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The FTC and DOJ Issue Final Revised Horizontal Merger Guidelines

The Federal Trade Commission and Antitrust Division of the Department of Justice have jointly issued the final revised Horizontal Merger Guidelines (the "2010 Guidelines"), which replace the Guidelines that were originally issued in 1992 and slightly revised in 1997. The revised Guidelines were issued following receipt and consideration of multiple public comments solicited by the agencies from current and former government enforcers, as well as practitioners, economists, consumer advocates, industry executives, and academics.

According to FTC Chairman Jon Leibowitz, the 2010 Guidelines "provide a clearer and more accurate explanation to merging parties, courts, and antitrust practitioners of how the agencies review transactions." DOJ Assistant Attorney General Christine Varney stated that the 2010 Guidelines "better reflect the agencies' actual practices, . . . provide more clarity and transparency, and will provide businesses with an even greater understanding of how [the agencies] review transactions."

A major theme of the 2010 Guidelines is to favor a more flexible, integrated, and fact-specific analysis directed at competitive effects, and to move away from the more rigid analytical process outlined in the 1992 Guidelines. The 2010 Guidelines codifies the agencies' focus on competitive effects of a merger, while de-emphasizing market definition as a foundation for merger analysis. However, the agencies will continue to use market definition principles to identify the line of commerce and geographic region in which competitive concerns may arise, and to identify market participants, measure market share, and identify product substitutes.

Highlighting this shift towards more flexibility, the agencies explain that, to analyze competitive effects, they may consider "any reasonably available and reliable evidence" and cite the following evidentiary sources that, "in their experience, [they] have found most informative": (a) for consummated mergers, evidence of actual competitive effects; (b) evidence that the parties currently set their prices above incremental cost; (c) direct comparisons based on experience; (d) market share and concentration in one or more relevant market(s); (e) the robustness of competition (e.g. whether they are or are likely to become "head-to-head" competitors); and (f) whether the transaction would eliminate a "maverick" player in the market.

Other highlights of the proposed revisions include:

- Updated Herfindal-Hirschman Index ("HHI") thresholds used to evaluate market concentration and to determine whether a transaction warrants further scrutiny;

- Expanded discussion of how the agencies evaluate unilateral competitive effects, including effects on innovation;

- Updated explanation of the hypothetical monopolist test used to define relevant antitrust markets and how the agencies implement that test in practice;

- Expanded discussion on how the agencies evaluate market entry, removing the 1992 Guidelines' explicit presumption that entry will be considered timely only if it can be achieved within two years;

- New sections on powerful buyers, mergers between competing buyers, and partial acquisitions;

The 2010 Guidelines were not universally praised, however. According to FTC Commissioner J. Thomas Rosch, while the 2010 Guidelines successfully clarify the heightened importance of competitive effects, the revisions over-emphasize economic evidence such as margins and prices while not sufficiently addressing empirical evidence and non-price competitive effects such as quality, variety and innovation.

The 2010 Guidelines are available at:
http://www.ftc.gov/os/2010/08/100819hmg.pdf

FTC Approves Settlement of Anticompetitive Conduct Charges Against Intel

The Federal Trade Commission has approved a settlement with Intel Corp. regarding charges that the company engaged in anticompetitive conduct to suppress competition in computer chip manufacturing.

The FTC brought those charges on December 16, 2009, in a complaint relying solely on Section 5 of the FTC Act—which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." The FTC alleged that Intel's conduct was designed to maintain its monopoly in Central Processing Units ("CPUs") by slowing market adoption of competing CPUs and eliminating potential competition to this monopoly from Graphic Processing Units ("GPUs"), as well as to create a monopoly in GPUs. For example, Intel allegedly punished its own customers (computer manufacturers) for using competing products from Advanced Micro Devices ("AMD") and Via Technologies, and used deceptive practices to create a false impression of competing product performance.

