Antitrust Update

EXECUTIVE SUMMARY

Is antitrust dead or is it just being reshaped by the Supreme Court? Will anything come of the recently issued Antitrust Modernization Commission report? What is the status of indirect purchasers? Gathered to discuss these issues were plaintiffs attorneys, Maxwell Blecher of Blecher & Collins and Joseph Saveri of Lieff, Cabraser, Heimann & Bernstein; and for the defense, Aton Arbisser of Kaye Scholer; Jesse Markham of Morrison & Foerster; and Michael Tubach of O'Melveny & Myers. The roundtable was moderated by Custom Publishing Editor Chuleenan Svetvilas and reported for Barkely Court Reporters by Krishanna DeRita.

MODERATOR: What's left of antitrust law and where is it heading?

BLECHER: I don't see much future for antitrust. If you look over the last decade or two, previous Supreme Court decisions are being replaced by a series of pro-defense decisions, which will significantly reduce private enforcement down the road. For example, *Utah Pie* [386 U.S. 685 (1967)] used to govern predatory pricing. It's now been replaced by *Brooke* [509 U.S. 209 (1993)]. *Grip-Pak v. Illinois Tool* [651 F. Supp. 1482 (1986)] used to govern the standard for litigation as a predatory act. That's been replaced by *Professional Real Estate Investors* [508 U.S. (1993)]. *Chroma Lighting* [111 F.3d 653 (1997)] has been replaced by *Volvo* [546 U.S. 164 (2006)].

Aspen [472 U.S. 585 (1987)] had been replaced by *Trinko* [540 U.S. 398 (2004)]. *California v. El Paso Natural Gas* [376 U.S. 651 (1964)] on the interplay between regulation and antitrust has also been replaced by *Trinko*, and will probably be further reinforced by a forthcoming *Credit Suisse* decision. [No. 05-1157; argued 3/27/07.]

Vertical resale pricing is on its last leg. And then you look at the complexities created by summary judgments. They've become the preferred mode of disposing of antitrust cases in the federal system. You add the complexities, costs, and uncertainties of *Daubert* [509 U.S. 579 (1993)], which operates only as a one-way street, and inexorably you have to come to the conclusion that antitrust is, if not dead, certainly dying.

ARBISSER: In the area of vertical restraints, it's very difficult to make a case these days. But the government is still actively enforcing price fixing. If there's one lesson I hope that in-house counsel take away from reading this, it's that they need to go out to their salespeople and make sure they understand there is an antitrust law, that people are going to prison today for longer and longer terms, that companies are paying larger and larger fines for violating the antitrust laws.

MARKHAM: Antitrust is both stable and vibrant in the United States. All of the developments that Max [Blecher] recited became more or less inevitable three decades ago. The fine points are getting some adjustments in the courts, but the basic rules are as constant in antitrust as in any other area of law. For example, if one looks at the current hyperactivity in the United States Supreme Court — which has been taking a surprising number of antitrust cases — the Court is not creating new antitrust rules. It is instead simply cleaning up what became inevitable with the shift toward economic analysis as the governing guide to antitrust decision-making. What I see going on in antitrust is a great deal of stability and vigorous enforcement within narrowed bounds.

Moreover, you can't assess the current state of antitrust without paying attention to other jurisdictions. Europe has a mature body of competition law that has developed considerably over the past few decades. European merger control and antitrust rules governing IP licensing are in some respects more restrictive than U.S. law, and so the EU plays a significant role internationally. Of course merger control has become a truly global affair, with dozens of jurisdictions around the world requiring pre-merger notifications and clearances.

We not only have vigorous enforcement in the EU, Japan, Australia and so on, but we now have the approaching enactment of an antitrust law in China, which is going to be a significant issue for businesses that want part of the China market. So from a global perspective antitrust is having an enormous impact on business. While it is true that U.S. courts are no longer hospitable to some kinds of antitrust claims, from a broader perspective antitrust plays a much greater role in the world's economy than in the past.

