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New Draft Merger Guidelines Present Challenges and Opportunities for Antitrust Counsel

By Thomas B. Leary and Janet L. McDavid

Antitrust counsel for substantial companies are probably the primary audience for agency merger guidelines, and they may have conflicting expectations.

In some situations, counsel would benefit from guidelines that offer clear cut tests for what the antitrust agencies will or will not permit. Predictability is paramount. In other situations, counsel would benefit from the opportunity to argue the unique competitive environment that affects their client. Flexibility is favored. The challenge for the antitrust agencies is to write guidelines that draw the appropriate balance between predictability and flexibility, for the guidance of the practicing Bar, while adhering to sound economic principles that will command the respect of the Bar, the academic community, the business community, and, ultimately, the judiciary.

The new draft of Horizontal Merger Guidelines, recently released for comment by the Department of Justice Antitrust Division and the Federal Trade Commission, attempt to achieve these various objectives in a way that reduces the emphasis on pure statistical tests, both to define competitive harm and to recognize defenses. They continue to rely on the best economic tools currently available, but they also emphasize (Section 1) that "merger analysis is necessarily predictive;" that absolute precision in merger analysis, therefore, is not possible; and that statistical calculations are not the only sources of economic wisdom. The agencies will "consider many sources of evidence" (Section 2.2).

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This candid acknowledgement of a more flexible approach will not surprise experienced counsel, who have long recognized that the technical economic inquiries articulated in the 1992 Guidelines did not necessarily reflect actual practice. This article will summarize the most significant changes of the proposed new Guidelines in more detail.

(1) Less Emphasis on market definition, calculation of shares and concentration.

Although the previous Merger Guidelines, published in 1982, 1984 and 1992, have progressively given less weight to market concentration statistics, they continued to assume that the first step in merger analysis would be the definition of a "relevant market." In the 1992 Guidelines, the appropriate calculations were discussed immediately after the introductory paragraph (Section 1). But in the new draft Guidelines, these statistical matters are deferred until Section 4, after an extended discussion of other sources of information about economic consequences, including the informed views of merger parties, customers and analysts (Section 2).

Moreover, Section 4 states at the outset: "Market definition is not an end in itself: it is one of the tools . . . ." Competitive analysis "need not start with market definition." Product and geographic markets may occupy a spectrum of both close and more distant substitutes. "[D]efining a market to include some substitutes and exclude others is inevitably a simplification …."

The draft revised merger guidelines provide that "market definition is not an end in itself" and that competitive analysis "need not start with market definition."

If market definition is necessarily an imprecise inquiry, it obviously makes sense to further reduce the emphasis on market definition and market shares. The new Guidelines raise the HHI thresholds between "unconcentrated," "moderately concentrated," and "highly concentrated" markets to levels more consistent with agency practice, but note that the presumptions from increased concentration enhance the likelihood of serious agency review. Although there are no express safe harbors, counsel can continue to assume that mergers in "unconcentrated" markets are highly unlikely to be challenged. Higher concentration levels do not make a deal dead-on-arrival, but do indicate than an in-depth investigation is likely.

This reduced emphasis on markets and shares may affect counsel in various ways. It sometimes could make it more difficult for counsel to offer firm advice, but it could also make it easier for counsel to caution that merger clearance can be an expensive and fact-specific undertaking.

The notion that precise market definition may sometimes be unnecessary could help prosecutors to avoid a controversial issue up front, and this could blunt a traditional defense weapon. On the other hand, the increased emphasis on more subjective sources of information could help defendants who have persuasive witnesses.

Other effects are similarly mixed. The vast majority of notified merger transactions do not wind up in litigation, and it is obviously helpful for counsel to have a more accurate description of the way that internal agency inquiries actually will proceed. On the other hand, it is not unusual for judges, familiar with one methodology, to resist change. Possible judicial resistance to the new Guidelines may – at least for a time – add an additional element of uncertainty. In the short run, the agencies are likely to plead cases in the alternative, using both a relevant market definition and the new Guidelines approach.

(2) Reduced Focus on Predicted Price Increases.

The traditional focus on likely price increases has been modified. When markets are defined, for example, agencies still give deference to the so-called "SSNIP" test. (Section 4.1.1.), which defines a market as the smallest product and geographic space within which a hypothetical monopolist "likely would impose at least a small but significant and non-transitory increase in price." But, if it is not always necessary to define markets rigorously, these hypothetical predictions may also be unnecessary. The mixed effects of eliminating mandatory market definitions have already been noted. Counsel should also know that, even if markets are defined, the agencies rarely undertake the rigorous analysis described by the SSNIP test. The test really describes a methodology for arriving at an ideal economic solution that most often is estimated by other means. For example, the agencies will frequently define markets based on their precedents for particular industries or on the common understanding of market participants.

There is a new statement of a "unifying theme" that mergers should not be permitted to create, enhance, or entrench market power (Section 1). The word "entrench," which does not appear in the 1992 version, signals that an anticompetitive effect can be found – even absent a likely price increase – if the merger would make it easier for the surviving company simply to maintain already high prices that might otherwise be expected to fall (See Section 4.1.2). The recent Whole Foods case is a good example of a transaction that might have been affected by this change.

The extended discussion of "non-price" effects also modifies the prior Guidelines' almost-exclusive concern with likely price increases, a position which again was not always consistent with agency practice. Injury from non-price effects was briefly acknowledged in the 1992 Guidelines (Section 0.1 n.6), but is given greater emphasis in Section 6.4 of the new Guidelines, titled "Innovation and Product Variety." It is also noteworthy that proof of adverse effects on innovation does not depend on definition of an "innovation market," which is a difficult and controversial concept. Counsel for companies in some "high-tech" industries or in the growing service and entertainment areas need to be aware of this change, because price is often not the most significant competitive variable in these areas.

(3) Shift in Emphasis from "Coordinated Effects" to "Unilateral Effects."

The 1982 and the 1984 Guidelines focused exclusively on the increased likelihood of either explicit or implicit cooperation among competitors after a merger. Concern about adverse "unilateral effects" resulting from the post-merger conduct of a single firm was first introduced in the 1992 version, in a section that followed discussion of coordinated effects (Sections 2.1, 2.2). The new Guidelines discuss unilateral effects first, and at greater length (Sections 6, 7), because it is more often applied by the agencies today.

(a) Unilateral Effects

Greater emphasis on unilateral effects can further reduce the need for market definition or concentration calculations, because these inquiries may not be necessary. (See Section 6.1) This theory of competitive harm is relatively easy to articulate: If the producer of one product acquires a close substitute product, it may have an incentive to increase prices on one of them because some of the resulting lost sales will be captured by the substitute. A prediction of whether this may actually happen, however, requires estimates of sales lost by the product subject to a hypothetical price increase; the percentage of these lost sales likely to be captured by the newly acquired product; and the future incremental profit margins on both. Confidence in these predictions depends on the availability of data. The new Guidelines do not endorse any specific technique for these calculations, and acknowledge that there may be a number of alternative "economic models" and other "available and reliable information" that will be relevant to the analysis. The agencies will choose the appropriate tool based on the facts of each transaction and the nature of the data available. Counsel need to be aware, however, that resources saved by reducing the emphasis on market definition and market shares will be diverted in some cases to disputes over alternative calculations of unilateral effects. There often are many ways for defense counsel to challenge the conclusions of government experts – and vice versa.

