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FOCUS ON THE FEDERAL TRADE COMMISSION

Supreme Court Decision in *FTC v. Actavis* Provides Guidance on Pay-for-Delay

The Supreme Court heard arguments in March on the *FTC v. Actavis* case concerning "reverse-payment patent settlements" also known as "pay-for-delay" agreements. The Justices, at oral arguments, seemed to focus on how the inquiry into any challenged settlement would take place. In particular, the Justices asked whether courts will treat the agreement as presumptively legal or illegal, whether a district court judge must make a determination of the validity of the patent in order to determine if a reverse-payment settlement is anticompetitive, and whether courts should view antitrust claims under the "quick look" or "rule of reason" analysis. In an opinion released on June 17, the Court reversed the Eleventh Circuit, which had held that the anticompetitive effects of the settlement were immune from antitrust attack if they fell within the scope of the patent (that is, if the settlement did not provide for anticompetitive impacts broader than what the patent allowed, such as extending the exclusivity period beyond the patent term). The Supreme Court ruled that reverse-payment settlements, such as the one in this case, are not presumptively legal or illegal, but that litigants may seek to prove that a particular settlement violates the antitrust laws under a rule of reason analysis.

DOJ Prevails on Liability in eBooks Antitrust Case in the Southern District of New York

Judge Denise Cote ruled on July 10 that Apple Inc. had conspired with five book publishers, serving as the "hub" in a hub-and-spoke conspiracy that resulted in an agreement to set prices above the $9.99 level that Amazon had set when it launched the Kindle eBook reader. After settlements by all five publishers (Hachette, HarperCollins, MacMillan, Penguin, and Simon & Schuster) Apple was the only remaining defendant as the bench trial began in early June. In the 160 page ruling, the court concluded that Apple and the publishers conspired to eliminate retail price competition and that Apple's orchestration allowed the conspiracy to succeed. Attention now turns to a trial on potential damages.

Dawn Raids in Oil-Manipulation Investigation in Europe

European antitrust regulators conducted dawn raids of several oil companies investigating claims that the companies rigged oil prices on the continent. The European Commission confirmed that it had raided oil companies in the United Kingdom, the Netherlands, and Norway. The EC did not name the affected companies but BP (United Kingdom), Shell (Netherlands), Statoil (Norway), and the oil price reporting agency Platts have all confirmed that they are being investigated. The focus of the investigation is the "Market-on-Close" price assessment process run by Platts and whether the large oil companies prohibited competitors from participating in the price assessment process going back more than ten years.

Commissioner Wright Proposes Guidance on Section 5 Scope

FTC Commissioner Joshua Wright, one of two Republican commissioners, recently proposed his own policy statement on the scope of FTC authority under Section 5. Wright criticized the FTC for not offering an explicit definition of the meaning of unfair competition. To combat this, Wright suggested two main factors to consider when evaluating conduct: 1) whether the conduct harms or is likely to significantly harm competition, and 2) whether it lacks "cognizable efficiencies." Critics expressed concern that Wright's proposal would overreach in its attempt to limit authority to "effectively target plainly anticompetitive conduct."

Obama Nominates McSweeney to FTC

President Obama nominated Terrell McSweeney, a former staff member of Vice President Joe Biden, to the FTC in June. Ms. McSweeney is currently chief counsel for competition policy in the antitrust division of the Justice Department. She will be the fifth commissioner on the FTC and the third Democrat. The Commission had been split, 2-2, between the parties, since February, when FTC Chairman Jon Leibowitz stepped down.

FTC Congressional Testimony Reveals Areas of Focus in Antitrust Enforcement

Courtney T. Carter

On April 16, the FTC Chairwoman Edith Ramirez testified on behalf of the FTC before the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights. Chairwoman Ramirez discussed the FTC's current areas of focus, and its progress in rulemaking, regulatory efforts, and guidelines for competition. The FTC has focused its enforcement efforts on sectors that most directly affect consumers, such as health care, technology, and energy.