TUBACH: The obvious shift has been toward protecting competition and not consumers per se. Oddly, in the one area in which antitrust is most alive and well, in the criminal context, there's a great focus simply on price fixing without real inquiry into whether there has been any actual harm caused by the conduct. In addition, given the increasing

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emphasis on competition as the touchstone of what we are trying to protect, we may well see a shift in litigation to Europe, where courts and governments are likely to be more receptive to arguments based on policies other than protecting competition.

SAVERI: It's become increasingly difficult through procedural mechanisms such as the Class Action Fairness Act to provide relief for the people who were actually damaged. It's more likely now than it used to be that classes will not get certified, and there will be real substantive impediments for redress for those down the distribution chain.

BLECHER: A lot of international cartels exist and the government is doing something about ferreting them out. That part of antitrust price fixing is alive and well. But antitrust is more than price fixing. It's always encompassed a much wider range of activity, and that wider range is narrowing itself almost exclusively to price fixing.

MODERATOR: Are federal courts more hospitable to antitrust claims than state court?

ARBISSER: If you are a company that's a victim of anticompetitive activity, the federal court is not going to be a very hospitable place. You may well be served pursuing your claim in California or some other jurisdiction. Those individual plaintiff claims under state law are going to continue to permit the states to develop their substantive antitrust laws. A lot of them are committed to following federal law in one way or the other, but I'm a believer in the end that the antitrust laws are one of the relief valves in our society. If you try to put the stopper too tightly in the bottle, it's going to find a way of leaking out one way or the other. State court is one place to go.

SAVERI: There are substantive reasons to bring these cases in California court, putting aside things like the different procedural rules that apply to summary judgment or how many jurors are needed to vote in your favor to prevail. Those are all very significant things that California presents as an alternative to federal court.

MARKHAM: State courts are often more hospitable to antitrust plaintiffs. The federal policy shift toward Chicago School economics has not necessarily been followed by the states. In some respects this reflects the relative scarcity of state decisional law. If there are three antitrust precedents in Maine all establishing that the antitrust laws protect standards of fair play in the marketplace, a Maine state court might not be inclined to ignore those three cases just because there are hundreds of more recent Sherman Act cases to the contrary.

There is, after all, about a hundred years of combined federal and state antitrust law jurisprudence that championed individual freedom of participants in the marketplace, fairness, and the distribution of political power. Those policies have been dropped from federal antitrust law, but each state may or may not elect to follow that approach.

The U.S. Supreme Court in *ArcAmerica* [490 US. 93 (1989)] loosened up the state courts to follow their own thread, and they have in some instances done so. For example, in *Van De Kamp v. Texaco* [46 Cal. 3d 1147 (1988)], the California Supreme Court analytically divorced the state's antitrust law from the Sherman Act. So, the states continue to offer more hospitable courts for antitrust plaintiffs.

BLECHER: Whenever we can, we'll go to state court. The state judicial philosophy is clearly much more aligned with underdogs, much more interested in the preservation of competitors per se. You only have to read decisions like *Eddins* [134 Cal. App. 4th 290 (2005)] and *SBC* [133 Cal. App. 4th 1277 (2005)] to get a flavor that the state courts have a completely different mentality and philosophy about antitrust and trade restraint issues. You can have exclusive dealing violations under the state law with as little as 20 percent of the market, which would be unthinkable in federal court.

MODERATOR: What's your opinion of the Chicago School of economics and its link to antitrust? Will it continue?

MARKHAM: We've been living in the era of Chicago School antitrust for a very brief period of time. It's not at all clear to me that Chicago School of economics is really an answer to all of the problems that can be raised legitimately in an antitrust forum. Pitofsky early in this process referred to it in a published article as bad history, bad law, and bad policy. We haven't necessarily seen the very end of that debate. Indeed, we now refer to "post-Chicago School" economics, because the pendulum clearly swung a little bit backwards on some of the more dogmatic principles of conservative economic theory.

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TUBACH: The question is: upon what principles do we want the substantive laws to be based? While the Chicago School has not been around very long, relatively speaking, it's going to be very difficult in the future to divorce the idea of sound economic policy from antitrust law. More than anything else, even if you disagree about any specific application of those economic principles, it's going to be very difficult down the road to say, "We just want to have this antitrust law out there even if it isn't supported by sound economics."