The new Guidelines discuss unilateral effects first, and at greater length, because it is more often applied by the agencies today. Greater emphasis on unilateral effects can further reduce the need for market definition or concentration calculations, because these inquiries may not be necessary.

(b) Coordinated Effects

Reduced reliance on market definition and market concentration statistics will diminish the relative importance of coordinated effects. However, the new Guidelines do provide one useful caveat: "[t]he higher the HHI level, the greater is the likelihood that the agencies will request additional information . . . .." (Section 5.3) This statement seems to recognize the concept of a "sliding scale," which holds that the burdens of defense are roughly keyed to the strength of the prosecutor's case. The overt recognition of a more flexible, and more realistic approach codifies what actually has been standard agency practice in recent years.

There also is implicit recognition of the fact that coordination does not have to be perfect in order to be harmful. The 1992 Guidelines emphasized that successful coordination depends on the ability to detect and punish deviations (Sections 2.1, 2.12). The new version emphasizes various other factors that may enhance or inhibit coordination (Sections 7.1-7.2), and thus recognizes that the effect can be present in varying degrees.

(4) Less Technical Definitions of Entry.

The new Guidelines eliminate the semantically confusing distinction between "uncommitted" and "committed" entrants in the 1992 version. So-called "rapid entrants" can be included in the initial market definition (Section 5.1), without the unrealistic expectation that their entry (or exit) would be virtually costless.

In addition, the "actual history of entry" is "given substantial weight." (Section 9) This recognizes current practice and, if used with discretion, could be a less burdensome and controversial inquiry than calculations of what potential entrants might do in hypothetical circumstances. Counsel should be able to argue, however, that lack of entry in the past has little predictive value if the industry has changed fundamentally. Moreover, absence of entry at pre-merger prices does not preclude the real possibility that entry will discipline price increases post-merger.

The three significant elements of "timeliness, likelihood, and sufficiency of the entry" are also cast in less technical terms, and the arbitrary two-year test for timeliness has been eliminated. This change could benefit either prosecutors or defendants, depending on particular circumstances, but it makes better sense to weigh the three elements together rather than specify individual hurdles. Counsel need to be aware, however, of a potential inconsistency when they claim that entry is easy, but also claim scale economies as an efficiency.

(5) Little Change in Discussion of Efficiencies.

The close correspondence between efficiencies language in this version and the 1992 version is itself noteworthy, in light of heightened skepticism about business acumen after the 2008 crash. The greater willingness to credit fixed cost savings could actually be a big benefit for companies in industries where marginal costs are minimal. Conversely, predicted lower prices are discounted if accompanied by "reductions in product quality or variety." (Section 10)

(6) Monopsony Power.

The draft Guidelines include a discussion of the potential issues raised by mergers of competing buyers, which can enhance market power on the buying side of the market. The draft states that the agencies use "essentially the [same] framework" for evaluating such mergers. Monopsony issues are relatively rare and, in the past, have been largely limited to transactions involving health insurers and agriculture. But, counsel need to be careful about any claims that increased purchasing power will create merger-related efficiencies.

(7) Partial Acquisitions.

Although partial acquisitions have been the subject of enforcement actions at both agencies, the draft Guidelines for the first time discuss the potential competitive effects of these acquisitions on the conduct of both the acquirer and the acquiree. These effects include deals that will give a minority owner the ability to influence the competitive conduct of the target firm, reduced incentives to compete because of profits gained through the minority interest, and the exchange of competitively sensitive information, which may facilitate coordination.

Conclusion

The new draft Guidelines provide a more accurate description of actual agency practice in recent years. They do not evidence an intention to make radical changes in merger analysis. The increased emphasis on economic evidence that cannot readily be captured by statistics may look like a retreat from purely objective agency determinations. But, some subjective judgments are inevitable and have always been present – and dramatic changes are tempered by the influence of long-term career staff and by the oversight of courts, which tend to rely on precedent. The avoidance of lengthy upfront disputes over market definition, with attendant calculations, might appear to favor the agencies, and greater flexibility could have an adverse effect on predictability. However, the more holistic approach also creates opportunities for defense counsel with good stories to tell. The future level of merger activity is likely to be driven, as it has been, by general economic conditions and by government regulations other than antitrust.

The avoidance of lengthy upfront disputes over market definition, with attendant calculations, might appear to favor the agencies, and greater flexibility could have an adverse effect on predictability. However, the more holistic approach also creates opportunities for defense counsel with good stories to tell.

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Supreme Court's *Stolt-Nielsen* Decision Limits Use of Class Arbitration

By Peter Carney and Charles Moore

On April 27, 2010, the U.S. Supreme Court ruled in *Stolt-Nielsen SA*, *et al. v. AnimalFeeds Int'l Corp.*, that arbitrators exceed their authority under the Federal Arbitration Act (FAA) if they impose class arbitration on parties whose arbitration agreement is silent as to class arbitration. Justice Alito authored the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justice Ginsburg authored a dissent, which Justices Stevens and Breyer joined. Justice Sotomayor took no part in the consideration or decision of the case.

The Court's decision reversed a Second Circuit ruling upholding an arbitral panel's partial final award that the arbitration clauses in Stolt-Nielsen's shipping contracts with AnimalFeeds permitted class arbitration, despite the undisputed silence of those arbitration clauses on the availability of class arbitration. In reversing the Second Circuit's ruling, the Supreme Court resolved an issue of substantive FAA law that it previously had not been able to reach in its 2003 decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) — namely, that class arbitration cannot be imposed absent some evidence that the parties agreed to authorize class arbitration. The Court's decision also addressed other important procedural issues, such as the timing and ripeness of a challenge to an arbitrator's partial final clause construction award, the standard of review that applies to that ruling, and the effect of *Bazzle*. The Court's decision, however, left open other issues, including whether it is for the arbitrator or the court to decide the class arbitration question in the first instance, and whether the decisional rule applies to take-it-or-leave-it type contracts of adhesion. As to the latter question, the Court appears poised to address unconscionability in the next term in *AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S.).

In reversing the Second Circuit's ruling, the Supreme Court resolved an issue of substantive FAA law that it previously had not been able to reach — namely, that class arbitration cannot be imposed absent some evidence that the parties agreed to authorize class arbitration.

Getting To Arbitration

The underlying class arbitration dispute in *Stolt-Nielsen* actually began as a federal Sherman Act lawsuit, which itself resulted in a significant Second Circuit precedent on arbitrability, *JLM Industries, Inc. v. Stolt-Nielsen S.A.*, 387 F.3d 163 (2d Cir. 2004). In 2003, several customers brought federal antitrust class-action lawsuits against Stolt-Nielsen and certain other parcel tanker shipping companies. AnimalFeeds International Corp. ("AnimalFeeds") brought its class action lawsuit in the United States District Court for the Eastern District of Pennsylvania. In the meantime, JLM Industries, Inc., among other putative class action plaintiffs, brought a lawsuit in the District of Connecticut and resisted Stolt-Nielsen's effort to compel arbitration under the terms of the parties' maritime arbitration clauses. While that dispute was on appeal to the U.S. Court of Appeals for the Second Circuit, the Judicial Panel on Multidistrict Litigation transferred and consolidated AnimalFeeds' lawsuit into a single MDL proceeding with several similar suits, including the one by JLM Industries, Inc. In October 2004, the Second Circuit issued a sweeping decision in *JLM Industries, Inc.*, requiring the plaintiffs to arbitrate their antitrust claims against the parcel tanker companies.

