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FEDERAL TRADE COMMISSION PUBLIC WORKSHOP POSSIBLE ANTICOMPETITIVE EFFORTS TO RESTRICT COMPETITION ON THE INTERNET: RETAILING

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When the Commission conducted its hearings on B2B exchanges, one of its conclusions was that the antitrust issues involved "old wine in new bottles." That same categorization seems applicable to the issues being explored in the workshop on anticompetitive efforts to restrict competition on the Internet involving retailing. I want to focus on the antitrust issues for both manufacturers/suppliers ("manufacturers") and dealers/retailers ("dealers") that may be raised by collective efforts by dealers to restrict competition from discounters who are selling on the Internet. In this area, the issues are similar to the issues the Commission and the courts have addressed in other contexts.

The FTC was actually in the forefront of these issues in its case against a group of 25 automobile dealers in the Pacific Northwest who organized a boycott designed to restrict supplies to a competing retailer, which was offering cars at discount prices over the Internet. *In the Matter of Fair Allocation System, Inc.*, FTC Docket No. C-3832 (1998). The discounter offered "no haggle" pricing, and offered to sell Chrysler automobiles at firm, low, predetermined prices—marketing over the Internet. Other dealers in Washington, Oregon, and Montana organized Fair Allocation System, Inc. and asked Chrysler to allocate vehicles to dealers based on each dealer's expected sales to local residents, *i.e.* excluding Internet sales to non-residents. The objective was to deprive the discounting Internet dealer of sufficient cars to supply a multi-state area. FAS threatened to refuse to sell certain Chrysler cars and to limit warranty service unless its demands were met. Rather than capitulate to these demands, however, Chrysler brought the FAS' conduct to the attention of the FTC, which brought an enforcement action and secured a consent decree against FAS.

The *Fair Allocation System* case illustrates the risks to both manufacturers and dealers of efforts to boycott discounters. Such collective actions by competing dealers convert a distribution restriction from a vertical restraint into a horizontal restraint that may be evaluated under per se rules rather than the rule of reason. There is an obvious risk to the colluding dealers, but a manufacturer can inadvertently become involved in such conduct and therefore equally liable. Chrysler avoided liability by not agreeing to the FAS demands and instead taking

its case to the FTC.[1] But too often manufacturers respond to such demands by dealers in ways that involve the manufacturer in unlawful conduct. This is illustrated by federal court cases involving similar conduct, as outlined below.

In general, a manufacturer has the right to select the dealers with which it chooses to do business, and the terms on which it will do so. Many cases have involved termination of discounting dealers in response to dealer complaints. The courts generally find that an agreement to terminate the discounting dealer cannot be inferred merely from such complaints, and that there must be evidence of agreement between the complaining dealer and the manufacturer that excludes the possibility that the manufacturer acted unilaterally. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752 (1984). In *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court imposed the additional requirement that the agreement between the manufacturer and the complaining dealer must do more than merely affect resale prices—there must be agreement on specific prices or price levels. 485 U.S. 717, 735-36 (1988). In the wake of *Monsanto* and *Sharp*, most cases by terminated dealers have been unsuccessful.

However, dealers also may be able to avoid the *Sharp* and *Monsanto* rules if they can prove the existence of a horizontal agreement (as opposed to a vertical agreement) among competing dealers.[2]

For example, in *Lovett v. General Motors Corp.*,[3] plaintiffs alleged that various competing dealers conspired with GM to reduce the number of cars GM supplied to the plaintiff. The district court reasoned that the *Sharp* rule of reason analysis applied only in *vertical* restraint cases, in contrast to the horizontal conspiracy it believed existed between GM and the competing dealers. It concluded, therefore, that *Sharp* was inapplicable and that the *per se* rule was properly applied. Without addressing whether the arrangement was horizontal (*per se* analysis) or vertical (rule of reason analysis), the Eighth Circuit reversed the district court's denial of GM's JNOV motion on the grounds that the dealer failed to produce evidence showing that GM's conduct was as consistent with permissible competition as with illegal conspiracy. Thus, GM avoided liability by distancing itself from the dealer's arrangement – just as Chrysler did in *Fair Allocation System*.

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1 The FTC also challenged a similar boycott in a non-Internet context. A 1995 FTC consent decree also involved an attempted boycott of a discounter organized by retailers. *In the Matter of New England Juvenile Retailers Ass'n*, 5 Trade Reg. Rep. (CCH) ¶ 23,689 (FTC 1995).

2 *See, e.g., United States v. General Motors Corp.*, 384 U.S. 127, 144-45 (1966) (horizontal agreement among dealers along with vertical agreement between dealers and a manufacturer to boycott another dealer constituted a per se illegal horizontal restraint).

3 769 F. Supp. 1506 (D. Minn. 1991), *aff'd on certain grounds*, 975 F.2d 518 (8th Cir. 1992), *rev'd on certain grounds*, 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994).

In a similar case, the Eighth Circuit held that car dealers who pressured manufacturers to preclude competing dealers from entering an automall were acting pursuant to a per se illegal horizontal conspiracy. *ES Development Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547 (8th Cir. 1991). The dealers, who sold cars of many different manufacturers, retained a single lawyer, who sent identical letters to each manufacturer seeking to deprive the automall of car supplies.

In *Big Apple BMW v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993), the Third Circuit relied in part on proof of a horizontal conspiracy among competing BMW dealers to deny plaintiff a BMW franchise because of plaintiff's reputation as a discount/high volume dealer. In the court's view, this made *Sharp* irrelevant.