MARKHAM: The economics of efficiency and consumer welfare, however, are not the only disciplines of sound economics. There is "sound" economics addressed to such matters as income redistribution, but federal courts ignore it, having concluded that antitrust is an inefficient way to redistribute wealth. I think there is still an interesting debate to be had about whether we should continue with the Chicago School, and if so to what extent. This debate is not really taking place at the moment, but perhaps it will.

Today's orthodoxy might not be tomorrow's. There are thoughtful people who believe that small and less efficient businesses are preferable to discount superstores. There are thoughtful people who believe the courts' job ought to be to enforce standards of fair business conduct. Antitrust once explicitly embraced these views, as in the *Alcoa* decision, and there are plenty of reasons to debate these matters instead of dismissively setting them to the side.

ARBISSER: There is a question whether the erosion of antitrust law is because we have a better understanding of economics. With that understanding, some of the things we thought were bad may not be so bad in terms of the overall impact. Price discrimination is one area where it's increasingly difficult to maintain claims. More often than not, price discrimination is beneficial to consumers. It's much harder for a company to say, "I'm going to cut my price across the board to everybody." Price discounts begin selectively and ultimately spread as companies are forced to spread those out.

BLECHER: It's not a better understanding of economics that's changed antitrust law; it's an adoption of a philosophy that antitrust should now be an economic remedy instead of a civil rights remedy that Justice Marshall talked about and was articulated in *Northern Pacific* [356 U.S. (1958)]. There's been a 180-degree flip. At one time, Judge Learned Hand talked about competition for competition's sake to preserve small business, and now that's gone down the drain. The antitrust law protects competition but not competitors, which is nonsensical facially because you can't really have competition without competitors.

ARBISSER: But in society where people choose every day to go shop at Wal-Mart rather than their local grocery store or local hardware store, it's very hard to convince people that there's value to having a local hardware or grocery store. People are voting with their dollars and they vote for politicians, too, who support the Wal-Marting of America.

BLECHER: We'll have two or three super giant banks and two or three airlines left, if that is an acceptable economic end result, then that's where we are going to wind up.

TUBACH: Regardless, it's not clear that a contrary policy should be borne on the backs of those who are competing in that space. So what's left of antitrust law? The best part, for the most part.

MODERATOR: In April, the Antitrust Modernization Commission released its report, which included repealing the Robinson-Patman Act, which prohibits sellers from offering different prices to different purchasers of "commodities of like grade and quality" where the difference injures competition. It also recommended overruling *Illinois Brick, Inc. v. Illinois*, [431 U.S. 720 (1977)], in which a plaintiff who purchased goods indirectly from an antitrust violator could not recover damages for overcharges passed on to the plaintiff through a chain of distribution. What are the implications of the report?

MARKHAM: The report is a very thoughtful document. That said, it is every bit as much a nonevent as its predecessors. There have been commissions reviewing the efficacy and policy underpinnings of antitrust laws since I was in high school, which was all too long ago. None of those commissions have made recommendations that went anywhere.

SAVERI: While the panel might have been bipartisan in number, there weren't representatives of the state enforcement agencies on the panel. Most of the panel members had defense practices.

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TUBACH: An important Antitrust Modernization Commission recommendation was to strip away the potential for multiple treble damages in different forums. *Illinois Brick* created something that the Supreme Court clearly didn't anticipate, which is having 60, 70 different lawsuits out there basically alleging the same thing in different forums. That's a one-sided set up against the defendant for collateral estoppel reasons. It makes every sense in the world to have those issues decided in one forum.

The way the system is set up now, there is the danger of over-deterring potential wrongdoing. The criminal sanctions are presumed under the U.S. Sentencing Guidelines to be double an assumed 10 percent overcharge. Then you have treble damages for direct purchaser claims and then treble damages again for indirect purchaser claims.

SAVERI: The empirical studies show that very seldom, if at all, does anybody pay anything near treble damages. These cases are resolved at a substantial discount from what the maximum exposure should be. So anybody who says they're concerned about over-deterrence is really blinking at what goes on in the world.