Disputing The Availability Of Class Arbitration

After the *JLM Industries, Inc.* Second Circuit decision, several of the putative class action plaintiffs, including AnimalFeeds, agreed with Stolt-Nielsen and the other ship owners to proceed with a consolidated arbitration. Notably, although agreeing to a limited consolidation of the named plaintiffs and defendants, the ship owners sharply disputed that the arbitration agreements permitted class arbitration. As part of their April 2005 consolidation agreement regarding the arbitration proceedings, the parties adopted Rules 3 through 7 of the AAA Supplementary Rules on Class Arbitration to provide a procedural framework for the class arbitration dispute. Consistent with the plurality opinion in *Bazzle,* these rules require, among other things, that the arbitrators first construe the arbitration clause to determine the availability of class arbitration and issue a Partial Final Award on Clause Construction. Under Rule 3, this initial determination precedes, and is separate from, any analysis of whether to certify a class under a Rule 23-type analysis. Importantly, from the ship owners' perspective, Rule 3 also provided for an immediate right of appeal of the clause construction award to federal court.

On December 20, 2005, relying on AAA arbitration decisions principally involving consumer actions governed by various state laws, the arbitrators ruled that the parties' maritime arbitration clauses could be construed to permit class arbitration.

The ship owners petitioned the United States District Court for the Southern District of New York to vacate the arbitrators' award on the grounds that the arbitrators had exceeded their authority under the FAA and/or that they had manifestly disregarded the law. On June 26, 2006, the District Court vacated the arbitral award for manifest disregard of the law. The court held that the arbitrators' award disregarded governing maritime law prohibiting the imposition of class arbitration upon parties without their express consent.

AnimalFeeds then appealed to the U.S. Court of Appeals for the Second Circuit. During AnimalFeeds' appeal, the Supreme Court issued its decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). In *dicta*, the *Hall Street* decision questioned whether the manifest disregard of the law standard was a basis for vacating an arbitral award, or simply shorthand for the grounds for vacatur set forth in Section 10 of the FAA.

On November 4, 2008, the Second Circuit reversed the District Court's ruling. The Second Circuit panel held that the Supreme Court's decision in *Bazzle* effectively abrogated prior Second Circuit and other circuit courts of appeals' precedent interpreting the FAA to prohibit class-action or consolidated arbitration absent the express consent of the parties.

On March 26, 2009, Stolt-Nielsen and the other ship owners petitioned the Supreme Court for certiorari review. On June 15, 2009, the Supreme Court granted the petition for certiorari, and the Court issued its decision on the merits on April 27, 2010.

<u>The Supreme Court's Opinion In *Stolt-Nielsen*</u>

The Supreme Court's decision in *Stolt-Nielsen* addressed four issues of note here: (i) the standard of review under the FAA for vacatur of an arbitral award; (ii) the ripeness of the challenge to the partial final arbitral award; (iii) the effect of the plurality decision in *Bazzle*; and, finally, (iv) the merits of the dispute, *i.e.*, whether the FAA permits the imposition of class arbitration where the arbitration agreement is silent on the issue.

Standard for vacatur. The standard for vacatur is addressed in Section II.A. of the Court's decision. Stolt-Nielsen and the other ship owners had sought to vacate the arbitral award under Section 10(b)(4) of the FAA, arguing that the arbitrators had "exceeded their powers." The ship owners also asserted in their petition that to the extent the "manifest disregard" doctrine survived *Hall Street*, the doctrine supported vacatur. Regarding the "exceeded powers" standard, the Court held that arbitrators exceed their authority when they "stray[] from interpretation and application of the agreement and effectively 'dispense[] [their] own brand of industrial justice.'" *Stolt-Nielsen, Slip Op.* ("*Slip Op*.") at 7 (quoting *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001) (*per curiam*) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960))). Previously, the Court had used this standard for the "exceeded their powers" basis for vacatur almost exclusively in the context of labor arbitrations.

The Court addressed the "manifest disregard" point in footnote 3 of its decision. There, the Court noted that it was not deciding whether the "manifest disregard" doctrine survives *Hall Street* "as an independent ground for review or as a judicial gloss" on the Section 10 grounds. The Court further noted that AnimalFeeds had described manifest disregard as requiring the showing that the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." (Brackets in original) The Court then stated: "Assuming, *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow." *Slip Op*. at 7 n.3.

Ripeness. Both the majority and the dissent addressed the ripeness of Stolt-Nielsen's challenge, a point that AnimalFeeds had failed to raise prior to reaching the Supreme Court. Labeling the challenge to the partial final award as "premature," Justice Ginsburg's dissent criticized the Court's decision to approve immediate judicial review of a "preliminary" clause construction award. The dissent underscored that parties cannot create jurisdiction simply by agreeing that an arbitrator's decision is a "partial final award" (at 4-5), and questioned how the arbitrators' "preliminary decision," which determined the arbitration clause permitted class arbitration but did not decide whether the actual claims were suitable for class arbitration, could be reconciled with the "firm final-judgment rule prevailing in the federal court system." *Dissent* at 3. The dissent drew nourishment, in part, from the Sixth Circuit's decision in *Dealer Computer Services, Inc. v. Dub Herring Ford*, 547 F.3d 558 (6th Cir. 2008), which held as unripe for review a challenge to a clause construction award under the AAA Supplementary Rules because "the arbitrators had not yet determined that arbitration *should* proceed on behalf of a class." *Dissent* at 5 (emphasis in original).

The majority decision dismissed AnimalFeeds' ripeness challenge, noting it was "necessarily considered and rejected" in granting certiorari, and in any event, the Court continued, ripeness had not been raised below, such that any argument the claim was "prudentially unripe" had been waived. *Slip. Op*. at 6 n.2. Addressing constitutional ripeness, the Court held that the challenge to the clause construction award was fit for judicial decision, and that the "hardship of withholding decision" confirmed the ripeness of the claim. *Id.* The Court reasoned that if Stolt-Nielsen were correct in its claim that there was no basis to force the ship owners into class arbitration, then — absent court review — the arbitrators would be conducting class determination proceedings for which they lacked authority. *Id.* The Court noted that Stolt-Nielsen and the other ship owners could not simply refuse to participate in what they considered an *ultra vires* arbitration, as "they almost certainly would be subject to a petition to compel arbitration under 9 U.S.C. §4." *Id.* The Court concluded: "We think it is clear on these facts that petitioners have demonstrated sufficient hardship, and that their question is fit for our review at this time." *Id.*

***Bazzle*.** Section III of the Court's decision tackled the question that had bedeviled courts, arbitrators, the AAA, and practitioners for some seven years — namely, what effect or force did the fractured *Bazzle* decision have, if any? The Court described *Bazzle* as having raised three questions: (1) who decides — the court or the arbitrator — if the arbitration clause is "silent" on the issue of class arbitration; (2) what standard should apply for deciding whether a contract allows class arbitration (does the FAA preclude class arbitration entirely, does the FAA permit class arbitration under limited circumstances, is the question entirely one of state law); and (3) was the standard properly applied in the underlying *Bazzle* arbitration to permit class arbitration? *Slip Op*. at 14. The Court explained that the plurality opinion in *Bazzle* only decided the first question — that it was for the arbitrator to decide whether the arbitration clause is silent in the first instance — but the Court noted that Justice Stevens "did not take a definitive position" on the question. *Id.* at 14-15. (The Court found it did not need to "revisit that question," because "the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible." *Id.* at 16.) As to the second and third questions, the Court explained that although Justice Stevens' opinion in *Bazzle* rested on the resolution of those two questions, the plurality "did not decide either the second or third questions noted above." *Id* at 15. Accordingly, the Court concluded that "*Bazzle* did not yield a majority decision on any of the three questions." *Id.*

Class arbitration question. Finally, unlike in *Bazzle* — or *Southland Corp. v. Keating*, 465 U.S. 1 (1982), the first case to present the Court with the class arbitration issue — the Court in Section IV of its *Stolt-Nielsen* decision reached the merits question of compelling class arbitration where the arbitration agreement is silent on class arbitration.

