request an evaluation of proposed business conduct. In October 2006, the Division issued a review to the VMEbus International Trade Association, which develops technical standards. The Division stated that it does not intend to challenge the group's proposed patent policies, which require patent holders to make early declarations of maximum royalty rates and most-restrictive licensing terms for patent rights that may be essential to relevant standards. The group explained its policies as, in part, an attempt to strike a balance between the interests of innovators and the threat of anticompetitive patent "hold up" in high-technology standard setting. At this writing, the Division is considering a similar request from the Institute of Electrical and Electronics Engineers for a review of its proposed policy regarding the disclosure of patents and licensing terms.

DOJ/FTC HEARINGS ON SINGLE-FIRM CONDUCT

The Division seeks to advance development of antitrust law across its activities. Among other things, sound antitrust enforcement policy requires prosecution of exclusionary conduct that reduces output and increases prices while at the same time avoiding rules for condemning single-firm conduct that would chill procompetitive behavior.

However, determining when unilateral conduct is unlawful under Section 2 has proven difficult because aggressive, unilateral behavior at issue in Section 2 cases often resembles healthy, aggressive competition that the antitrust laws seek to promote. To help meet this challenge, in June 2006 the Division and the Federal Trade Commission (FTC) began a series of public hearings on single-firm conduct under the antitrust laws. The primary goal of the hearings is to examine thoroughly the competitive implications of such conduct and their appropriate treatment under Section 2 of the Sherman Act.

The antitrust enforcement agencies expect the hearings to lead to a clearer understanding of when it is appropriate to challenge unilateral conduct under the antitrust laws and provide firms with more usable standards for assessing their business strategies before implementation. Accordingly, the agencies solicited public comments from lawyers, economists, businesses, consumer groups, academics, and other interested persons on the relevant legal and economic principles underlying Section 2 and on real-world examples of single-firm conduct that should be considered in these hearings. The agencies also invited legal and economic experts as well as academics and business representa-

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ANTITRUST — AN INCREASINGLY HOT SUBJECT AT THE SUPREME COURT

Antitrust is a hot subject at the Supreme Court. Despite shrinking its docket overall, the Court considered the merits of four antitrust cases this term — the most since 1989-1990 — and seven cases in the last two years. In addition, the Court has sought the government's views on six antitrust petitions over the last three years, and in each of those cases has reached decisions consistent with the government's position. In the following four cases the United States filed merit briefs this term:

Leegin Creative Leather Products v. PSKS

Leegin Creative Leather Products v. PSKS continues the Court's review of long-established antitrust doctrine in light of modern understanding. The case addresses whether resale price maintenance (RPM) should remain per se unlawful, as the court of appeals held has been the standard since the Court's *Dr. Miles* decision in 1911.

In *Monsanto v. Spray-Rite Service* (1984), the United States as amicus urged the Court to reconsider *Dr. Miles*, but the Court concluded the issue was not properly raised. *Leegin* squarely raises it, and the United States' amicus brief recommends that Dr. Miles be overruled and RPM analyzed under the rule of reason. It argues there is a near-consensus that RPM can be pro-competitive as well as anticompetitive, making per se treatment inappropriate under established criteria. The brief urges the Court to bring the treatment of RPM into line with modern experience and economic understanding, as the Court did for other vertical practices in *State Oil v. Khan* (1997) (maximum price fixing) and *Continental T.V. v. GTE Sylvania* (1977) (non-price restraints). The Court heard argument in the case on March 26, 2007.

Bell Atlantic v. Twombly

Bell Atlantic v. Twombly may be the most significant of this term's antitrust cases because it concerns federal pleading standards as applied to antitrust conspiracy claims. The court of appeals held a class action complaint's Section 1 conspiracy allegation sufficient to state a claim if the "pleaded factual predicate" includes conspiracy among "the realm of 'plausible' possibilities." Pleading facts indicating parallel conduct by the defendants would be sufficient, the Court said, unless "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion."

The United States as amicus urged that federal pleading rules required more before permitting a potentially massive factual controversy to proceed to discovery, the burdens of which might force a settlement regardless of the merits of the claim. It argued that the allegations, taken as true, must provide a "reasonably founded hope" that discovery will reveal evidence supporting the alleged wrongful conduct. The United States argued that allegations of parallel conduct, without more, are unlikely to do so, because parallel conduct is normal, indeed pervasive, in competitive markets. The Court heard argument on November 27, 2006.