Ms. Ramirez testified that in 2012, the FTC challenged 25 mergers after it determined that these mergers would likely have anticompetitive effects on the market and consumers. As of the date of the testimony, the FTC has challenged 11 mergers in 2013, filing preliminary injunctions to prevent the merger from consummation in two instances. In addition, the FTC has updated its rules for a faster administrative process, which now has a similar timetable to a federal court challenge.

Areas of Primary Concern and Enforcement: Health Care, Technology, and Energy

Health Care

Chairwoman Ramirez testified that the FTC has prioritized competition in the health care markets due to the impact of health care costs on the average consumer and concern about rising health care prices. The Commission has focused on stopping anticompetitive health care mergers, such as hospital mergers where the local market prices may be impacted negatively due to insufficient competition for services. For example, in the past two years, the FTC has blocked hospital mergers in Toledo, Ohio and Rockford, Illinois, because of the likely anticompetitive impact of the mergers. Hospital mergers are not the sole concern in the market for health care services, however; the FTC also challenged the merger of a physician specialty group in March of 2013. In her testimony to Congress, Ramirez emphasized that it "will not stand in the way of legitimate provider collaboration that will reduce costs and improve the quality of care."

Ms. Ramirez expressed that another major focus in health care is the lack of competition for generic drugs. The FTC has focused on ending anticompetitive "pay for delay" agreements that often arise between a branded manufacturer and a generic manufacturer, whereby a branded manufacturer settles patent litigation by making a payment to the generic manufacturer, which keeps the generic of the market. The Supreme Court addressed this analysis in *FTC v. Actavis, Inc.* last term, holding that reverse-payment settlements are not presumptively illegal but may be litigated under antitrust laws under a rule of reason.

The Commission has also filed amicus briefs in antitrust litigation involving potentially anticompetitive abuses of REMS ("Risk Evaluation and Mitigation Strategies") safety protocols, preventing a generic from being able to access samples of brand products in order to begin bioequivalence testing required by Hatch-Waxman. The FTC also filed an amicus brief in litigation involving

product hopping, which occurs when a branded manufacturer makes small adjustments to the products in an effort to prevent generic substitution by pharmacies.

Technology

Ms. Ramirez also testified about the FTC's recent challenges to mergers and practices in technology markets. The Commission challenged a proposed merger between Integrated Device Technology, Inc. and PLX Technology, Inc., both of whom make the same complex integrated circuits used to transmit data in computer systems. The evidence reviewed by the FTC showed intense competition on price and innovation, and a post-merger market share of over 80 percent.

Ms. Ramirez also testified about the FTC's partnership with the DOJ to issue two important policy statements—the revised Horizontal Merger Guidelines and the Antitrust Enforcement Policy Statement Regarding Accountable Care Organizations, to better clarify U.S. antitrust policy and enforcement.

Conversely, the FTC recently closed its investigation into allegations that Google unfairly promoted its own content, referred to as "search bias." Here, Chairwoman Ramirez testified that the evidence revealed procompetitive benefits, such as the improvement of Google search results overall.

The FTC challenged Google's alleged misuse of standard essential patents ("SEPs"). Google acquired a patent portfolio and allegedly refused to license the SEPs to willing licensees, after manufacturers had developed products in reliance on commitments made earlier by Google. In exchange for settling the charges, Google agreed to not seek an injunction for infringement of its SEPs unless it has followed the process outlined by the FTC's proposed order, which encourages negotiation with potential licensees over disputed terms or ruling by a neutral third party.

Energy

Chairwoman Ramirez also presented testimony regarding the FTC's work in the energy sector. Last year, the FTC required Kinder Morgan, Inc., one of the largest transporters of natural gas in the U.S., to sell three natural gas pipelines and two gas processing plants to settle the FTC's charges that this acquisition in the Rocky Mountain region would have been likely anticompetitive. The FTC also required AmeriGas L.P. to amend its proposed acquisition of Energy Transfer Partners' Heritage Propane business, as AmeriGas and Heritage are two of the largest propane distributors in the U.S. The Commission charged that the acquisition would reduce competition and raise prices for consumers.

Ms. Ramirez noted also that the FTC monitors retail and wholesale gasoline prices daily, as a means of identifying unusual pricing activity as early as possible.