As the Court noted, the parties had agreed before the arbitrators that there was no agreement on whether the arbitration clause allowed or precluded class arbitration, leaving, in the Court's estimation, "no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task." *Slip Op.* at 12. Having determined that "the rule to be applied" in the face of silence was an "open question" not decided by *Bazzle* (*Slip Op*. at 16-17), the Court based its analysis on core FAA principles, including "the basic precept that arbitration 'is a matter of consent, not coercion,' *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)." *Slip Op*. at 17.

Parsing the arbitral award, the Court noted that the award contained no analysis of the FAA or other applicable law — *i.e.*, the "default rule" that applies when an arbitration clause is silent as to class arbitration. *Slip Op.* at 8-9. The Court concluded that the arbitrators had instead rested their decision on AnimalFeeds' argument that "the clause should be construed to permit class arbitration as a matter of public policy." *Slip Op.* at 8. According to the Court, "what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration." *Slip Op.* at 7.

The Court rejected such a policy-based approach as impermissible because it is not grounded in and bounded by the parties' actual agreement, which is the fundamental concern of the FAA. Thus, an award "may be vacated under §10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Id*. The Court specified that parties may not be forced to arbitrate on a class basis "unless there is a contractual basis for concluding that the party *agreed* to do so." *Slip Op*. at 20. To require otherwise would be "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id*.

The Court rejected any notion that an arbitrator is empowered to infer an agreement to arbitrate on a class basis from a contract that is silent on the issue. *Slip Op.* at 21. The Court held that arbitrators may not imply class arbitration due to the fundamental differences between bilateral and class proceedings. *Id.* Among the significant differences, the Court noted the binding of numerous unnamed parties in a class proceeding, the dramatic increase in the financial stakes for the respondent, and the loss of confidentiality. *Id*. at 22-23. The Court held that these fundamental differences "are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id*. at 23.

The Court rejected any notion that an arbitrator is empowered to infer an agreement to arbitrate on a class basis from a contract that is silent on the issue. The Court held that these fundamental differences "are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."

<u>What Does *Stolt-Nielsen* Mean?</u>

Silent clauses are not consent to class arbitration. At a minimum, *Stolt-Nielsen* stands for the proposition that arbitrators and courts cannot impose class arbitration on commercial parties absent evidence — a "contractual basis," in the Court's language — that the parties agreed to authorize class arbitration. Going forward, arbitrators no longer can rely on the post-*Bazzle* proposition that arbitration agreements that do not expressly forbid class arbitration implicitly permit such proceedings. As the Supreme Court made clear, no rationale in *Bazzle* commanded a majority of the votes, leaving *Bazzle* of limited, if any, vitality.

Who decides the silence/class arbitration issue? While there is more clarity regarding the rule that should be applied in the face of a silent arbitration agreement, the waters are muddier on the question of who decides whether a clause is silent and what type of arbitration was agreed upon. Gone is the post-*Bazzle* presumption — embedded in the AAA Supplementary Rules — that it is for the arbitrator in the first instance to make the clause construction determination. While this is now an open question, the Court's recent decision in *Rent-A-Center West, Inc. v. Jackson*, No. 09-497, 561 U.S. — (2010), provides little additional guidance. In that case, the Court addressed the question whether the issue of unconscionability is to be decided by the arbitrator or the court where the agreement expressly assigns the resolution of such issues to the arbitrator. The Court held in *Rent-A-Center* that the identity of the decision maker depends upon the nature of the challenge. *Rent-A-Center*, *Slip op.* at 7-9. While courts hear challenges specific to the validity of the agreement to arbitrate, *id*. at 7, challenges to the agreement as a whole are for the arbitrators. *Id*.

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at 9. *Rent-A-Center* did not present the class arbitration issue, so the question whether the class arbitration arguments are for arbitrators or courts to decide remains unresolved.

Court challenges to partial final clause construction awards. Notwithstanding that the FAA permits appeals concerning "partial final awards," 9 U.S.C. § 16(a), and that many parties contemplate and agree to such an appeal by adopting the AAA Supplementary Rules, some courts had declined to decide such appeals, as the dissent's reference to *Dealer Computer Services* underscored. While the Court's decision in *Stolt-Nielsen* may not finally resolve the issue for all cases (*Slip Op*. at 6 n.2), it provides greater certainty that parties can authorize arbitrators to render a partial final award and agree on a procedure for court review at that time in order to avoid costly and burdensome class proceedings that a court may later find to be *ultra vires*.

Standard of review and manifest disregard. The Court declined to clarify whether *Hall Street* had signaled the end of the manifest disregard of law standard for vacating an arbitral award. Thus, practitioners must continue to be fastidious about framing any petitions for vacatur under the statutory grounds in Section 10 of the FAA, but may also choose to assert manifest disregard of law pending further clarification.

Effect on pending AAA Class Proceedings. The Court's clarification of *Bazzle* is significant as it may have a profound effect on the pending AAA class arbitrations that have not reached a final award or judgment. In September 2009, the AAA filed an *amicus* brief in *Stolt-Nielsen* in which it explained that it drafted class arbitration rules to respond to *Bazzle* and that it had (as of then) administered 135 putative class arbitrations that had reached the clause construction stage. Of the 102 disputes over clause construction (parties entered stipulations in 33 of the arbitrations), 95 of the disputes — a whopping 93% — resulted in clause construction awards that permitted class arbitration. Many of those arbitration agreements involved "silent" clauses. As the Supreme Court's *Stolt-Nielsen* decision is now the law of the land, it is likely that respondents who lost the clause construction battle but whose proceedings are still pending will attempt to revisit the issue, arguing that the class proceedings are *ultra vires* and that the arbitrators lacked the authority to entertain class arbitration.

Effect on consumer arbitrations? Many companies that had silent clauses in their form contracts with individual consumers have faced demands for class arbitration and arguments by counsel for the consumers similar to the ones raised by AnimalFeeds that "the clause would be unconscionable and unenforceable if it forbade class arbitration." *See Slip Op*. at 8. The Court in *Stolt-Nielsen* did not dwell on unconscionability issues — the arbitrators had passed over the argument, and the maritime dispute involved large, sophisticated, multi-national parties on both sides and an arbitration clause that the customer (AnimalFeeds) selected. *Slip Op*. at 2-3. While the *Stolt-Nielsen* Court does not distinguish between consumer and business-to-business arbitrations, the dissent suggests that "contracts of adhesion presented on a take-it-or-leave-it basis" ought to be treated differently. *Dissent* at 13. And the point is sharpened where many businesses, concerned by how arbitrators were reading class arbitration into silent clauses, have expressly precluded class arbitration in the arbitration clauses in their form contracts.

