ANTITRUST BULLETIN

Winter 2013 | Vol. 5, No. 1

Inside This Issue

Antitrust Practice Group Contacts

K. Craig Wildfang
800 LaSalle Avenue
2800 LaSalle Plaza
Minneapolis, MN 55402
612.349.8554 (phone)
612.339.4181 (fax)
kcwildfang@rkmc.com

Stacey P. Slaughter
800 LaSalle Avenue
2800 LaSalle Plaza
Minneapolis, MN 55402
612.349.8289 (phone)
612.339.4181 (fax)
spslaughter@rkmc.com

Edition Editor

Amelia N. Jadoo
800 LaSalle Avenue
2800 LaSalle Plaza
Minneapolis, MN 55402
612.349.8296 (phone)
612.339.4181 (fax)
anjadoo@rkmc.com

We would like your feedback – see publication survey on page 7.

NEW DEVELOPMENTS

U.S. Supreme Court Will Decide Whether Patent Agreements That Postpone the Sale of Generic Drugs Violate Antitrust Laws

The U.S. Supreme Court agreed to hear the Federal Trade Commission's recent appeal of a case challenging so-called "reverse payment" or "pay-for-delay" settlements—a hotly debated antitrust issue for over a decade. These types of patent litigation settlements include payments from the patent holder to an allegedly infringing generic drug maker to abandon their patent challenges and delay the sale of their generic versions. The Supreme Court will decide whether these types of agreements are agreements between competitors to not compete, or are procompetitive because they permit generic drugs on the market before the patent expires on the branded drug without lengthy litigation. Specifically, the Court will squarely address whether these agreements are per se lawful unless the underlying patent litigation was a sham or obtained by fraud, or whether they are presumptively anticompetitive and unlawful—two conflicting views adopted by lower courts.

Direct Purchasers Have Standing to Bring Antitrust Claims Based on the Fraudulent Procurement of a Patent

The Federal Circuit recently held in *Ritz Camera & Image, LLC v. Sandisk Corp.*, that direct purchasers have standing to bring antitrust claims alleging that a patent owner obtained a monopoly by fraudulently obtaining a patent. These claims, frequently referred to as "*Walker Process*" claims, are based on a 1965 U. S. Supreme Court decision where the Court held that antitrust liability may attach where a party uses a fraudulently procured patent to obtain a monopoly. The issue in *Ritz Camera & Image, LLC v. Sandisk Corp* was whether a direct purchaser could bring such a claim. The Federal Circuit held that *Walker Process* did not prohibit direct purchasers from such claims.

The Interplay between Antitrust and Patent Laws as the Wireless Device Industry Evolves

With the evolving wireless device industry, the Department of Justice has become even more concerned with the unlawful use of patent rights to gain unfair competitive advantage. The DOJ has taken an active role in ensuring that patent owners do not participate in anticompetitive behavior by charging excessive fees, demanding unreasonable licensing terms, or denying access to the patented technology. It has already investigated several large patent portfolios relating to wireless mobile devices including smartphones and tablets. These investigations include Rockstar Bidco and its acquisition of 6,000 patents and patent applications from Nortel as well as Google's acquisition of Motorola Mobility. The DOJ continues to carefully review the acquisition of patent portfolios and urges standard-setting organizations to create fair standards.

Ninth Circuit Clarifies Scope of the "Direct Purchaser" Rule in Federal Antitrust Claims

Laura E. Nelson

The Ninth Circuit recently reviewed, and clarified, the scope of the limited exceptions to the *Illinois Brick* antitrust standing rule. In 1977, the U.S. Supreme Court announced in *Illinois Brick Co. v. Illinois*, that generally speaking, an indirect purchaser that claims to have paid an overcharge passed on by the direct purchaser has no standing to sue under the Clayton Act. The Supreme Court's intent was "(1) to eliminate the complications of apportioning overcharges between direct and indirect purchasers . . . ; (2) to eliminate multiple recoveries . . . ; and (3) to promote the vigorous enforcement of the antitrust laws . . . ."[1] In *In re ATM Fee*, the Ninth Circuit, noting that exceptions to *Illinois Brick* should be narrowly construed, analyzed both the co-conspirator exception and the ownership/control exception and found that neither saved the plaintiffs from running into the "*Illinois Brick* wall."

The plaintiffs in *In re ATM Fee* alleged that the defendants – several ATM card-issuing banks and an ATM network – violated Section 1 of the Sherman Act by conspiring to fix the interchange fee that banks operating ATMs are required to pay to card-issuing banks when a cardholder withdraws money from an ATM. As cardholders, the plaintiffs claimed injury on the theory that the banks passed on the inflated fixed-interchange fees by increasing the "foreign ATM" fee that cardholders pay. The defendants sought and were granted summary judgment on the basis that the fee that was the subject of the conspiracy was paid by the banks and therefore the plaintiffs were indirect purchasers who lacked standing. The plaintiffs argued unsuccessfully that, although they did not pay the allegedly-fixed prices directly, they had standing because they purchased from co-conspirators and that there was no realistic possibility that the direct purchasers—the banks—would sue.