Joint Efforts with DOJ

Ms. Ramirez also testified about the FTC's partnership with the DOJ to issue two important policy statements—the revised Horizontal Merger Guidelines and the Antitrust Enforcement Policy Statement Regarding Accountable Care Organizations, to better clarify U.S. antitrust policy and enforcement. The two agencies also recently co-hosted two workshops, exploring the antitrust implications of most-favored nation clauses and patent assertion entities.

Chairwoman Ramirez's testimony makes clear that the FTC is focused on certain markets with a high level of consumer impact. Participants in these markets should be aware of this focus and be prepared for a high level of regulatory scrutiny.

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FTC Prevails at the Supreme Court and Fourth Circuit on Two State Action Cases

George D. Carroll

Two recent appellate decisions handed victories to the FTC as it fought to narrow the state action exemption to the enforcement of the federal antitrust laws. In *Federal Trade Commission v. Phoebe Putney Health System*, the Supreme Court clarified the standard for granting state and local governments' immunity from the antitrust laws. The case was a victory for the FTC, which overturned lower-court decisions that found immunity in a merger the Commission had challenged. In a case noting the still-fresh *Phoebe Putney* decision, the Fourth Circuit upheld a lower-court ruling in favor of an FTC challenge to a practice by the North Carolina Dental Board and in the process rejected the defense that the Dental Board was exempt from antitrust scrutiny under the "state action" doctrine. These victories for the FTC show that the "state action" exemption from antitrust enforcement is limited and they offer some further guidance for determining the boundaries and applicability of the exemption.

The antitrust laws exempt "state action" following a 1943 Supreme Court decision that reasoned that the antitrust laws do not prohibit a state or local government from passing laws that restrict competition within their local economies. *Parker v. Brown*, 317 U.S. 341 (1943). The scope of the "state action" exemption is not always clear, however. Governments may empower private actors to serve a state interest, though the state must clearly articulate and express that an anticompetitive restraint is state policy, and the state must supervise the policy. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The "state action" exemption applies to actions of local governments where harm to competition was "foreseeable" based on what the legislature authorized. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42-43 (1985). These recent appellate decisions came about after the FTC challenged conduct (including a merger) and the defendants raised the "state action" exemption as a defense.

Phoebe Putney

The Supreme Court's decision in *Phoebe Putney* concerned a merger between two hospitals in Georgia. The state of Georgia had empowered local governments to create hospital authorities that would aid in the provision of health care services to poor and underserved residents of the state.[1] Dougherty County and the City of Albany in Georgia created such an authority. This authority created private nonprofit corporations and these corporations leased Phoebe Putney Memorial Hospital.[2] Later, one of the corporations purchased the only other acute-care hospital in the area, the Palmyra Medical Center.[3] The FTC challenged this merger alleging that it would impermissibly reduce competition for acute care services in the county.

At the district court, the hospital prevailed after arguing that the "state action" exemption applied because the legislature had authorized the creation of the hospital authorities.[4] The Eleventh Circuit Court of Appeals agreed, stating that anticompetitive outcomes were foreseeable where the legislature created a program allowing for private proxies to operate hospitals and even acquire competing hospitals.[5] The Supreme Court took the case to determine whether 1) the legislature had indeed

authorized anticompetitive mergers, and 2) whether the hospital authority was sufficiently involved in the merger to allow the "state action" exemption to apply.[6]

In a unanimous opinion, the Court found that the Georgia legislature had not "clearly articulated and affirmatively expressed" that the hospital authorities were authorized to make anticompetitive acquisitions.[7] Justice Sotomayor wrote for the united court, which declined to decide the question of whether the hospital authority had sufficiently participated in the merger talks. The Court's opinion returns the case to the district court, even though the hospital merger had already been approved. While the practical ramifications of the decision remain unclear as to Dougherty County, the FTC's success at the Supreme Court overturned a broad interpretation of the "state action" exemption that may have implications throughout the United States.

NC Dentists

The FTC won another victory before the Fourth Circuit, which upheld a lower court decision in the FTC's favor.[8] The FTC challenged the North Carolina Dental Board—a state-created entity—which had begun sending cease-and-desist letters to non-dentist providers of tooth-whitening services that claimed these non-dentist providers were in violation of North Carolina law.[9] The FTC argued that this practice violated Section 1 of the Sherman Act because the dentists (putative competitors) on the dental board had agreed to the anticompetitive behavior. The North Carolina Dental Board argued, among other things, that the "state action" exemption applied to the board.