MARKHAM: Joe [Saveri] is correct that the studies do not find payouts as high as one might expect. However, adjusting antitrust sanctions would not affect deterrence one way or the other. Whether price fixing is sometimes profitable is not a factor that a general counsel is likely to spend a lot of time thinking about. Corporations either have or don't have a culture of compliance. Effective compliance is expensive and the failure to comply can be far more expensive—that is the arithmetic, and smart well-run companies generally opt for effective compliance.

ARBISSER: Nobody sits there and says, "We can afford to take the risk of doing this because if we get caught, we'll pay three times, which we wouldn't do if we were paying six times." But there are issues of enforcement. That is, having the right incentives for private plaintiffs to be an alternative form of enforcement. For the most part, what we are reacting to collectively is the big class actions that frequently follow on an admitted antitrust violation with criminal pleas or with the finding in one-on-one litigation. This is the one area where the commission's recommendation of stripping away the potential for multiple treble damages in different forums is in the right place at the right time.

But we won't see movement on this. The November 2006 election ended any hope of moving things more pro-defendant through Congress. At least until November 2008, the president will use his veto to prevent things from moving any more pro-plaintiff in the antitrust area.

BLECHER: *Illinois Brick* is a completely artificial rule made by the court for judicial convenience. It's artificial because it doesn't look at who is the actual victim and who should keep the money. Where economic analysis might help somebody, the court is not interested. It's only when the defendants win. It doesn't have, in my view, a principled basis in the law. The law should be able to trace and allow recovery for the injured party. So I'm not a fan of *Illinois Brick*. Having said that, the committee wants to move the cases to the federal court for the same reason they wanted CAFA—because there's an underlying assumption that the federal courts will be more hostile and certainly less hospitable to indirect purchaser class actions. Admittedly, there is now a possibility for sextuplet or ninetuplet recovery, which does seem inconsistent with the original antitrust law and needs corrections. It's not such a bad thing to bring it together in a single form and expand indirect purchaser to all states.

On another note, there's a large number of Robinson-Patman cases that stick in the craw of the business community. But to a small businessman who finds himself literally unable to compete because somebody is getting a lower price, why ought there not be a remedy for that?

MARKHAM: There's no chance Robinson-Patman will be repealed. There's never been momentum for it, and a Democratic Congress would not earn stripes with its constituents by repealing price discrimination laws. Even on the defense side, there are many who question whether we would be better off repealing one unified federal statute and replacing it with the hodge-podge of state laws prohibiting various pricing tactics, including discrimination and loss leaders. These state laws are not frequently invoked, but in the absence of federal law they would potentially fill a larger role.

MODERATOR: What are the latest developments regarding indirect purchaser claims in California? In the Antitrust Modernization Commission's report, the recommendation was for these cases

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to be removed to federal court and consolidated with cases brought by direct purchasers.

TUBACH: In my last few indirect purchaser settlements, in state court, no payment was made to any class member at all. I'm not sure a movement from state to federal court is something that can be lamented as the death of compensation to wronged consumers. Class members in indirect cases are often very difficult to identify, so state courts have ended up instead simply doing a cy pres distribution to the plaintiff's favorite charity.

MARKHAM: The Commission's report reflects a growing consensus that *Illinois Brick* has had unintended consequences and ought to be revisited. The current regime doesn't work. First, having indirect purchaser claims available to some but not all states is manifestly unfair to consumers in the states that got left out. Second, under CAFA all of these cases now end up in federal court, and the indirect purchaser rules in all the states differ on things as fundamental as whether you get single or treble damages and the like. To require federal courts to sift through all these different rules is not very productive.

ARBISSER: There was an important decision at the very end of last year. In a case called *Clayworth v. Pfizer* [No. RG 04172428, 12/19/06], a bunch of pharmacies sued the drug companies claiming they had fixed the prices of drugs. The drug companies won summary judgment because the pharmacies admitted they passed on 100 percent of any overcharge to their customers.

The plaintiffs advocated that *Hanover Shoe* [392 U.S. 481 (1968)], which held that a defendant in an antitrust action generally is precluded from asserting as a defense that the direct purchaser passed on the overcharge to an indirect purchaser and, therefore, suffered no damages, should not be a defense in California. The defense argued that when the legislature rejected *Illinois Brick*, they also implicitly rejected *Hanover Shoe*, and the judge ultimately agreed with the defense. That issue is going to go up to the Court of Appeal now. By the end of this year or certainly early next year, I would expect to get a determination as to whether or not *Hanover Shoe* is alive or dead in California. That's going to have important implications about whether indirect purchaser litigation is going to be worth fighting, at least for middlemen.