In light of the increasing use of these class arbitration waiver provisions, a key question is whether courts or arbitrators can continue to authorize class arbitration by excising the waiver from the arbitration agreement. In *Am. Express Co., et al. v. Italian Colors*, 2010 WL 1740528 (U.S.), the Supreme Court recently vacated and remanded a Second Circuit decision that struck down a class arbitration waiver provision as unconscionable. Like *Stolt-Nielsen*, *American Express* involved businesses and not consumers. The Supreme Court's recent resolution of *American Express* — granting certiorari, and vacating and remanding the case in light of *Stolt-Nielsen* — could mean that the Court was enforcing the parties' bargain and precluding class arbitration where there was clear evidence that the parties had not agreed to authorize class arbitration. Because the Court's "grant, vacate and remand" orders are non-precedential, the Court may need to more directly address the severability issue.

What is next? Although it took the Court 28 years from the 1982 *Southland* appeal to the *Stolt-Nielsen* decision to address the class arbitration issue head on, it appears that now the Court is not shying away and may soon address more fully the unconscionability arguments in the consumer context. In addition to the *Rent-A-Center* decision, the Court already has accepted certiorari in *AT&T Mobility LLC v. Concepcion*, No. 09-893, a case that will be heard in the upcoming term. There, the question presented is: "Whether a state may condition enforcement of an arbitration agreement on the availability of certain procedures—here, class-wide arbitration—where those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims." *AT&T Mobility*, Pet. For Cert. at i. In that case, the Ninth Circuit noted many of the arbitration agreement's pro-consumer features and expressly found that one of the features, a premium payment provision that rewards a consumer for obtaining relief greater than AT&T Mobility's last settlement offer (and equal to the maximum amount the consumer could obtain in small claims court), would "essentially guarantee" that the consumer would be made whole. *See Concepcion v. AT&T Mobility*, 584 F.3d 894, 902 n.9. The Ninth Circuit invalidated the class action waiver provision, however, because it found that California state law would consider the contact a contract of adhesion involving a small amount of money that would not motivate a consumer to bring a claim in the first place. *Id*. The Court's resolution of the case may resolve not only questions of whether (and the extent to which) the FAA preempts state law on arbitration, but — with *Rent-A-Center* — may also round out a trilogy of arbitration decisions that provide a clearer framework for how unconscionability concerns should be addressed in class arbitrations.

Although it took the Court 28 years from the 1982 *Southland* appeal to the *Stolt-Nielsen* decision to address the class arbitration issue head on, it appears that now the Court is not shying away and may soon address more fully the unconscionability arguments in the consumer context.

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**The authors of this article represent Stolt-Nielsen in connection with the matters that are the subject of this article*

Earnings Calls, Invitations to Collude, and Antitrust Lessons from the Federal Trade Commission's Settlement with U-Haul

By Claudia R. Higgins

The recent consent settlement by U-Haul International, Inc. and its parent company AMERCO (together, "U-Haul") with the Federal Trade Commission ("FTC") raises important issues for corporate counsel, particularly as they assist executives preparing for quarterly earnings calls. According to the FTC, U-Haul's CEO invited the company's closest competitor to collude to raise prices for one-way truck rentals in violation of Section 5 of the FTC Act, in part, by making statements during a 2008 earnings call that U-Haul was "show[ing] rate leadership" and, in answer to questions from analysts, suggesting that competitors should not "throw money away" by cutting prices.[1] These statements, together with private discussions with competitors regarding prices, formed the basis for charges that U-Haul attempted to collude — an unfair method of competition under Section 5 according to the FTC.[2]

The agency action rests on U-Haul's unilateral conduct. There are no allegations of an agreement having been reached with competitors, and as such, the case is brought solely under Section 5 of the FTC Act without charges under either the Sherman or Clayton Acts. Follow-on private treble damages litigation is therefore less likely than would be the case with a traditional Sherman Act or Clayton Act antitrust violation, a point made specifically by Chairman Leibowitz and Commissioners Kovacic and Rosch.[3] Nonetheless, the settlement is instructive and provides a cautionary note for antitrust counselors.

This invitation-to-collude case against U-Haul makes clear that the FTC is closely watching what companies say in public statements and particularly in earnings calls, the transcripts for which are routinely available.

This invitation-to-collude case against U-Haul makes clear that the FTC is closely watching what companies say in public statements and particularly in earnings calls, the transcripts for which are routinely available. In many ways this presents a difficult dilemma for companies because the securities laws encourage transparency. Also, the agency's willingness to use Section 5 of the FTC Act alone, without alleging a traditional antitrust violation under the Sherman Act or the Clayton Act, potentially brings a broader array of corporate conduct under the scrutiny of federal authorities.

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[1] Transcript of Q3 2008 AMERCO Earnings Conference Call -- Final, at pp. 2, 11, Attachment A, Proposed Complaint, FTC File No. 081-0157.

[2] "Unfair methods of competition in or affecting commerce . . . are declared unlawful." 15 U.S.C. § 45.

[3] Statement of Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch, In the Matter of U-Haul Int'l, Inc. and AMERCO, FTC File No. 081-1057 (June 9, 2010) (hereinafter, "U-Haul Statement").

The FTC's Complaint Against U-Haul

U-Haul agreed to settle charges that, between 2006 and 2008, it had engaged in an unfair method of competition in violation of Section 5 of the FTC Act by inviting competitors to collude on prices for one-way truck rentals. According to the FTC, U-Haul's attempt to collude included both private communications about pricing between U-Haul personnel and its competitors, as well as public pronouncements by U-Haul that were intended to facilitate collusion and raise prices.

The complaint first set the structural stage for its allegations. U-Haul is the largest consumer truck rental company in the United States.[4] Its closest competitor is Avis Budget Group ("Budget"), which represents "the principal competitive constraint upon U-Haul's pricing power."[5] Penske Truck Leasing Co. L.P. is a third competitor in the market. U-Haul and Budget account for 70 percent of the one-way truck rentals in the United States and, according to the FTC, if the two companies were to act together, they "could profitably impose higher prices upon consumers."[6] U-Haul's CEO is said to have been "aware that price competition from Budget was forcing U-Haul to lower its rates for one-way truck rentals."[7]

***Private Communications*.** Having described the competitive structure of the industry, the complaint then details conduct by U-Haul's CEO who allegedly employed a strategy of both public and private communication between 2006 and 2008 in an attempt to collude with Budget.[8] In 2006 and 2008, he directed the company's regional managers and dealers to raise one-way rental prices in their regions, and then to speak privately with their counterparts at Budget making certain that their competitors knew about U-Haul's "conditional rate increase."[9] During these conversations, the managers were to encourage Budget to follow U-Haul's lead, and to make sure the competitors understood that, if U-Haul's price leadership were not followed, U-Haul would return its rates to original levels.[10]

In circumstances where U-Haul managers or dealers believed a price leadership strategy would not be successful, the regional managers were to lower one-way rates below competitors' prices, and then to inform the competitor of the reduction. According to the complaint, U-Haul believed this would "teach" the competitor "that its low-price policy was fated to be ineffective" and would "prepare the ground for the future implementation by U-Haul of the basic, collusive strategy."[11]

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[4] Proposed Complaint, FTC File No. 081-0157 (hereinafter, "Complaint") at ¶ 1.

[5] *Id.* ¶¶ 1, 10.

[6] *Id.* ¶ 10.

[7] *Id.* ¶ 11.

[8] *Id.* ¶¶ 12-24.

[9] *Id.* ¶ 12a.