Similarly, in *Alvord Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1691 (1995), the Third Circuit reversed a grant of summary judgment based on its conclusion that a reasonable jury could find a horizontal conspiracy among members of an association of full-service wallpaper dealers and manufacturers to compel manufacturers to boycott discount wallpaper dealers. The Third Circuit considered whether the actions of the association's officers could be imputed to the association as a whole and constitute collective action by the retail dealers. The court concluded that a jury could find that a statement by one of the association's officers constituted a threat by the association (and its members) to boycott manufacturers who supplied the discounting dealers. *Accord, e.g., AAA Venetian Blind Sales, Inc. v. Beaulieu of America*, 1995 U.S. Dist. LEXIS 11243 (W.D. Mich. 1995) (district court denied defendants' motion for summary judgment on the ground that there was sufficient evidence of conspiracy among competing dealers and the manufacturer to cut off supplies to the plaintiff/dealer); *Hewlett-Packard Co. v. Arch Assoc. Corp.*, 1995-2 Trade Cas. (CCH) ¶ 71,201 (E.D. Pa. 1995) (dealer adequately alleged conspiracy among manufacturer and its dealers to restrict sales by each dealer to particular areas).

In *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993), the court found a horizontal agreement by boat dealers to exclude a discounting dealer from two boat shows was a per se unlawful agreement to fix prices. The participation of the boat show operator of the in the conspiracy did not make it a vertical conspiracy.

By contrast, in *Thompson Everett, Inc. v. National Cable Advertising L.P.*, 850 F. Supp. 470, 480 (E.D. Va. 1994), the court found that "frequent business contact among the defendants (who were horizontal competitors), joint presentations to industry trade groups were insufficient evidence of concerted action by the defendants. *Accord, e.g., Nichols Motorcycle Supply, Inc. v. Dunlop Tire Corp.*, 913 F.Supp 1088 (N.D. Ill. 1995) (dealer's claim that it was terminated pursuant to a conspiracy among the manufacturer and competing dealers judged under the rule of reason; no adverse effect on competition shown).

In *Lake Hill Motors, Inc. v. Yamaha Motor Co.*, 1999-2 Trade Cas. (CCH) ¶72,653 (N.D. Miss. 1999), the plaintiff alleged that Yamaha's threat to deny advertising expenses under its cooperative advertising program constituted a horizontal conspiracy. The district court rejected the plaintiff's claims and ruled that the alleged conspiracy was properly reviewed as a vertical agreement.

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Ms. McDavid is a partner in the Washington, D.C. office of Hogan & Hartson L.L.P., where she focuses on antitrust and trade regulation litigation and counseling, with a particular emphasis on government investigations, litigation, and legislation. She has served as counsel in a number of significant antitrust matters, including for Mobil Corporation in its merger with Exxon, for DaimlerChrysler, Ford, and General Motors in the formation of their B2B ventures Covisint and OEConnection, for American Express in the Justice Department's successful litigation against Visa and MasterCard, for General Dynamics in several defense industry transactions, for Carnival Corporation in its proposed acquisition of P&O Princess, and for BT plc in transactions with MCI.

She is a Past Chair of the Section of Antitrust Law of the American Bar Association. She was previously Chair (1999-2000), Chair-Elect (1998-1999), Vice Chair (1997-1998), Program Officer (1994-1997), a member of the Antitrust Section Council (1991-1994), and Chair or Vice Chair of the Antitrust Section's Committees on Franchising, Section 2 of the Sherman Act, and Civil Practice and Procedure (1985-1991). She was a member of the Governing Committee of the ABA Forum on Franchising (1991-1997) and Chair of the 1993 Annual Forum on Franchising. She is also a member of the Antitrust Council of the U.S. Chamber of Commerce. She is the author or co-author of many books involving antitrust law, including the ANTITRUST EVIDENCE HANDBOOK, MERGERS & ACQUISITIONS, and ANTITRUST & TRADE ASSOCIATIONS PRACTICE GUIDE, all published by the ABA Antitrust Section. Her published articles include *How to Avoid Negotiations on Second Requests*, *Antitrust Law: EU Merger Regulation, Globalization and the EU, Globalization of Premerger Notification and Review: Practical Problems and Solutions, Antitrust Intersection with IP, The Revival of Franchise Antitrust Claims*, *The Defense of Mergers in the Defense Industry, Antitrust Issues in Health Care Reform,* and *The 1992 Horizontal Merger Guidelines: A Practitioner's View of Key Issues in Defending a Merger.* She is a frequent speaker on antitrust issues.

Ms. McDavid was a member of the Advisory Team to the Transition Team for the Federal Trade Commission for the Bush Administration in 2001 and was a member of the Transition Team for the FTC for the Clinton Administration in 1992. She also served as Co-Chair of the ABA Antitrust Section's Task Force on Competition Policy, which provided advice on antitrust issues to the Clinton Administration. In 1993-94, she was a member of the Department of Defense Antitrust Task Force, which was appointed by the Secretary and the General Counsel of the Defense Department to advise on antitrust issues involved in defense

industry mergers and joint ventures. In 1996-97, she was a member of a Department of Defense Task Force to evaluate issues raised by Vertical Integration and Supplier Decisions among defense contractors.

Ms. McDavid received her J.D. from Georgetown University Law Center in 1974, where she was an editor of the *Georgetown Law Journal*, and her B.A. with honors from Northwestern University in 1971. She joined Hogan & Hartson in 1974. Ms. McDavid is a member of the District of Columbia Bar, and is admitted to practice before the United States Supreme Court and several other federal courts.

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