Credit Suisse Security v. Billing

Credit Suisse Securities v. Billing concerns implied repeal of the antitrust laws by the securities laws ("implied antitrust immunity"), a topic the Court has addressed several times. Plaintiffs alleged that investment banks that underwrite initial public offerings (IPOs) violated Section 1 of the Sherman Act. In light of the SEC's role in regulating IPOs, the district court dismissed the complaint on implied immunity grounds. Because the complaint included allegations of conduct prohibited by the securities laws, the Second Circuit vacated the district court's decision. In response to the Supreme Court's request, the United States recommended that the underwriters' petition for a writ of certiorari be granted.

The United States' amicus brief on the merits argues that a proper accommodation of the federal regulatory regime governing public offerings of securities with the antitrust laws "should give effect to *both* statutory schemes." Such an accommodation "recognizes that antitrust immunity must be extended not only to collaborative conduct specifically authorized under the securities regime, but also to activities that are inextricably intertwined with permitted collaboration." It does not, however, "require conferring antitrust immunity for all conduct of underwriters in connection with IPOs." Because neither of the lower courts adequately accommodated the interests of the two critical statutory frameworks, the United States argued, the decision below should be vacated, and the case should be remanded. The plaintiffs should be given an opportunity to amend their complaint. If at any point the district court determines that they "cannot establish an antitrust violation without relying on conduct that is authorized by the regulatory scheme or cannot be practicably separated from authorized conduct, the court must grant judgment for" the defendants. The Court heard argument on March 27, 2007.

Weyerhaeuser v. Ross-Simmons Hardwood Lumber

Antitrust cases alleging predatory sales are relatively rare; cases alleging predatory buying (or bidding) have been even more rare. The Court held in *Brooke Group v. Brown & Williamson* (1993) that liability for predatory selling requires proof of both below-cost pricing in the short term and a "dangerous probability" of recouping the resulting losses over the long term. In *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, the court of appeals held that liability for a sawmill operator's alleged predatory buying of sawlogs could be established without proof of the buy-side analogs of the *Brooke Group* requirements; liability could properly rest on a finding that the defendant paid more than "necessary" for the logs to prevent the plaintiff from obtaining the logs it needed at a "fair price."

The United States, which had recommended certiorari, argued on the merits that *Brooke Group's* requirements should apply, mutatis mutandis, to buy-side price predation for essentially the same reasons that supported their application by the Court to sell-side price predation. It also contended the court of appeals' subjective liability standard would likely deter procompetitive conduct by large firms. On February 20, 2007, in a unanimous opinion authored by Justice Thomas, the Court agreed, holding that "predatory bidding mirrors predatory pricing" and that the "two-pronged *Brooke Group* test should apply to predatory-bidding claims."

PROFILE: LITIGATION II SECTION

The Antitrust Division's Litigation II Section ("Lit II") is responsible primarily for the enforcement of the antitrust laws with regard to mergers and acquisitions and civil non-merger activity in unregulated industries. Lit II reviews, investigates, and litigates matters in a large variety of industries, including defense, banking, steel, metals, heavy industrial equipment, road and building construction, and waste hauling and disposal.

Lit II cooperates with a variety of governmental entities in conjunction with its enforcement efforts. In defense industry mergers, Lit II works closely with the Department of Defense and with the applicable military branch affected by a proposed transaction. When reviewing banking mergers, Lit II works closely with the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency. Lit II also coordinates with the relevant state attorneys general in its review of transactions affecting regional economies, such as mergers in the road construction industry. For that industry, in particular, Lit II staff attorneys have undertaken a significant consulting role with numerous state attorneys general investigating transactions that affect local markets. Further, Lit II informally advises and consults with foreign officials on a variety of competition issues and cooperates with foreign competition authorities on multi-jurisdictional investigations. During the past year, Lit II investigated two multi-jurisdictional transactions — the proposed $33 billion hostile takeover of Arcelor S.A. by Mittal Steel Company and the $15 billion cash tender offer by Inco Limited for the shares of Falconbridge Limited — each of which presented unique investigative issues.