The settlement, in which Intel does not admit any violation of law, prevents Intel from conditioning benefits to customers on their promise to buy CPUs and GPUs exclusively from Intel, or denying benefits to customers who do business with Intel's competitors with respect to those products. The settlement also requires Intel to alter its intellectual property agreements with AMD, Via Technologies, and Nvidia Corp. providing those companies greater freedom to enter business combinations without the threat of patent infringement suits from Intel, and requires Intel to extend its current licensing agreement with Via for five years. Separately, the settlement prohibits Intel from changing the design of its CPUs and GPUs in a manner which does not benefit their performance but which degrades the performance of competing products, and prohibits Intel from making deceptive claims about the performance of those competing products. Intel also

must include a key interface (known as a PCI Express Bus) for at least six years in a manner not intentionally limiting the operation of GPUs.

The decision and order settling the matter is available at: http://www.ftc.gov/os/adjpro/d9341/100804inteldo.pdf.

Fifth Circuit Dismisses RPM Claims Against Leegin Creative Leather Products

In *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the Supreme Court reversed nearly 100 years of jurisprudence by ruling that resale price maintenance (RPM) agreements should no longer be deemed *per se* unlawful, but rather judged under the rule of reason. That decision remains controversial, as some critics suggest that the decision is tantamount to a rule of *per se* legality. Both the House of Representatives and the Senate have drafted legislation to overturn *Leegin*.

The subsequent history of *Leegin* shows the difficulty in establishing a claim for RPM under the rule of reason. After the Supreme Court's decision, the district court dismissed the complaint against Leegin for failure to state a claim. On August 17, 2010, the Fifth Circuit affirmed that decision on appeal. Applying the rule of reason analysis to PSKS's claims, the Fifth Circuit dismissed the complaint on the grounds that PSKS failed to adequately plead a relevant market and failed to adequately plead anticompetitive harm.

The facts of the case were as follows. Leegin manufactures and distributes handbags, belts, jewelry, and other products under the "Brighton" brand. The plaintiff, PSKS, Inc., operated Kay's Kloset, a retail store in Lewisville, Texas, which sold Brighton products. Leegin imposed a resale price maintenance policy, which PSKS violated, and as a result Leegin discontinued selling Brighton products to PSKS. PSKS sued, alleging that the RPM scheme violated Section 1 of the Sherman Act.

In its complaint, PSKS alleged two alternative product markets: (1) the retail market for Brighton's women's accessories and (2) the wholesale sale of brand-name women's accessories to independent retailers. The Fifth Circuit stated that neither market "encompasses interchangeable substitute products or recognizes the cross-elasticity of demand for Brighton goods." As to the first alleged market, the court held that Brighton products could not constitute their own market. There is no structural barrier to the interchangeability of Brighton products with competing goods, and so consumers are not "locked in" to the Brighton brand. As to the second alleged market, the court held that "wholesale sale" does not adequately define the relevant market since market definition must focus on the product itself rather than the distribution level of the product. PSKS also failed to allege why Brighton goods are not interchangeable with non-brand name products, and the court considered "women's accessories" too broad and vague a definition to constitute a market.

Finally, the court held that PSKS failed to adequately allege anticompetitive harm. The court stated that PSKS's allegation that the RPM program forced consumers to pay artificially higher prices for Brighton products was contrary to basic economic theory, since, absent market power, a price hike by Leegin would merely cause it to lose sales to competitors. The court also rejected the

argument that the termination of PSKS as a retailer was an anticompetitive effect, since the antitrust laws protect competition, not competitors.

Because the court dismissed the complaint for failure to properly allege a relevant market, it did not consider the argument of *amicus* American Antitrust Institute that RPM arrangements should carry a presumption of illegality and treated as "inherently suspect."