The test as to whether the "state action" exemption applies depends in part upon whether the entity is a "private" actor. Actions of the state itself are necessarily state action, whereas actions of a private entity in service of a state purpose or a state agency may not be. Whether a state agency is considered "private" may depend upon whether it is controlled by participants in the market it regulates. The Dental Board was made up of a majority of dentists, many of whom stood to benefit from increased business and pricing power if non-dentists were barred from the market for tooth-whitening.[10] The Fourth Circuit agreed with the FTC that the North Carolina Dental Board was not actively supervised by the state of North Carolina.[11]

The Fourth Circuit provided some additional discussion of the relationship of the state boards to the federal antitrust laws. The Court noted that the case was "about a state board run by private actors in the marketplace *taking action outside of the procedures mandated by state law* to expel a competitor from the market."[12] Moreover, the Court noted that active supervision of the board by the State of North Carolina would have entitled the board to "state action" exemption.

Conclusion

Both of these recent decisions are examples of the FTC successfully arguing a narrow scope of the "state action" exemption to the antitrust laws. Their success in these two cases suggests that the FTC will continue to take a critical view of actions it deems anticompetitive despite claims that the activities fall within the "state action" exemption to the antitrust laws. Parties seeking to take shelter under the "state action" exemption would be well advised to note the Court's endorsement of the principle that "state-action immunity is disfavored" in *Phoebe Putney* and the FTC's willingness to pursue cases in that realm.[13]

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1. *FTC v. Phoebe Putney Health Systems, Inc.*, 568 U.S. ___ (2013).
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*. (noting the presumption that a general grant of corporate power by a state to accomplish a goal means the state is authorizing actions that will accomplish the goals without being anticompetitive).
8. Robins, Kaplan, Miller & Ciresi L.L.P. represented the American Antitrust Institute, which submitted an amicus brief urging the Fourth Circuit to uphold the lower court decision.
9. *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 2013 U.S. App. LEXIS 11006 at *7 (4th Cir. May 31, 2013).
10. *Id*. at *15.
11. *Id*. at *21.
12. *Id*. at *37 (emphasis added).
13. *FTC v. Phoebe Putney Health System., Inc.*, 568 U.S. ___ (2013).

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FTC Decision May Provide Comfort to Competitor-Information Exchanges

Ryan W. Marth

A recent decision by an FTC Administrative Law Judge may provide reassurance to companies engaging in information exchanges with competitors, so long as certain accepted safeguards are employed. However, a consent decree in the same matter simultaneously casts doubt on the efficacy of those safeguards for the exchange of information amongst competitors. This outcome is noteworthy because the FTC was able to get a consent decree with two participants in an information exchange even though an Administrative Law Judge later found the exchange was not anticompetitive.

In the winter and spring of 2012, the FTC issued consent decrees with Star Products, Ltd. and Sigma Corporation to enjoin the companies from further participation in an information-exchange program with McWane, their competitor in the market for ductile iron pipe fittings ("DIPF"). DIPF describes a broad range of fittings that are used in pipeline systems that transmit sewage and drinking water for municipal and regional water authorities. The FTC alleged that twice in 2008, McWane orchestrated a conspiracy of the three DIPF producers to raise and maintain prices. According to the FTC, part of this conspiracy consisted of forming the Ductile Iron Fitting Research Association—DIFRA—in order to monitor each other's compliance with the agreement by collecting data on historical tons shipped.

The FTC alleged that this information exchange facilitated a price-fixing agreement among Star, Sigma, and McWane and was also a stand-alone violation of the antitrust laws. The consent decree was noteworthy because the FTC challenged an information exchange, even though the participants took many of the precautions that antitrust counselors typically advise companies to employ. For example, the participants provided only historical information to a third-party accounting firm, which aggregated the information before disseminating it to the participants, and made the information public after it was collected. None of the DIPF manufacturers included price with the information provided to the accounting firm. And even though DIPF was sold throughout the United States at varying prices, the data provided to the accounting firm did not include the location of sales. Under the consent decree, Star agreed not to participate in information exchanges unless fairly stringent safeguards were taken – the data had to be at least six months old, could be disseminated no more than twice annually, and price or cost data could not be exchanged if market shares reached certain thresholds.[1] Thus, one could have fairly concluded based on the FTC's consent decree with Star that information exchanges were at risk, even when traditional procedural safeguards were employed.