[10] *Id.* ¶¶ 12-19.

[11] *Id.* ¶ 12b.

The Complaint includes allegations showing that, in at least one instance, the private communication strategy was successful. After raising his rates, a regional manager in Florida spoke with Budget: "[I] told them I was killing them on rentals to that area and I am setting new rates to the area to increase revenue per rental. I encouraged them to monitor my rates and to move their rates up. And they did."[12]

Public Communications — U-Haul also used public statements to invite collusion as well, according to the Complaint.[13] During late 2007, U-Haul had introduced a nationwide rate increase that Budget had not matched.[14] Therefore, with the alleged expectation that competitors monitored U-Haul's earnings calls, during his call on February 7, 2008, U-Haul's CEO made clear his intentions about leading prices upward.[15] Specifically, he announced U-Haul's efforts "to show price leadership" for the industry even in "highly competitive" markets and explained that his company would refrain from cutting prices immediately in response to competition in order to convince their competitors that they need not "throw the money away" by cutting prices — that "[i]f they cave on prices the net effect is we got less money."[16] Attached to the Complaint is a transcript of the earnings call during which the allegedly errant statements were made.

Therefore, with the alleged expectation that competitors monitored U Haul's earnings calls, during his call on February 7, 2008, U-Haul's CEO made clear his intentions about leading prices upward.

Intent and Possible Effects — The Complaint alleges that U-Haul acted with specific intent to facilitate collusion and achieve market power.[17] Further, it states that if Budget had accepted the invitations to collude, the result would have been higher prices and reduced output for one-way truck rentals.[18]

Violation and Remedy — The Complaint charges that U-Haul engaged in an "invitation to collude" that is an unfair method of competition in violation of Section 5 of the FTC Act.[19] U-Haul signed a consent order that includes both cease and desist provisions enjoining the company from colluding or inviting collusion as well as compliance monitoring and reporting requirements. The order remains effective for 20 years.

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[12] *Id.* ¶ 13.

[13] *Id.* ¶¶ 20-24.

[14] *Id.* ¶¶ 20-22; see also Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of U-Haul International, Inc. and AMERCO, FTC File No 081-0157, at 2 ("Analysis to Aid Public Comment").

[15] Complaint ¶ 23.

[16] *Id.* ¶ 24; see also Analysis to Aid Public Comment at 2-3.

[17] Complaint ¶ 25.

[18] *Id.* ¶ 26.

[19] *Id.* ¶¶ 27, 28.

Invitations to Collude

Invitation-to-collude charges are relatively rare, but this case serves as a reminder of the need to be cautious in statements during earnings calls, as well as in direct conversations with competitors. Although U-Haul's alleged conduct for this settlement with the FTC included both private and public invitations to collude, it is at least a possibility that the FTC could have decided to file its complaint based on the earnings calls statements alone. The FTC defines an invitation to collude as "an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output."[20] If the invitation had been accepted, the FTC explained that it would have referred the matter to the Department of Justice for criminal investigation, which raises the specter of much greater difficulty for defendants, both before the government and with private plaintiffs' actions.[21]

Invitation-to-collude charges are relatively rare, but this case serves as a reminder of the need to be cautious in statements during earnings calls, as well as in direct conversations with competitors. Although U-Haul's alleged conduct for this settlement with the FTC included both private and public invitations to collude, it is at least a possibility that the FTC could have decided to file its complaint based on the earnings calls statements alone.

Effect of Section 5 FTC Act Charges

By far, most FTC cases are brought both under Section 5 of the FTC Act as well as under the antitrust statutes — the Sherman Act and the Clayton Act.[22] By charging only a violation of Section 5 of the FTC Act here, with no allegations of agreement or of a Sherman Act or Clayton Act violation, the FTC has entered into a settlement that some of its officials believe may not spark private litigation. Three of the FTC's Commissioners — Chairman Leibowitz and Commissioners Kovacic and Rosch — issued a statement explaining that

> [T]he complaint in this case alleges an unfair method of competition in violation of Section 5 of the FTC Act that does not also constitute an antitrust violation.
>
> Invitations to collude are the quintessential example of the kind of conduct that should be — and has been — challenged as a violation of Section 5 of the Federal Trade Commission Act,[23] which may limit follow-on private treble damage litigation from Commission action while still stopping inappropriate conduct. In contrast to conspiracy claims that would violate Section 1 [of the Sherman Act], invitations to

[20] Analysis to Aid Public Comment at 3.

[21] *Id.*

[22] The term "antitrust law" is defined by Section 1 of the Clayton Act as the Sherman Act, the Clayton Act, and parts of the Wilson Tariff Act. 15 U.S.C. § 12. Section 2 of the Robinson-Patman Act is an amendment to the Clayton Act and is therefore included in this definition.

[23] *Citing to* In re Valassis Commc'ns, Inc., F.T.C. File No. 051-008, 2006 FTC LEXIS 25 (April 19, 2006) (Complaint); In re MacDermid, Inc., F.T.C. File No. 991-0167, 1999 FTC LEXIS 191 (Feb. 4, 2000) (Complaint, Decision and Order); In re Stone Container Corp., 125 F.T.C. 853 (1998) (June 3, 1998) (Complaint, Decision and Order); In re Precision Moulding Co., 122 F.T.C. 104 (Sept. 3, 1996) (Complaint, Decision and Order); In re YKK (USA) Inc., 116 F.T.C. 628 (July 1, 1993) (Complaint); In re A.E. Clevite, Inc., 116 F.T.C. 389 (June 8, 1993) (Complaint); In re Quality Trailer Products Corp., 115 F.T.C. 944 (Nov. 5, 1992) (Complaint).

collude do not require proof of an agreement; nor do they require proof of an anticompetitive effect.[24]

The analysis released by the FTC to aid in public comment on the settlement with U-Haul goes further to make clear that the agency is not alleging an agreement and thereby is not alleging a violation of the Sherman Act. The statement explains that, if an invitation to collude "is accepted and the two firms reach an agreement, the Commission will allege collusion and refer the matter to the Department of Justice for criminal investigation."[25] Interestingly, however, the FTC's Complaint includes an allegation that a U-Haul official reported to his superiors his successful implementation of the U-Haul strategy of raising prices and communicating the increase to Budget — after which Budget raised its prices as well.[26] The FTC makes specific note of these circumstances explaining that nonetheless, the agency made no allegation that U-Haul and Budget reached an agreement.[27]

The U-Haul case shows the need to review carefully executives' prepared statements for conference calls and to prepare answers for analyst questions that may seek information about reactions to competitive market forces, as well as a reminder of the need to be cautious in direct conversations with competitors.

Practical Advice for Antitrust Counseling

The U-Haul case shows the need to review carefully executives' prepared statements for conference calls and to prepare answers for analyst questions that may seek information about reactions to competitive market forces, as well as a reminder of the need to be cautious in direct conversations with competitors. The FTC leadership under the Obama Administration has made clear that the agency is seeking cases to bring solely under Section 5 of the FTC Act, and because the FTC takes the position that Section 5 reaches conduct that does not arise to an antitrust violation under the Sherman and Clayton Acts, its reach may be quite broad.[28] While this is not settled law, the agency's enforcement posture has been made clear, and this case demonstrates the intention. Most clients would rather avoid being the vehicle for further development of the law in this area.

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[24] *See* U-Haul Statement.

[25] Analysis to Aid Public Comment at 3.