The opinion is available at:
http://www.ca5.uscourts.gov/opinions/pub/09/09-40506-CV0.wpd.pdf

Second Circuit Denies Petition for En Banc Rehearing in "Pay-For-Delay" Case

The Second Circuit offered no assistance to the United States Department of Justice, Antitrust Division and the Federal Trade Commission in their efforts to limit the use of "pay-for-delay" settlements, which resolve patent litigation through payments by brand name drug makers to generic drug manufacturers in exchange for the generic's agreement to delay market entry. Disregarding the support of the DOJ, the FTC, the majority of State Attorneys General, and the American Medical Association for a rehearing, the Second Circuit denied a request for an en banc review of its decision in *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, Civ. No. 05-2851 (2d Cir. 2005), a case alleging an agreement between Bayer AG and Barr Laboratories to prevent generic-drug competition in the market for the antibiotic Cipro.

The petitioners sought a review of a three-judge appellate panel's conclusion that the agreement between Bayer and Barr was permissible under controlling precedent in the Circuit, specifically a decision in a previous case involving AstraZeneca PLC's drug Tamoxifen, *Joblove v. Barr Labs. Inc. (In re Tamoxifen Citrate Antitrust Litig.)*, 488 F.3d 187 (2d Cir. 2005), in which the Second Circuit held that reverse payment settlements did not violate U.S. antitrust law. The petitioners had hoped the *en banc* rehearing would provide the Second Circuit with an opportunity to revisit its *Tamoxifen* decision. Such hopes were based largely on the *Cipro* panel's invitation to the plaintiffs—despite upholding summary judgment in favor of the defendants—to petition for a rehearing *en banc*, citing the opposition of the antitrust enforcement agencies to the pay-for-delay practice, the well-developed factual record in the *Cipro* litigation, the increase in the number of pay-for-delay settlements since the court's *Tamoxifen* decision, and the impact of reverse payments on the Hatch-Waxman Act as factors militating in favor of a rehearing.

Ultimately, however, that petition was denied as a majority of judges were not in favor of rehearing. Judge Pooler dissented, arguing that the Second Circuit's *Tamoxifen* decision "unambiguously deserves reexamination." She noted that "such settlements serve no obvious redeeming social purpose. Put simply, what the patent holder purchases by means of an exclusion payment settlement is the continuation of a patent the patent holder must have thought had some significant probability of being declared invalid." Still, she recognized that in light of the Second Circuit's refusal for an *en banc* rehearing, it would fall to either the Supreme Court or Congress to determine the proper limits of the enforceability of these agreements.

The order and dissenting opinion are available at:
http://newsroom.law360.com/articlefiles/191872-05-2851-cv.pdf

Federal Circuit Makes Clear the Limits of the Patent-Misuse Defense

In *Princo Corporation, v. Int'l Trade Comm'n*, Case No. 2007-1386, the Federal Circuit rejected Princo's assertion of the patent-misuse defense and articulated the narrow circumstances under which such a defense may be viable.

The dispute in *Princo* arose from the establishment of technical standards for recordable compact discs (CD-Rs) and rewritable compact discs (CD-RWs). The principal developers of the CD-R/RW technology were Philips Corporation and Sony Corporation—which jointly developed the prevailing standards. Philips and Sony developed different technological solutions for the one component of the CD-R/RW technology that was at issue in *Princo*. Following the evaluation of the two solutions, representatives from Philips and Sony jointly decided to use Philips's solution (the "Raaymakers patents") not Sony's (the "Lagadec patent").

In order to commercialize the CD-R/RW technology in accordance with the established standards, the patents of Philips and Sony as well as other entities were offered in different licensing packages. Philips, which administered the licensing program, included in the packages those patents that Philips deemed "potentially necessary" to manufacture CD-Rs and CD-RWs consistent with the chosen standards. Both the Raaymakers and Lagadec patents were included in the package licenses. The package licenses were subject to a "field of use" restriction that allowed licensees to use the technology only to produce CD-Rs and CD-RWs that were compliant with the agreed upon standards.

Princo licensed these patents, but quickly stopped paying the required licensing fees. Philips then brought a patent infringement action against Princo before the International Trade Commission. As part of its defense to that action, Princo attacked the availability of the Lagadec patent only as part of the package licenses. According to Princo, this constituted patent misuse because Philips and Sony's alleged agreement to not license the Lagadec patent outside of the package license prevented the development of a solution utilizing the Lagadec technology that would compete with products compliant with the established standard, which utilized the Raaymakers patents.