In its investigations of both the Mittal/ Arcelor and the Inco/Falconbridge transactions, Lit II determined early in its review that the transactions raised competitive concerns — Mittal/ Arcelor in the eastern U.S. market for steel tin mill products and Inco/Falconbridge in the high-purity nickel market. The investigations and the potential remedies were complex in each case due to the nature of the transactions. For example, prior to a full second request investigation, Mittal entered into an agreement with the Division whereby Mittal agreed to divest Arcelor's Canadian subsidiary, Dofasco, or, if necessary, one of two alternative assets, in the event that Mittal's takeover of Arcelor succeeded and the Division concluded after further investigation that such a divestiture was necessary to protect competition. The Division provided for the divestiture of an alternative asset because, in an attempt to thwart a takeover by Mittal, Arcelor had tied up Dofasco in a Dutch trust, or "stichting." The Division ultimately filed suit to block the transaction and simultaneously filed the consent decree that it previously had negotiated with Mittal. As foreseen by the consent decree, the Dutch stichting did not authorize the sale of Dofasco; accordingly, the Division selected one of the alternative assets — Mittal's Sparrows Point plant near Baltimore — for divestiture.

The Inco/Falconbridge investigation presented the unique circumstance of simultaneous competing bids for the same company. During the pendency of Inco's tender offer for Falconbridge, Xstrata plc, a Swiss mining company, also planned to acquire Falconbridge. Lit II concluded that the proposed transaction would have resulted in higher prices to a significant number of customers for high-purity nickel. The Division entered into a proposed consent decree that, among other things, would have required Falconbridge to divest a refinery in Norway and related assets to a particular buyer, with which Inco already had negotiated agreements for the sale of the refinery. After Xstrata acquired Falconbridge and Inco abandoned its effort to acquire Falconbridge, the Division dismissed its lawsuit against Inco.

Litigation II Section.

In addition to these notable cases, during the past year Lit II conducted a comprehensive investigation of the proposed bank merger of Regions Financial Corp. and AmSouth Bancorporation, after which the Division resolved its competitive concerns in 17 local markets for small business lending by requiring divestitures of 52 branch offices with approximately $2.7 billion in deposits in Alabama, Mississippi, and Tennessee. This case represents just one of the approximately 1,000 bank merger applications reviewed by Lit II's Banking Unit each year. For more than half of those bank mergers, Lit II prepares for the bank regulating agencies a "competitive factors" report, which contains an assessment of the competitive issues presented by the transaction in question. For those transactions that present more significant competitive concerns, Lit II conducts a more extensive investigation.

Lit II's dedicated 50-member staff will continue its mission to enforce the antitrust laws in these important industries.

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The Merger Review Process Initiative

2006 Amendments

The December 2006 amendments build on the success of the 2001 initiative, which are the culmination of an extensive internal review of the Division's best practices for investigating mergers and acquisitions, as well as an analysis of the progress the Division has made since first launching its initiative. The amendments include a voluntary option that will enable companies to limit the duration and cost of merger investigations. Under this option, document searches generally will be limited to certain central files and a list of 30 employees. For their part, companies taking advantage of this option will need to provide certain critical information to the Division early in the investigation; agree to an investigation schedule; and agree to a sufficient period for the Division to conduct post-complaint discovery should the investigation become one of the few that result in contested litigation. This option reflects the reality that few merger investigations result in a contested challenge. In FY 1999-2006, for example, the Division issued second requests in 265 HSR merger investigations and brought 60 enforcement actions, but only four of those enforcement actions led to a trial.

As part of the amendments, the Division also released a revised Model Second Request that is based largely on limitations that Division staff have successfully negotiated and implemented in merger investigations in recent years. These changes include: a shorter time period for most document requests (generally, two years rather than three to four years); significant limitations on when second request recipients must conduct a "second sweep" for responsive documents; and an alternative to the requirement that companies search back-up tapes for responsive electronic documents.

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DOJ/FTC Hearings on Single-Firm Conduct

tives to give public presentations and participate in panel discussions.