The Ninth Circuit first turned to the co-conspirator exception. The plaintiffs claimed that their purchase of a product that contained the price-fixed product as a component directly from a co-conspirator created antitrust standing under the co-conspirator exception to *Illinois Brick*. In finding that it did not apply, the Court held that the co-conspirator exception applies only in cases where the indirect-purchaser plaintiff purchased the allegedly price-fixed product itself, not a final product containing the allegedly price-fixed product, from a member of the conspiracy. As the Court noted, the requirements that the plaintiff purchase the price-fixed product, and purchase it from a member of the conspiracy, mean that this exception is not really an exception at all. Under the constraints set forth by the Ninth Circuit, plaintiffs that would qualify under the "co-conspirator exception" are in fact direct purchaser plaintiffs.

The Ninth Circuit then turned to the ownership/control exception. The seminal case on the ownership/control exception is *Royal Printing Co. v. Kimberly Clark Corp.*[2] Under

Royal Printing and its progeny, the Ninth Circuit has held that where the direct purchaser is under the control of a co-conspirator, such as a division or a subsidiary, the indirect purchaser has standing to sue because applying *Illinois Brick* "would eliminate the threat of private enforcement" as the co-conspirator parent would forbid the direct purchaser from bringing suit.[3] In *In re ATM Fee,* the direct purchasers were not divisions or subsidiaries of the co-conspirators. The plaintiffs argued that at least some of the co-conspirators controlled the direct purchasers. The Court noted that there is no statutory definition of control and therefore applied its ordinary meaning: "to exercise restraint or direction over; dominate, regulate, or command," or to have the "power or authority to guide or manage." The Court found that because the direct purchasers were publicly owned, and the co-conspirators only owned small percentages of them, they had insufficient interest to control the direct purchaser. As such, the exception did not apply.

The Court noted that there is no statutory definition of control and therefore applied its ordinary meaning: "to exercise restraint or direction over; dominate, regulate, or command,"

The plaintiffs also argued that as the purpose of the ownership/control exception is to provide indirect purchasers with an avenue to sue for antitrust violations, where "there is no realistic possibility that the direct purchaser will sue its supplier" the exception should apply. The Ninth Circuit disagreed. The Court noted that although in *Freeman v. San Diego Ass'n of Realtors*[4] it had discussed the lack of a realistic possibility that the direct purchaser would sue as a basis for indirect purchaser standing, it had not created a separate exception to *Illinois Brick*. Rather, the holding in *Freeman* was premised on the existing ownership/control and co-conspirator exceptions. The Court further noted that the Supreme Court has been indifferent to how likely the direct purchaser actually is to sue. The Ninth Circuit declined to create a fourth exception or to extend the *Royal Printing* exception to cases where the seller does not own or control the direct purchaser.

In the wake of *In re ATM Fee,* we will likely see increased challenges to standing in the Ninth Circuit. Antitrust defendants will likely argue that in addition to the clarification of the co-conspirator exception and the rejection of a fourth exception, the ownership/control exception to *Illinois Brick* has also been narrowed. However, at least two Courts have addressed this issue and both found that the *ATM Fee* opinion does nothing to change the *Royal Printing* standard.[5]

---

1. *In re ATM Fee*, 686 F.3d 741, 748.
2. 621 F.2d 323 (9th Cir. 1990).
3. 621 F.2d at 326 n.7.
4. 322 F.3d 1133 (9th Cir. 2003).
5. *See In re CRT Antitrust Litigation,* C-07-5944-SC MDL No. 1917 (N.D. Cal. Nov. 29, 2012); *In re TFT-LCD (Flat Panel) Antitrust Litigation,* M-07-1827-SI MDL 1837 (N.D. Cal. Nov. 19, 2012).

Laura E. Nelson
lenelson@rkmc.com

Laura represents and advises plaintiffs and defendants in antitrust, trademark, contract, trade secret, and other complex litigation matters. Prior to joining Robins, Kaplan, Miller & Ciresi L.L.P., she was a Law Clerk to the Honorable Kathryn L. Quaintance, Hennepin County District Court, Fourth Judicial Circuit. Laura received her J.D., *cum laude,* from the University of Minnesota Law School in 2003.

Interest-Rate Ruse: Understanding the Libor Scandal

Stacey P. Slaughter
Thomas F. Berndt

Aside from the recent mortgage crisis, the alleged manipulation of the London Interbank Offered Rate ("Libor") by a panel of the world's leading banks is one of the most significant financial frauds of the past decade.