[26] Complaint at ¶ 19; Analysis to Aid Public Comment at 3.

[27] *Id.*

[28] *See, e.g.,* Remarks of Chairman Jon Leibowitz, Commissioner, Federal Trade Commission, 36th Annual Conference on International Antitrust Law & Policy, Fordham Competition Law Institute at Fordham Law School (September 24, 2009); and "Rewriting History: Antitrust Not As We Know It . . . Yet," remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, before the ABA Antitrust Section 2010 Spring Meeting, Washington, D.C. (April 23, 2010).

Robinson Patman Counseling after the Third Circuit's Decision in *Feesers*

Millie Calhoun[1]

The recent decision by the Third Circuit Court of Appeals in the *Feesers*[2] case is a cautionary tale for Robinson Patman counselors everywhere. As of this writing, the defendant has prevailed. Nevertheless, the case is a fascinating example of how the Act can create significant litigation issues for a business.

The plaintiff Feesers[3] is a regional food distributor servicing customers within a 200 mile radius around Harrisburg, Pennsylvania. The defendants include Michael Foods, a producer of egg and potato products, who supplies both Feesers and the second defendant, Sodexho, Inc., the world's largest food management company. On March 17, 2004, Feesers sued Michael Foods and Sodexho. It alleged that Michael Foods had violated the Robinson Patman Act by giving Sodexho illegal discriminatory prices. It also alleged that Sodexho had violated the Act by illegally inducing the discriminatory prices.

The recent decision by the Third Circuit Court of Appeals in the Feesers case is a cautionary tale for Robinson Patman counselors everywhere. As of this writing, the defendant has prevailed. Nevertheless, the case is a fascinating example of how the Act can create significant litigation issues for a business.

Actual Competition

The Robinson Patman Act prohibits discrimination between actual competitors. In May 2006, the trial court granted summary judgment on the grounds that Feesers had not shown that it actually competed with Sodexho.[4] The defendants argued that Feesers was a distributor and Sodexho was a food management company. Therefore, they did not compete. Institutional customers such as hospitals and schools used one of two models: a self supply model (where they would use a distributor) and a managed model (where Sodexho would contract for the distributor to supply food pursuant to contract terms negotiated by Sodexho). Where customers were determining which model to use, Sodexho and Feesers competed to supply the customer. But once the customer chose one model or the other, Sodexho and Feesers did not compete to serve that customer. In fact, Sodexho is not a distributor, so it never competed directly with Feesers to distribute food. The district court concluded that because Michael Foods and Sodexho had different business models, they were not competing at the same functional level and granted summary judgment against Feesers.

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[2] *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191 (3d Cir. 2009).

[3] This is not Feeser's first Robinson Patman claim. *See J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F2d 1524 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991).

[4] *Feesers, Inc. v. Michael Foods, Inc.*, 2006-2 Trade Case ¶75,335 (M.D. Pa. 2006).

The Court of Appeals reversed in a 2-1 decision,[5] holding: 'The District Court required Feesers to prove too much. It placed the burden on Feesers to show not only that it "actually competes" with Sodexho, but also that "food costs and distribution are the determining factors' in a consumers choice between hiring Sodexho or Feesers, i.e., that Sodexho's lower food prices are why customers switch from buying products from Feesers to buying products and management services from Sodexho."[6] The Court of Appeals sent the case back for trial.

Discrimination

The case was tried to the court in January 2009. On April 27, 2009, the court handed down an opinion finding for Feesers.[7] The defendants' first argument was that there was no discrimination. The court concluded that the price differences were in fact "stunning."[8] Feesers paid Michael Foods's list price, but Sodexho received "deviated" pricing. Michael Foods also had discounts explicitly identified as "volume discounts." On average, the court concluded that Feesers paid 60% more for the eleven top selling Michael Foods products.[9]

Actual Competitors

At trial, the court rejected the defendants' argument that Feesers and Sodexho did not compete because the facts showed that the different models competed directly for customers and that Feesers had lost accounts to Sodexho. The court cited Sodexho documents which demonstrated that it regarded Feesers to be a competitor.

Meeting Competition

The defendants also argued that they were entitled to the affirmative defense of meeting competition. Michael Foods's meeting competition defense was presented through the testimony of Vicky Waas, Michael Foods's main negotiator. The court found Ms. Waas to be candid and credible, but still concluded that Michael Foods had not met the elements of the defense. Michael Foods never actually had evidence of competing offers. Rather, it assumed it was meeting competition for two reasons. First, Sodexho's demands for lower prices were in line with what Michael Foods expected its competitors could deliver. Second, Sodexho was a very attractive customer likely to receive other offers from Michael Foods's competitors due to its large purchasing volume.[10]

Ms. Waas's testimony clearly showed that she had no knowledge of whether other offers existed, much less what the prices or terms of those offers might be.

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[5] *Feesers, Inc. v. Michael Foods, Inc*., 498 F.3d 206 (3d Cir. 2007).

[6] *Id*. at 213.

[7] *Feesers, Inc. v. Michael Foods, Inc.*, 632 F. Supp. 2d 414 (M.D. Pa 2009).

[8] *Id*. at 434.

[9] *Id.*

[10] *Id*. at 458.

Q: My question is, when you negotiated this ’99 agreement, do you recall doing anything to check what the competitive prices were being offered to Sodexho to make sure you weren’t beating those competitive prices?

A: I recall I was in a competitive situation with my competitor on the 1999 agreement as well as the 2002 agreement.

Q: In ’99 specifically, do you recall seeing any prices of a competitor from Sodexho?

A: I don’t recall, but I remember conversations about such.

Q: Okay. Do you recall conversations about specific prices being offered by a competitor?

A: Not specific, but in scope, yes.

. . .

Q: What do you mean by in scope?

A: Essentially, where I had to be, maybe not showing me exactly a price to match a price, but looking at the entire portfolio of what I was offering and asking me to, you know, do a better job with my pricing.

Q: Well, do you recall in ’99 if anyone, either orally or in writing gave you a specific price of a competitor being offered to Sodexho?

A: Specific price, no, sir.[11]

And similarly,

Q: I understand he told you he wanted something better, it wasn’t working. He didn’t tell you, here is a specific competitive proposal you have to meet, right?

A: He didn’t show me one.

Q: He didn’t orally tell you the details of one?

A: He did not orally tell me the details of that proposal, no sir.[12]

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[11] *Id* at 453.

[12] *Id* at 454.

The court concluded Ms. Wass's testimony "establishes that she simply did not have enough information about competitive offers from other egg and potato manufacturers to craft an offer calculated in good faith to meet, and not beat Michael Foods' competition."[13] The court concluded as follows:

> [T]he greater problem is that acceptance of Wass's assumption would be contrary to the primary purpose of the Robinson-Patman Act, which is to prevent large buyers from utilizing their purchasing power to secure lower prices than their smaller competitors. If the meeting competition defense could be satisfied merely by showing that a particular customer was large and therefore likely to receive lower prices from competitors, then the Act's purpose would be largely thwarted. This is particularly true where, as here, the large buyer made no reference to any offer by any particular competitor for most of the negotiations. . . . In sum, the court is not persuaded that the discounts granted to Sodexho constituted a good faith offer to meet competition, rather than a concession to win the business of a large and powerful buyer.[14]

Inducement

Based on its findings of fact, the court concluded that Sodexho had knowingly induced an illegal price discrimination. In addition to all the facts already discussed, the court based this conclusion in part on the fact that Sodexho demanded and vigorously enforced a most favored nations clause which required Michael Foods to provide Sodexho with its lowest price. It was also based in part on Sodexho's own documents.