Assistant Attorney General Thomas O. Barnett and FTC Chairman Deborah Platt Majoras opened the hearings on June 20, 2006. They were joined by two of the leading antitrust and industrial organization scholars in the United States, Professor Herbert Hovenkamp and Professor Dennis Carlton (now the Division's Deputy Assistant Attorney General for Economics). Professors Hovenkamp and Carlton discussed the difficulties involved in identifying monopolists, defining the types of single-firm conduct that should be prohibited under the antitrust laws, and crafting remedies that improve competition.

Hearings held since June 2006 have focused on predatory pricing, predatory buying, refusals to deal, tying, exclusive dealing, bundled loyalty and market share discounts, misleading and deceptive practices, market definition and market power, and remedies. There have also been hearings on foreign antitrust enforcement, empirical studies, business history and strategy, and business and academic perspectives on single-firm conduct. The final hearing, tentatively scheduled for late April 2007, will both review prior hearings as well as deal with the appropriateness of general standards for evaluating single-firm conduct under Section 2.

Through these hearings and the follow-on efforts by the agencies, the agencies seek to provide businesses, the antitrust bar, and foreign enforcers with transparent, objective, and economically sound frameworks for identifying single-firm conduct under Section 2 that harms competition that may be condemned without chilling procompetitive conduct that benefits consumers and businesses.

*Antitrust Division Front Office Staff. **Seated** (L-R): Gerald Masoudi, Thomas Barnett, Scott Hammond. **Front Row** (L-R): Robert Kramer, Helen Agostino, Jacqueline Lincoln, Bruce McDonald, David Meyer, Dennis Carlton, Marc Siegel, Ann O'Brien, Patricia Brink, Paula Wright, Belinda Barnett. **Back Row** (L-R): Frederick Young, Robert Potter, Anne Marie Cushmac, James O'Connell, Aaron Hoag, Douglas Ross, Thomas King, Hill Wellford, James Fredricks, Edward Hand.*

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FIELD OFFICES

Each of the Division's field offices handles criminal matters within its respective area and serves as the Division's liaison with U.S. Attorneys, state attorneys general, and other regional law enforcement agencies. The field offices also handle national and international matters that arise within their territories.

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Assistant Chief: James Kurosad
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Chicago

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Assistant Chief: Frank Vondrak
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Cleveland

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Assistant Chief: Michael Wood
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Dallas

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Assistant Chief: Mitchell Chitwood
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New York

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Philadelphia

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Antitrust Division: *www.usdoj.gov/atr*

OBTAIN DOCUMENTS

Law firms and the general public may obtain paper copies of Division documents from the Antitrust Documents Group:

Phone: 202-514-2481
Fax: 202-514-3763
E-mail: *atrdocs.grp@usdoj.gov*

WEB LINKS

The following links may be used to obtain Division documents online:

Public Court and Administrative Filings:
http://www.usdoj.gov/atr/cases.html

Guidelines and Policy Statements:
http://www.usdoj.gov/atr/public/guidelines/guidelin.htm

Speeches:
http://www.usdoj.gov/atr/public/speeches/speeches.htm

Congressional Testimony:
http://www.usdoj.gov/atr/public/testimony/testimon.htm

Business Review Letters:
http://www.usdoj.gov/atr/public/busreview/letters.htm

PRESS RELEASES

Copies of Division press releases (from 1992 to the present) can be found online at: *http://www.usdoj.gov/atr/public/press_releases/2007/index07.htm*

Media may contact the Office of Public Affairs at:

Phone: 202-514-2007
Fax: 202-514-5331

Law firms and the general public should contact the Antitrust Documents Group to obtain other documents.

ASSISTANT ATTORNEY GENERAL AND DIVISION STAFF

For contact information for the Office of the Assistant Attorney General and the Division's sections and field offices, see *http://www.usdoj.gov/atr/offices2.htm*.

Use the following link to obtain phone numbers for Division employees:

http://www.usdoj.gov/atr/contact/phoneworks.htm

Comments

To comment on past or ongoing investigations, send an e-mail to antitrust.atr@usdoj.gov.

Report Possible Antitrust Violations

If you have information about a possible antitrust violation or potential anticompetitive activity please contact the Division:

E-Mail:
antitrust.complaints@usdoj.gov
Phone: 1-888-647-3258
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