Libor is the average interest rate at which a panel of the world's largest banks report they could borrow unsecured funds from other banks in the London wholesale money market for maturities ranging from overnight to one year. Libor is calculated for 10 different currencies and is a primary interest-rate benchmark used to price numerous financial instruments, including mortgage loans, student loans, credit card debt, bonds, and various derivative products. The value of derivatives and other financial products tied to Libor is estimated to be at least $350 trillion.

Between 2007 and 2010, the U.S. dollar Libor panel consisted of 16 banks: Bank of America, Bank of Tokyo-Mitsubishi, Barclays Bank, Citibank, Coöperatieve Centrale Raiffeisen-Boerenleenbank, Credit Suisse, Deutsche Bank, HBOS, HSBC, JPMorgan Chase, Lloyds Banking Group, Norinchukin Bank, Royal Bank of Canada, The Royal Bank of Scotland Group, UBS, and WestLB AG.

At approximately 11:00 a.m. (GMT) each morning, each panel bank reported its estimated costs to "borrow funds, were [it] to do so by asking for and then accepting interbank offers in reasonable market size, just prior to 11.00 London time." Libor is calculated by discarding the four lowest and four highest reported rates, and averaging the remaining eight.

Beginning in August 2007, and corresponding with the financial crisis, Libor began to behave erratically and became decoupled from other financial indicators that had historically functioned as benchmarks.

While Libor has historically remained high during times of financial uncertainty — reflecting banks' reluctance to lend unsecured funds to one another without receiving a higher risk premium — the U.S. dollar Libor remained surprisingly low during the financial crisis. This led to concern that Libor's abnormal behavior was the result of manipulation. Economists speculated that both the desire to appear financially sound and the potential to profit from Libor-based holdings incentivized panel banks to artificially suppress Libor.

In 2011, domestic and foreign regulators began to investigate whether certain panel banks had manipulated Libor. In March 2011, the *New York Times* reported that UBS, a member of the USD Libor panel, received subpoenas from the SEC, the CFTC, the DOJ, and the Japanese Financial Supervisory Agency — all regarding its Libor submissions.

In July 2011, investigators expanded their probe to include yen-based Libor and the Tokyo Interbank Offered Rate ("Tibor"). In exchange for cooperating with the investigation, UBS disclosed in a July 26, 2011, SEC filing that it had "been granted conditional leniency or conditional immunity from authorities . . . including the Antitrust Division of the DOJ, in connection with potential antitrust or competition law violations related to submissions for Yen Libor and Euroyen Tibor." The DOJ Antitrust Division's conditional leniency program is reserved for corporations reporting "illegal antitrust activity."

On February 16, 2012, the *Wall Street Journal* reported that a "cooperating bank, which unnamed sources identified as UBS AG told Canadian investigators that those involved in the alleged scheme [to manipulate Libor] 'were able to move' the yen Libor at times between 2007 and June 2010." Notably, from 2006 to 2009, thirteen of the sixteen banks on the USD Libor panel were also on the yen-based Libor panel.

By August 2011, the investigation expanded to include panel members HSBC, Barclays, Royal Bank of Scotland, and Lloyds Banking Group.

In June 2012, as part of a non-prosecution agreement, Barclays agreed to pay to U.S. and U.K. regulators $453 million. In that agreement, Barclays admitted that "[o]n at least a few occasions from approximately September 2007 through at least approximately May 2009, Barclays submitted improperly low Libor contributions." The agreement cites numerous internal Barclays emails demonstrating that its Libor submitters knowingly submitted false rates at the request of Barclays traders and were instructed to stay "within the pack" by submitting rates "in line" with other panel banks.

In December, 2012, UBS paid $1.5 billion to settle charges of Libor manipulation with U.S., U.K., and Swiss regulators. In connection with the settlement, a Japanese subsidiary of UBS, UBS Securities Japan, agreed to plead guilty to U.S. criminal charges of felony wire fraud. U.S. authorities also unsealed a criminal complaint against two former UBS traders for their alleged role in the scheme. As part of the settlement, UBS admitted that "[f]rom as early as 2001 through at least June 2010, . . . [UBS] derivatives traders requested, and sometimes directed, that certain UBS LIBOR, Euroyen TIBOR, and Euribor submitters submit benchmark interest rate contributions that would benefit the traders' trading positions, rather than rates that complied with the definitions of LIBOR, Euroyen TIBOR and Euribor."