McWane, on the other hand, chose to fight the FTC's allegations and—at least with respect to the information-sharing allegations—prevailed.[2] After a full evidentiary hearing, Chief Administrative Law Judge Michael Chappell concluded that McWane did not engage in a conspiracy to fix prices on DIPF and that the information exchange was not illegal either as a facilitating device or as a stand-alone violation of the antitrust laws. Judge Chappell applied the factors for analyzing information exchanges set forth in *Todd v. Exxon*[3]—the time frame of data, the specificity of data, whether data were publicly available, and whether the data were discussed in joint meetings.[4]

Judge Chappell concluded that, unlike the company-specific data exchanged in *Todd*, DIFRA's data were sufficiently aggregated to minimize the utility of the data to monitor compliance with a conspiracy.[5] All tons-shipped data were grouped into six categories—2 different types of pipe and 3 different sizes for each type—despite the fact that they represented thousands of SKUs. Judge Chappell concluded that the DIFRA members could use the data to calculate their own market shares but not those of their competitors and that a company's own market share would not help one monitor adherence to an anticompetitive agreement.

> The consent decree was noteworthy because the FTC challenged an information exchange, even though the participants took many of the precautions that antitrust counselors typically advise companies to employ.

The age of the data also supported Judge Chappell's conclusion that the information exchange was not anticompetitive.[6] The DIFRA members exchanged only past data, which varied from three weeks to many months old and did not specify the date of particular sales. The DIFRA data were especially prone to delay and unpredictability because a large portion of sales were for public-works projects, which incur delays more frequently than private-sector projects.

Other precautions that DIFRA members took may also have helped McWane avoid liability for the information exchange.[7] Unlike in *Todd*, where the information was allegedly discussed at meetings of the competitors, the DIFRA members did not discuss the data among themselves and disseminated the sales data publicly. When this type of data is provided to customers but not shared among industry participants, Judge Chappell reasoned, it is unlikely to be used for nefarious purposes.

At first blush, Judge Chappell's decision will help antitrust counselors and participants in information exchanges rest easier. After all, some common tactics to allow information exchanges to pass muster were upheld in a 464-page decision by the FTC's Chief Administrative Law Judge, on a full factual record. As Judge Chappell noted in his decision, amalgamation of data, third-party administration, the data's historical nature, the absence of pricing information, and public dissemination clearly tipped the scales of likely competitive effect in DIFRA's favor. This story is not over, however, as the FTC's Complaint Counsel has indicated its intent to appeal the decision to the full FTC. But while Complaint Counsel traditionally has the upper hand before the Commission that approved the complaint, in this case only two commissioners—Chairwoman Edith Ramirez and Julie Brill—sat on the Commission that approved the complaint. Since that time, Republicans Joshua Wright and Maureen Ohlhausen have joined the Commission and may be more inclined to revisit their predecessors' decisions. Thus, whether or not Democrat Terrell McSweeney is confirmed before the appeal is heard could impact the success of Complaint Counsel's appeal and the viability of competitor information exchanges going forward.

1. Agreement Containing Consent Order, *In the Matter of McWane, Inc.*, No. 9351 (F.T.C. Mar. 20, 2012), available at *http://www.ftc.gov/os/adjpro/d9351/index.shtm*.
2. The FTC prevailed, however, on its claim that McWane unlawfully excluded competition from the DIPF market. Initial Decision, *In the Matter of McWane, Inc.*, No. 9351 (F.T.C. May 8, 2013), available at *http://www.ftc.gov/os/adjpro/d9351/index.shtm* ("Initial Decision").
3. *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001).
4. Initial Decision at 357-62.
5. *Id*. at 357-58.
6. *Id*. at 357.
7. *Id*. at 361-62.

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