I noticed in a recent complaint that Joe [Saveri] filed for indirect purchasers, he was careful to say he was only suing only on behalf of end users. That's at odds with others in the plaintiffs antitrust bar in California who want to minimize their affirmative proof of pass-on by suing only for the next level down from the direct purchaser.

SAVERI: The strategy of representing end users is a recognition of what was left unresolved by *BWI* [191 Cal. App. 3d 1341 (1987)]. The analysis is probably consistent with the *Illinois Brick* and *Hanover Shoe* line of cases.

TUBACH: Does it really make any sense to allow middlemen, who mark up and pass on any overcharge and, in fact, benefit from the overcharge, to be able to recover damages?

SAVERI: My experience is that middlemen do very frequently absorb part of the overcharge.

ARBISSER: And there's lost business if they have to raise their prices the customers who don't buy who otherwise would have bought. What's unique about the *Clayworth* case is that the plaintiffs gave up trying to prove that. It's very difficult to prove.

BLECHER: The problem with *Illinois Brick* has always been it doesn't pay any attention to who's really been injured, as I said earlier. If you are searching, as the indirect purchaser rule allows you to, for the actual victim, then why did *Pfizer* reach a wrong result? I'm not sure it did.

SAVERI: That was a decision that it was more important to have consumer redress to keep the ill-gotten gain from the wrong doer. It was a decision based on a measure of efficiency and an attempt to handle these cases in an expeditious way. I don't know whether, if the decision came down today, given our level of economic analysis and the level of comfort we have with econometrics or statistical ways of handling these problems, that these problems would be considered to be as insuperable as when *Illinois Brick* was decided.

ARBISSER: There's no question that certifying a class of direct purchasers, particularly in a price fixing case, is very easy. You get them certified, because there's no pass on defense. Everybody's damaged, the percentage overcharge times their purchases, and that really has facilitated enforcement by direct purchasers. It gets a lot more complicated when you start having to worry about allocations and pass on.

TUBACH: It's also in some ways more attractive to allow direct purchasers or even first-level indirect purchasers to recover because you can identify them. They are easier to find. It's very difficult to find the end consumer and actually get a dollar into that consumer's hand. In *Microsoft* [87 F. Supp. 2d 30 (2000)], they moved mountains and got a 25 percent response rate, and most of the time, at least in the indirect cases that we've seen here, there isn't an effort to locate end consumers at all.

On another note, under the Class Action Fairness Act, state law is unlikely to evolve in state court, because now virtually all indirect-purchaser actions are going to be in federal court. For the most part, there will just be a dead stop of state court interpretation of state antitrust laws in indirect purchaser cases. You are going see federal courts not only try to anticipate what a state court would do with it, but make that anticipatory decision knowing that there's not likely to be a state court that's ever going to make that decision.

SAVERI: I've done a number of cases where the real businesses that participated in the claims programs got substantial amounts of money. So given the right industry, given the right plaintiff class, you can easily distribute a lot of money, and sometimes there's a lot of money to distribute.

BLECHER: That's true, and that's what's good about indirect purchaser because it's flexible and it allows the injured party to seek recovery. The direct purchaser rule doesn't. It's very mechanical.

ARBISSER: The one area that is still percolating in California, it's bubbled to the surface in some other states, is the question of standing of indirect purchasers. It's been most stark in the *Visa Mastercard* cases [272 Neb. 489 (2006)] where the retailers clearly were paying elevated charges for people using Visa and Mastercard as a result of the duopoly there. Do the customers of those retailers have standing to come in and complain? You certainly wouldn't expect Wal-Mart to have absorbed those costs. You would expect them to pass it on in the form of higher prices someplace, but figuring out who bore that and whether in fact, that constituted a pass on of the overcharge are a difficult problems. If we are envisioning a world where there's going to more and more indirect purchaser litigation, we are going to confront these questions of trying to figure out really who are the indirect purchasers. ■

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