The cumulative effect of the alleged Libor manipulation is substantial. Academic articles suggest that Libor was underpriced as follows:

From	To	Manipulation
Aug. 2007	Aug. 2008	12 basis points
Sept. 2008	Dec. 2008	100 basis points
Jan. 2009	Mar. 2010	40 basis points

Considering that an estimated $350 trillion of derivatives are tied to Libor, manipulating the benchmark by up to 100 basis points (or 1%) can improperly shift enormous amounts of wealth.

> *Continued*

In addition to government scrutiny, numerous civil lawsuits alleging Libor manipulation have been filed against panel banks.

Many of these actions — consisting of both putative class actions and individual suits — have been consolidated into multidistrict litigation proceedings in the United States District Court for the Southern District of New York.

The plaintiffs—holders of Libor-tied instruments—allege that, in knowingly submitting false borrowing rates, panel banks violated the Sherman Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Commodities Exchange Act ("CEA"), and numerous state laws. Defendants in the Libor MDL have filed joint motions to dismiss these claims.

Defendants attack Plaintiffs' Sherman Act claims by arguing: (1) Plaintiffs do not plausibly allege a conspiracy, (2) Plaintiffs fail to allege a restraint of trade, (3) Plaintiffs have not suffered an "antitrust injury," and (4) Plaintiffs who are indirect purchasers lack antitrust standing. Given that nearly all of the current plaintiffs assert antitrust claims, the court's ruling on these issues will significantly impact the course of the litigation.

With regard to Plaintiffs' RICO claims, Defendants cite the Private Securities Litigation Reform Act, which states that claims actionable under the securities laws cannot be brought under RICO. Thus, to the extent Plaintiffs allege fraud in connection with the sale of securities, they are precluded from bringing RICO claims.

Lastly, Defendants attack both Plaintiffs' RICO and CEA claims on the grounds that these two statutes do not apply to conduct occurring outside of the United States. Plaintiffs respond by arguing that significant parts of the alleged conspiracy occurred within the United States. Not only are three of the defendant banks U.S. based, but also Plaintiffs' CEA claims are based on instruments purchased on the Chicago Mercantile Exchange.

While more than ten Libor-related suits have already been filed, a large number of potential plaintiffs are likely awaiting the court's ruling on the pending motions to dismiss. As the litigation continues, one can expect institutional investors with large claims to opt out of class actions and pursue individual relief.

Though much is yet unknown regarding the scope and innerworkings of the alleged conspiracy, the sheer magnitude of financial products tied to Libor gives this scandal the potential to be of historic significance.

Stacey P. Slaughter
spslaughter@rkmc.com

Stacey is a member of the complex business litigation, antitrust and trade regulation, and financial litigation practice groups. Before joining the firm, she clerked in the United States District Court for the District of Minnesota for Judge Michael J. Davis and Judge Paul A. Magnuson. She received her J.D., *cum laude*, from the University of Minnesota Law School.

Thomas F. Berndt
tfberndt@rkmc.com

Tom represents corporations and individuals in complex commercial disputes with a focus on financial litigation, class actions, and product liability. He received his J.D., *summa cum laude*, from William Mitchell College of Law.

The ***Antitrust Bulletin*** is distributed by the Robins, Kaplan, Miller & Ciresi L.L.P. Antitrust and Trade Regulation Group on a quarterly basis. As we prepare for the next issue, we would like your input to ascertain if we are meeting your expectations for this publication. Please take a moment to answer the following questions and return your responses in the postage-paid envelope provided. Thank you for your input.

TEAR OFF HERE

1. **What type of organization do you work for?**
   - ☐ Individual or Sole Proprietor
   - ☐ Corporation or S-Corporation
   - ☐ Partnership or an LLC
   - ☐ Non-Profit

2. **What is your title?**

   ____

3. **How often do you read the Bulletin?**
   - ☐ I read every publication
   - ☐ I read most of the publications
   - ☐ I read none of the publications

4. **How much of each publication do you read?**
   - ☐ Every page in detail
   - ☐ I skim some of the pages
   - ☐ Only the "short" articles that appear in the beginning
   - ☐ Only the longer articles

5. **The topics discussed in each publication generally**
   - ☐ Apply to my practice/industry and are helpful
   - ☐ Apply to my practice/industry but are not helpful
   - ☐ Do not apply to my practice/industry

TEAR OFF HERE

6. **Length of publication**
   - ☐ I wish the publication were longer
   - ☐ I wish the publication were shorter
   - ☐ The publication is about the right length

7. **What content would you like to see more (or less) of?**

   ____

   ____

   ____

8. **Would you prefer to receive the Antitrust Bulletin electronically?**
   - ☐ Yes (provide email)

     ____
   - ☐ No
   - ☐ I'd like both

9. **Please provide your contact information (optional)**

   Name ________________________

   Company/Organization ________________

   Address ________________________

   City, State, Zip __________________

   Phone ________________________

Thank you again.