Injunctions

On April 27, 2009, the court enjoined Michael Foods from selling to Feesers at different prices than those sold to Sodexho. The court also enjoined Sodexho from inducing discriminatory pricing. Michael Foods immediately stopped selling to Feesers. On May 5, 2009, Feesers petitioned for Michael Foods to be held in contempt. On May 26, 2009, the court held Michael Foods in contempt and ordered it to sell to Feesers.[15] On June 16, 2009, the court denied the defendant's motion for an emergency stay pending appeal.[16] On July 8, 2009, the Third Circuit Court of Appeals stayed the district court's order and ordered an expedited appeal.[17]

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[13] *Id*. at 458.

[14] *Id*. at 459.

[15] *Feesers, Inc. v. Michael Foods, Inc*., 2009-1 Trade Cas ¶76,628 (M.D. PA, May 26, 2009).

[16] *Feesers, Inc. v. Michael Foods, Inc*., 2009 U.S. Dist LEXIS 51361 (M.D. PA, June 16, 2009).

[17] *Feesers, Inc. v. Michael Foods, Inc*., 332 Fed. Appx 810 (3d Cir. 2009).

Third Circuit Reverses

This time, a different panel of the Third Circuit Court of Appeals reversed the district court on the grounds that Feesers and Sodexho were not competing purchasers, holding: "[P]arties competing in a bid market cannot be competing purchasers where the competition for sales to prospective customers occurs *before* the sale of the product for which the [Robinson Patman Act] violation is alleged."[18]

Robinson Patman and Competitive Bidding

Feesers is just the latest in a series of cases which have dealt with the difficulty of applying Robinson Patman to competitive bidding. Robinson Patman was originally enacted to protect small "Mom & Pop" stores from competition from large department and chain stores. Arguably, the non-discrimination requirements of the Robinson Patman Act are in conflict with the very nature of competitive bidding. Consider for example, how one can submit a winning bid if one is required to meet, but not beat, one's competitor's pricing. To use the analogy of the dissent in the Eighth Circuit's *Reeder-Simco* decision, applying Robinson Patman to competitive bidding is a lot like trying to put a round peg in a square hole.[19] Therefore, most counselors see bidding situations as outside the Robinson Patman Act. But *Feesers* demonstrates that this view is not without risk.

The Third Circuit Court of Appeals reversed the district court on the grounds that Feesers and Sodexho were not competing purchasers, holding: "[P]arties competing in a bid market cannot be competing purchasers where the competition for sales to prospective customers occurs before the sale of the product for which the [Robinson Patman Act] violation is alleged."

Over the years, the courts have tended to narrow the application of Robinson Patman in competitive bidding situations. Basically, the courts have adopted one of two theories to distinguish bidding cases. The first is that there are not "two sales" as required by the statute. Where two bidders are bidding to supply the same customer, only one will win the bid and there will only be one sale. The second rationale is that because only one bidder will win, they will not be "competing purchasers" as required by the statute.

In 2004, the US Supreme Court addressed Robinson Patman in a competitive bidding situation in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*[20] In *Reeder-Simco,* the Court was faced with a bidding situation where Volvo offered less advantageous prices to the plaintiff than it did to other dealers, but there was no evidence the plaintiff competed directly with those other dealers on the same bids. The Court held that there was no Robinson Patman violation because the dealers were not vying for the same customers and therefore were not in actual competition. The Supreme Court did not address the question as to whether Robinson Patman required Volvo to offer the same price to dealers who were competing for the same customer.

[18] *Feesers, Inc. v. Michael Foods, Inc.*, 591 F3d 191, 194 (3d Cir. 2009) (emphasis original).

[19] *Reeder-Simco GMC, Inc., v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 718 (8th Cir. 2004), *rev'd*, 546 U.S. 164 (2006).

[20] 546 U.S. 164 (2006).

In *Feesers*, the district court's grant of summary judgment on the grounds that Feesers and Sodexho did not compete was consistent with the Supreme Court's opinion in *Reeder-Simco* and other recent cases. Therefore, the Third Circuit's reversal of that opinion sent shockwaves through the counseling community. In *Reeder-Simco*, the US Supreme Court cautioned: "Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more toward the protection of existing *competitors* than to the stimulation of *competition*."[21] In spite of this admonition, the Third Circuit's original opinion did seem to revert to an era of literal interpretation of the Robinson Patman Act.

Third Circuit Opinion

In *Feesers*, after trial, a different panel of the Third Circuit appears to have reversed the trial court for doing exactly what the first panel instructed the court to do. Although the second panel had difficulty reconciling their opinion with the Third Circuit's original opinion, the second panel's opinion is much more consistent with the Supreme Court's opinion in *Reeder-Simco* and the general trend of decisions in the courts.

This case could have been analyzed as a "two sales" decision. Feesers and Sodexho may compete to provide food services to customers, but ultimately only one of them will win and there will only be one sale. The Third Circuit blurred the distinction between the two sales requirement, the competing purchaser requirement and the injury to competition requirement to conclude that the Act was not violated.

Lessons from *Feesers*

Over the past two decades, some counselors have become sanguine about the Robinson Patman Act. This is because there is virtually no Government enforcement, there are very few civil cases and those cases that have been brought are usually won by defendants.[22] Arguably, this is because courts are typically not very sympathetic to the Act, which could be characterized as a relic of its era and potentially very anticompetitive.[23] Even though this case appears to have ultimately been won by the defendant, it was won only after a long and presumably expensive battle with a persistent customer. The cautionary lesson here is that while some courts may be inclined to apply the Act very narrowly, there is always a risk that a court will interpret Robinson Patman to literally mean what it says.

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The district court's opinion raises two issues that a careful counselor will want to consider regardless of the outcome in this case:

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[21] *Id*. at 181 (emphasis in original).

[22] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS (April 2007) at 316.

[23] For example, the dissent to the Third Circuit opinion essentially rejected the plaintiff's claims because of its disagreement with the Robinson Patman Act on policy grounds. *Feesers, Inc. v. Michael Foods,* 498 F.3d 206, 216 (Jordan, J., dissenting).

First, the district court imposed a standard for the meeting competition defense that harkened back to another era in Robinson Patman enforcement. Many counselors will recognize in the testimony of Ms. Waas the echoes of their own clients who often make the same incorrect assumption that Ms. Waas made. The district court's opinion makes clear that the court would have come out differently if there had been careful contemporaneous documentation of meeting competition. Counselors should reinforce with their clients that it is prudent for many reasons to carefully document a meeting competition defense.

Second, the district court seems to have taken a uniquely broad view with respect to inducement of illegal pricing. This is one of a very few cases in the last several decades to find a buyer liable for inducement. The district court's opinion raises interesting questions about Most Favored Nations clauses which imply that the buyer is getting the lowest price. The court inferred from this that the buyer was intentionally inducing a discriminatory price. This problem may be avoided by making sure that the clause requires that no other customer gets a lower price rather than requiring that the customer gets a better price than anyone else.

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In Conclusion

While common sense and sound public policy appear to have prevailed in *Feesers*, they prevailed only after a long and difficult battle. The antitrust counselor must be ever vigilant to avoid even the appearance of Robinson Patman claims. As long as the statute remains upon the books, there is always a concern that it will be enforced within the literal meaning of its language.

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