The narrow question before the Federal Circuit was whether "when a patentee offers to license a patent, does the patentee misuse that patent by inducing a third party not to license its separate, competitive technology?" The court concluded that it did not. The court made clear that, with limited exceptions, to successfully assert a patent misuse defense a defendant must demonstrate that: 1) the patentee imposed a condition on the sale of a patented product or a patent license that has the effect of broadening the physical or temporal scope of the patent grant; and 2) this condition resulted in anticompetitive effects. Here, the Federal Circuit concluded that the plaintiff was unable to make either showing.

The Federal Circuit acknowledged that though the alleged agreement between Philips and Sony may have violated the antitrust laws, this had no bearing on whether the misuse defense was available. The Federal Circuit held that any agreement that existed between Philips and Sony had no effect on the scope of

the patent, and therefore there was not misuse. Where there is no connection between the patent holder's right and the alleged misconduct, there is no misuse.

Though unnecessary based on its initial holding, the Federal Circuit also analyzed whether Princo could have satisfied the second element of a patent misuse defense and demonstrated anticompetitive effects. Again, the court found in favor of defendants. The court concluded that, even if Philips had somehow unlawfully leveraged its Raaymakers patents by agreeing with Sony to suppress the Lagadec technology, Princo was required to demonstrate that "there was a 'reasonable probability' that the Lagadec technology, if available for licensing, would have matured into a competitive force in the storage technology market." The court was not persuaded, however, that Princo could meet this burden.

The opinion is available at:
http://www.cafc.uscourts.gov/images/stories/opinions-orders/07-1386.pdf

Canadian Competition Bureau Reaches Final Settlement with Canadian Real Estate Association over Rules Pertaining to Multiple Listing Service

On October 24, 2010, member boards of the Canadian Real Estate Association ("CREA") ratified the Consent Agreement ("Agreement") agreed to in principle in late September by CREA and the Canadian Competition Bureau ("CCB") to resolve the CCB's concerns with CREA's rules ("Rules") pertaining to the Multiple Listing Service ("MLS"). MLS is the online system through which most Canadian resale homes are marketed. CREA is the trade association for the Canadian real estate sales industry and represents more than 100 local boards and 98,000 real estate salespersons and brokers ("agents") across Canada. CREA owns the MLS trademarks and licenses their use to member boards.

Under the contested Rules, agents who listed residential properties on the MLS were required to offer a full set of services specified by CREA, including the presentation of offers and the negotiation of transaction terms, even if customers did not require these services. The CCB argued that this had the effect of excluding lower cost service providers, thus limiting service and pricing options for consumers and stifling innovation, and resulted in a substantial lessening of competition in the market for the supply of residential real estate brokerage services.

In February 2010, after three years of discussions and negotiations with CREA, the CCB applied to the Canadian Competition Tribunal alleging an abuse of dominance in the market for real estate brokerage services and seeking an order requiring CREA to make permanent changes to the Rules.

The CCB rejected initial amendments to the Rules proposed by CREA which would not have foreclosed its ability to reinstate discriminatory rules in the future. The Agreement ultimately reached, among other things, prohibits CREA from adopting, maintaining, or enforcing discriminatory rules against agents that offer MLS listing services alone for the ten-year duration of the Agreement. The Agreement has been registered with the Competition Tribunal, making it legally binding and exposing CREA to potential criminal sanctions if breached.

The Agreement sends a strong message to all industry associations of the CCB's willingness to take issue with the exclusionary effects of service restrictions imposed on their members and to ensure that necessary rules are put in place to provide customers with service and pricing choices that reflect their needs.

The consent agreement is available at:
http://www.ct-tc.gc.ca/CMFiles/CT-2010-002_Registered%20Consent%20Agreement_75_38_10-25-2010_2647.pdf

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